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Uvodna reč

Poštovani čitaoci,

Uzimajući u obzir značaj, aktuelnost i problematiku naučnih radova saopštenih na Međunarodnoj naučnoj konferenciji „Delovanje institucija sistema u vanrednim situacijama: iskustva i izazovi" broj 96/2022 naučnog časopisa „Zbornik radova Pravnog fakulteta u Nišu" je prevashodno posvećen izloženim referatima učesnika Konferencije, koji su predmetnoj materiji pristupili i analizirali je sa aspekta različitih grana prava.

U fokusu su radovi koji se bave problematikom primene fiskalnih pravila u Evropskoj uniji u pandemijskim okolnostima i korelacijom klimatskih promena, vanrednih okolnosti i odgovora srpskog, hrvatskog i crnogorskog zakonodavstva. U nastavku, predmet pažnje autora jeste analiza uticaja pandemije na visoko obrazovanje, reforma javne uprave, kao i potreba za uspostavljanjem optimalne zaštite prava medicinskih radnika u okolnostima prouzrokovanim vanrednim stanjem u Republici Srbiji.

Drugi segment u Zborniku radova predstavljaju oni prilozi koji su se bavili izazovima slobode udruživanja sudija u uporednom zakonodavstvu, pravnim režimom elektronskih medija u domaćem pravnom ambijentu i stvarnopravnim tretmanom budućih stvari. U nastavku su predstavljeni prilozi iz uže trgovinskopravne naučne oblasti koje se tiču raspoloživih pravnih sredstava u slučaju povrede prava kupca iz ugovora o međunarodnoj prodaji robe i pravnih izazova potencijalne regulative liberalnog ličnog stečaja u domaćoj i regionalnoj akademiji i praksi.

Kourednici Međunarodne naučne konferencije,

Prof. dr Marko Dimitrijević

Prof. dr Anđelija Tasić

U Nišu, decembar 2022.

Editor's Introductory Note

Dear Readers,

Bearing in mind the significance of issues covered in the scientific papers presented at the International Scientific Conference "Systemic Action in Emergency Situations: Experiences and Challenges", held at the Law Faculty in Niš in April 2022, this issue of the scientific journal Collection of Papers of the Law Faculty, University of Niš (96/2022) primarily includes the papers submitted by the Conference participants, who analyzed the subject matter from the perspective of different branches of law.

The rubric In Focus comprises two scientific papers dealing with the application of fiscal rules in the European Union in the circumstances of the COVID-19 pandemic, and the correlation between climate change, emergency situations and normative responses in Serbia, Croatia and Montenegro. In the subsequent papers, the authors focus on the analysis of the impact of the COVID-19 pandemic on higher education in Croatia, the public administration reform in Serbia, and the need for optimal protection of the rights of medical professionals in the state of emergency circumstances in Serbia.

The second part of this issue of the LF scientific journal comprises scientific articles addressing the challenges underlying the freedom of association of judges in comparative legislation, the legal regime of electronic media in the Serbian legal system, and the legal treatment of future things as objects of real rights in Macedonian property law. Covering the field of commercial law, the two subsequent articles focus on the legal remedies in case of violation of the buyer's rights arising from the contract on international sale of goods, and the challenges that may be encountered in domestic and regional theory and practice in the regulation of the liberal concept of personal bankruptcy.

Co-editors of the Conference Collection of Papers,

Prof. dr Marko Dimitrijević

Prof. dr Anđelija Tasić

Niš, December 2022

U FOKUSU

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*PRIMENA FISKALNIH PRAVILA EVROPSKE UNIJEU USLOVIMA KRIZE IZAZVANE PANDEMIJOM***

Apstrakt*: Fiskalna pravila u Evropskoj uniji (EU) uvedena su primarnim i sekundarnim zakonodavstvom i imaju za cilj da očuvajufiskalnu disciplinu država članica. Pandemijska kriza, izazvana virusom KOVID 19, snažno je pogodila zdravstveni sektor i privredu država članica EU. Prevladavanje posledica krize podrazumevalo je primenu mera koje su nužno vodile narušavanju fiskalne ravnoteže (pojava deficita i povećanje zaduženosti) i prekoračenju granica postavljenih fiskalnim pravilima. Rad je posvećen primeni fiskalnih pravila Evropske unije u uslovima poremećaja izazvanih KOVID 19 pandemijom, kada, prvi put od njihovog uvođenja, dolazi do aktiviranja opšte klauzule o odstupanju. U poslednjem delurada razmatraju se specifičnosti procesa deaktiviranja klauzuleo odstupanju od primene fiskalnih pravila i ukazuje na potrebu prilagođavanja fiskalnih okvira EU postkovid uslovima.*

Ključne reči*: pandemija, ekonomska kriza, fiskalna pravila, Pakt o stabilnosti i rastu.*

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** Rad je rezultat istraživanja na projektu „Odgovornost u pravnom i društvenom kontekstu“, koji finansira Pravni fakultet Univerziteta u Nišu, u periodu 2021–2025. godine.

1. Uvod

Formiranje Evropske ekonomske i monetarne unije (EMU) od samog početka pratilo je nastojanje država članica da razviju odgovarajuće instrumente kojima bi se osigurala koordinacija fiskalne politike država članica. Rešenje je pronađeno u inkorporiranju fiskalnih pravila u institucionalni mehanizam EMU, odnosno definisanju numeričkih ograničenja u kretanju budžetskog deficita i javnog duga, kao glavnih fiskalnih indikatora. Uloga fiskalnih pravila u EMU tokom vremena je evoluirala od instrumenta koji je u funkciji ispunjavanja kriterijuma konvergencije do instrumenta koji primarno ima za cilj očuvanje fiskalne discipline država članica. Suočene sa ozbiljnom ekonomskom krizom, izazvanom pandemijom, institucije Evropske unije marta 2020. godine prvi put su aktivirale opštu klauzulu o odstupanju od primene fiskalnih ograničenja utvrđenih Paktom o stabilnosti i rastu (tzv. izlazna klauzula). Klauzula je uvedena kao deo reforme fiskalnih pravila 2011. godine (paket šest mera) i omogućava državama članicama da, zbog ozbiljnih ekonomskih poremećaja, privremeno odstupe od postavljenih fiskalnih ograničenja. Aktiviranjem klauzule, državama članicama ostavljen je manevarski prostor za preduzimanje ekspanzivnih mera fiskalne politike, kojima se ublažavaju posledica krize, ali i negativno utiče na budžetsku ravnotežu. Mada koncipirana kao privremeno odstupanje fiskalnih indikatora od zadatih vrednosti, u praksi je došlo do ekstenzivne primene opšte klauzule, što je *de facto* dovelo do suspenzije fiskalnih pravila EU. Na to je uticalo i opredeljenje Evropske komisije i Saveta EU da, zbog ozbiljnosti krize i neizvesnosti u pogledu oporavka, odustanu od pokretanja postupka protiv država članica sa prekomernim budžetskim deficitom. Iskustvo sa primenom fiskalnih pravila tokom pandemijske krize nameće potrebu redefinisanja institucionalnih okvira fiskalnog upravljanja u EU, koje će osigurati čvršću vezu između numeričkih ograničenja i ciljeva fiskalne politike, ali i dovoljno prostora i resursa za intervenciju u uslovima nepovoljnih ekonomskih kretanja.

2. Evolucija uloge fiskalnih pravila u Evropskoj uniji

Stvaranje Evropske monetarne unije predstavlja, svakako, jedan od najvećih izazova u evropskom integracionom procesu. Oblast monetarnog regulisanja, koja se tradicionalno doživljava kao jedan od prerogativa suverenih nacionalnih država, prenosi se na nadnacionalni nivo, a države članice se praktično lišavaju jednog od glavnih oslonaca

ekonomske politike. Ono što stvaranje EMU čini specifičnim to je da monetarnu integraciju nije istovremeno pratila i fiskalna integracija, zbog nespremnosti država članica da, sa monetarnom nadležnošću, prenesu i nadležnost za vođenje fiskalne politike.[1] Dodatnu teškoću predstavljalo je i to što su u proces monetarnog ujedinjenja bile uključene države koje nisu činile optimalnu valutnu zonu − države uključene u proces monetarne integracije karakterisala je neusklađenost privrednih struktura, razlike u pogledu stepena razvijenosti, kao i značajne razlike u pravnom sistemu i političkoj kulturi). U tako koncipiranom modelu monetarnog ujedinjenja, od fiskalnih pravila se očekivalo da podstaknu proces nominalne i realne konvergencije država članica. Njihova primarna uloga svodila se na isključivanja iz procesa monetarne integracije zemalja koje nisu u stanju da ispune kriterijume konvergencije.[2] U Evropskoj uniji fiskalna pravila su definisana primarnim zakonodavstvom (sporazumom iz Mastrihta 1992)[3], i ona podrazumevaju permanentna ograničenja fiskalne politike postavljanjem granica u pogledu kretanja fiskalnih indikatora. Odredbeo kriterijumima konvergencije definisane su nekadašnjim članovima 121, t. 1, 122, t. 2 i 123, t. 5 tada važećeg Ugovora o Evropskoj zajednici (sada član 126 i čl. 140 Ugovora o funkcionisanju Evropske unije), kao i Protokolom br. 12 i 13. Pored zahteva u pogledu visine kamatne stope i stabilnosti deviznog kursa države, članice EU za prijem u EMU su morale da ispune fiskalne kriterijume, i to ograničenje visine budžetskog

1 Fiskalna politika ostala je u nadležnosti država članica. U skladu sa principom supsidijarnosti – čl. 5 Ugovora o Evropskoj uniji „u oblastima koje ne spadaju u njenu isključivu nadležnost, Unija interveniše samo, i u meri, u kojoj ciljevi razmatrane akcije ne bi mogli biti ostvareni na zadovoljavajući način od strane država članica, kako na centralnom, tako i na regionalnom i lokalnom niovu, već se, imajući u vidu veličinu ili učinak razmatrane akcije, oni mogu bolje ostvariti na nivou Unije“

2 Konačan korak ka stvaranju monetarne unije na tlu Evrope preduzet je maja 1998. godine, kada je Savet EU odlučio da je jedanaest zemalja Evropske unije (Nemačka, Francuska, Italija, Španija, Holandija, Belgija, Luksemburg, Portugal, Finska, Austrija i Irska) ispunilo neophodne uslove za usvajanje jedinstvene valute počev od 1. januara 1999. godine. Jedina zemlja koja nije na početku ispunila kriterijume utvrđene Ugovorom bila je Grčka. Ona ih je naknadno ispunila, tako da se od 1. januara 2001. godine priključuje evro zoni, čime se broj članica EMU uvećava na 12, a centralna banka Grčke postaje deo EMU.

3 Fiskalna ograničenja definisana Sporazumom iz Mastrihta 1992. godine preuzeta su Lisabonskim ugovorom 2007. godine, koji pored Ugovora o EU obuhvata i Ugovor o funkcionisanju EU. Važeća fiskalna pravila definisana su članom 126 Ugovora o funkcionisanju Evropske unije i Protokolom br. 12 o postupku u slučaju prekomernog deficita.

deficita sa referentnom vrednošću od 3% bruto domaćeg proizvoda – BDP, odnosno visine javnog duga (ne više od 60% BDP).

Nakon stvaranja Evropske monetarne unije uloga fiskalnih pravila se menja. Naglasak se stavlja na očuvanje fiskalne discipline država članica, a u cilju sprečavanja eventualnog prelivanja fiskalne krize. Primena fiskalnih pravila u EU konkretizovana je sekundarnim zakonodavstvom i to Paktom o stabilnosti i rastu iz 1997. godine.[4] Osnovu ovog sistema predstavlja multilateralni nadzor koji sprovodi Savet EU na osnovu izveštaja Evropske komisije, kao i primena preventivnih i korektivnih mera prema državama članicama protiv kojih je pokrenut postupak zbog postojanja prekomernih deficita. S obzirom na to da institucionalna struktura EMU uključuje nadnacionalnu monetarnu politiku i decentralizovanu fiskalnu politiku, čitav koncept fiskalnih pravila zasnovan je na ideji internalizovanja asimetričnih poremećaja i njihovog eliminisanja merama nacionalnih fiskalnih politika. Međutim, usvojena institucionalna rešenja nisu isključila mogućnost prelivanja negativnih efekata, već se pokazalo tokom globalne finansijske krize 2007. godine da je njihovo prelivanje moguće, i to kroz dva kanala. Prvo, fiskalna nedisciplina jedne države članice, zbog integrisanosti finansijskog tržišta, mogla je lako da se prelije na finansijski sektor drugih država članica, s obzirom na to da je finansiranje deficita prezadužene države članice na finansijskom tržištu uticalo i na rast kamatnih stopa za čitavu evrozonu. Druga potencijalna opasnost bila je da nivo zaduženja država članica pređe granicu nakon čega država više nije u mogućnosti da uredno servisira svoje obaveze. Proglašenje bankrota prezadužene članice EMU dovelo bi do domino efekta, budući da kupci obveznica iz drugih zemalja članica postaju takođe ugroženi. Opasnost od efekta prelivanja fiskalnekrize države ili država članica povećala bi pritisak da se problem prekomerne zaduženosti rešava tako što će ostale države preuzeti na sebe teret otplate dugova ili tako što će centralna banka odobriti monetizaciju dugova. Postojanje negativnih eksternih efekata razlog je što Ugovor o funkcionisanju EU (UFEU),[5] pored fiskalnih ograničenja, predviđa i zaštitne klauzule koje treba da eliminišu mogućnost njihovog prelivanja. U tom smislu, za očuvanje fiskalne discipline

4 Pakt o stabilnosti i rastu obuhvata: Uredbu Saveta (EZ) br. 1466/97 od 7. 7. 1997. o jačanju nadzora stanja budžeta i nadzora i koordinacije ekonomskih politika i Uredbe Saveta (EZ) br. 1467/97 od 7. 7. 1997. o ubrzanju i pojašnjenju sprovođenja postupka u slučaju prekomernog deficita.

5 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ of the European union, C 202/01, Volume 59, 2016.

predviđeni su sledeći mehanizmi: najpre, članom 120 UFEU za države članice predviđena je obaveza koordinacije ekonomske politike, zatim se čl. 123 uvodi zabrana finansiranja deficita kreditima Evropske centralne banke, odnosno zabrana preuzimanja instrumenata duga država članica, odnosno institucija EU, uključujući i zabranu povlašćenog pristupa finansijskim institucijama predviđenu čl. 124 Ugovora. I, najzad, članom 125 UFEU isključena je mogućnost da Unija odgovara ili preuzima obaveze državnih organa i drugih organizacija ili javnih preduzeća neke države članice, kao i mogućnost da država članica odgovara za obaveze centralnih administracija, drugih organa, ili javnih preduzeća neke druge države članice. Princip da je svaka država članica odgovorna za svoje javne finansije predstavlja glavnu uporišnu tačku postavljenog sistema fiskalne odgovornosti (Louis, 2010: 978). Niti Unija niti države članice ne mogu biti odgovorne za obaveze druge države članice. Na taj način, unošenjem ove klauzule u osnivačke akte Unije, upozoravaju se finansijska tržišta da je svaka država članica prepuštena sama sebi kada su u pitanju njene javne finansije i da nema implicitnih garancija od strane Zajednice ili država članica (Smits, 1997: 77–78). Prema tome, država može da finansira deficit emitovanjem obveznica na finansijskom tržištu, ali prema uslovima koji odgovaraju njenoj kreditnoj sposobnosti. Ukoliko se na tržištu pojavi država sa niskom kreditnom sposobnošću, tj. koja se ponaša finansijski neodgovorno, to će rezultirati većom premijom za rizik.

Ključni izazov za ovako postavljeni sistem fiskalne odgovornosti je njegova dosledna primena. Ukoliko ona izostane, fiskalna pravila, ali i predviđene zaštitne klauzule pokazuju se neefikasnim, čime se urušava njihov kredibilitet. Upravo to je i razlog čestih promena Pakta o stabilnosti i rastu. Svakako najznačajnija promena realizovana je kao odgovor na globalnu finansijsku krizu 2007–2008. godine usvajanjem tzv. paketa „šest mera“.[6] Usvojen 2011. godine, paket „šest

6 Paket šest mera obuhvata jednu Direktivu i pet uredbi i to: Council Directive 2011/85 of 8 november 2011 on requirements for budgetary fremeworks of the Member State; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No. 1174/2011 of the European Praliament and of the Council of 16 November 2011 on establishing enformcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of ecnomic policies; Regulation (EU) No 1176/2011 of European Parliament and of the Council of 16 November 20111 on the prevention and correction of macroeconomic imbalances; Council

mera“ imao je za cilj jačanje procedure za smanjenje deficita i rešavanja makroekonomskih neravnoteža. Reforma Pakta o stabilnosti i rastu bila je podržana međudržavnim fiskalnim sporazumom pod nazivom „Ugovor o stabilnosti, koordinaciji i upravljanju u Ekonomskoj i monetarnoj uniji“ i merama usvojenim 2013. (paket „dve mere“[7]) koji obavezuje države članice evrozone da predlog budžeta usaglase sa zajedničkim standardima utvrđenim od strane Komisije i Saveta (Dimitrijević, 2014: 801). Ideja je bila da se otklone nedostaci manifestovani tokom finansijske i dužničke krize, pre svega izbegne krutost pravila i osigura njihova fleksibilnost, pojača budžetski nadzor, posebno da se osigura prostor za sprovođenje strukturnih reformi uvođenjem srednjoročnih budžetskih ciljeva i uvođenjem obaveze država članica da fiskalna pravila uveduu nacionalne fiskalne okvire.

3. Pandemija i primena fiskalnih pravila

Sastavni deo fiskalnih pravila su i opšte klauzule o odstupanju, odosno izlazne klauzule koje dozvoljavaju nosiocima ekonomske politike suočenim sa ozbiljnim ekonomskim izazovima da privremeno prekorače numerički određene granice u pogledu visine budžetskog deficita, odnosno visine javnog duga (Bandaogo, 2020: 3). Njihova osnovna uloga je da krutost fiskalnih pravila ublaže i stvore prostor za fleksibilniji pristup. U protivnom, insistiranje na poštovanju fiskalnih pravila u uslovima nepovoljnih ekonomskih kretanja bi moglo, umesto stabilizaciono, delovati prociklično. To znači da bi mere usmerenena smanjenje javne potrošnje i stepena zaduženosti, a u cilju poštovanja ograničenja nametnutih fiskalnim pravilima, u periodima krize imale negativan efekat na ekonomske performanse, pre svega stopu zaposlenosti i privredni rast. Suočene sa takvim posledicama države bi, pre ili kasnije, odustale od primene fiskalnih ograničenja i opredelile se za ekspanzivnu fiskalnu politiku, a kredibilitet fiskalnih pravila bi bio urušen. Da bi se to sprečilo i ujedno otvorio prostor za anticiklično

Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of excessive deficit procedure.

7 Ovaj paket definisan je dvema uredbama: Regulation (EU) No 473/2013 on the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the Euro Area i Regulation (EU) 472/2013 of European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Eruo Area experiencing or threatened with serious difficulties with respect to their financial stability.

delovanje fiskalne politike, fiskalna pravila, pored numeričkih ograničenja, sadrže i izlaznu klauzulu. One omogućavaju subjektima ekonomske politike da u izuzetnim i nepredviđenim uslovima odstupe od fiskalnih ograničenja, pri čemu se unapred zna da ta odstupanja nisu trajna već privremenog karaktera, što obavezuje vladu da nakon krize pripremi odgovarajući plan povratka na put fiskalne stabilnosti.

Pakt o stabilnosti i rastu dopunjen je opštom klauzulom o odstupanju reformom iz 2011. godine, prema kojoj primena fiskalnih kriterijuma može biti suspendovana u slučajevima ozbiljnog ekonomskog pada u evrozoni ili EU u celini, pod uslovom da se time ne ugrožava fiskalna održivost na srednji rok. Opšta klauzula omogućava odstupanje kako od primene preventivnih mera, tako i od korektivnih mera predviđenih odgovarajućim uredbama. U skladu sa članom 5, st. 1 i članom 9, st. 1 Uredbe 1466/97 (primena preventivnih mera), predviđena je mogućnost da se „u slučaju neuobičajenog događaja izvan kontrole dotične države članice koje imaju veći uticaj na finansijsko stanje države ili u periodima ozbiljnog privrednog pada na evropodručju ili u Uniji u celini“, državama članicama može dopustiti privremeno odstupanje od prilagođavanja srednjoročnom budžetskom cilju, pod uslovom da se takvim postupanjem ne ugrožava fiskalna održivost.[8] Ovom klauzulom, takođe, uvodi se mogućnost odstupanja i od donetih korektivnih mera. Naime, u pogledu korektivnih postupaka članom 3, st. 5 i članom 5, st. 2 Uredbe 1467/97 predviđeno je da u slučaju ozbiljne ekonomske krize na evropodručju ili u Uniji u celini, Savet EU može doneti odluku, na osnovu preporuke Komisije, o odstupanju od utvrđene fiskalne putanje, odnosno dogovorenog fiskalnog prilagođavanja, a koje je usvojeno na osnovu čl. 126, st. 7 UFEU. Na preporuku Komisije, Savet može doneti odluku kojom se menja utvrđena preporuka. Uzimajući u obzir relevantne činioce navedene u čl. 2, st. 3 ove Uredbe, revidiranom preporukom može se produžiti rok za otklanjanje prekomernog deficita, i to, po pravilu, za jednu godinu. Savet procenjuje postojanje neočekivanih ekonomskih kretanja (recesija) sa značajnim nepovoljnim posledicama po javne finansije, u skladu sa prognozama o ekonomskih kretanjima datim u preporuci. Kao i u slučaju korektivnih mera, aktiviranje izlazne klauzule moguće je uz uslov da se primenom izmenjene preporuke ne ugrožava srednjoročna fiskalna održivost. Opštom klauzulom o odstupanju ne suspenduju se postupci u

8 Čl. 5, st. 1 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of ecnomic policies,

okviru Pakta o stabilnosti i rastu. Naprotiv, ideja je da se Komisiji i Savetu omogući da preduzimaju potrebne mere za usklađivanje politika u okviru Pakta (fiskalni nadzor), uz istovremeno odstupanje od fiskalnih zahteva koji bi se inače primenjivali s tim što bi, nakon izlaska iz krize, države bile u obavezi da ponovo uspostave fiskalnu ravnotežu.[9]

Pandemija izazvana koronavirusom izazvala je globalnu javnozdravstvenu krizu, što se negativno odrazilo na funkcinisanje svetske privrede. Nosioci ekonomske politike u svim zemljama suočili su se sa ogromnim izazovom da svojom akcijom ublaže ekonomsku krizu. Odgovor se, uglavnom, zasnivao na primeni fiskalnih mera, tj. povećanju rashoda namenjenih podmirivanju naraslih troškova zdravstvenog sistema, subvencionisanju preduzeća radi očuvanja nivoa zaposlenosti, odobravanju bespovratnih sredstava stanovništvu i primeni mera za očuvanje likvidnosti preduzeća. Sama priroda preduzete akcije nužno je vodila narušavanju fiskalne ravnoteže (pojavi deficita i povećanju zaduženosti), što je značilo i prelazak granica postavljenih fiskalnim pravilima. Kovid pandemija, između ostalog, razotkrila je sve nedostatke institucionalnih okvira EU, pre svega koliziju nadnacionalne monetarne i decentralizovane fiskalne politike. U uslovima kada su države članice odgovorne za fiskalnu politiku, podrška institucija EU državama članicama svodila se na uklanjanje prepreka za primenu ekspanzivnih mera. S obzirom na to da je pandemija događaj koji je nastao izvan kontrole država, kao i da je primena fiskalnih mera uveliko uticala na javne finansije, institucije EU su se opredelile za aktiviranje opšte izlazne klauzule predviđene Paktom o stabilnosti i rastu, što znači da se efekat preduzetih mera na fiskalne indikatore neće uzimati u obzir prilikom procene nacionalnih fiskalnih politika od strane institucija EU (Bilbiie, Monacelli, Roberto Perotti, 2021: 84). Prvi put od kada je Pakt o stabilnosti i rastu na snazi, EU se opredelila za primenu mera kojima se podstiče potrošnja (javna i investiciona), bez striktnog poštovanja strogih pravila o dugu i deficitu koja obično ograničavaju budžetsku politiku država članica. Uporedo sa ovom odlukom, i na nivou država članica aktivirane su klauzule o odstupanju od primene nacionalnh fiskalnih pravila.[10] Na taj način, omogućena je pravovremena reakcija

9 COMMUNICATION FROM THE COMMISSION TO THE COUNCIL on the activation of the general escape clause of the Stability and Growth Pact, Brussels, 20. 3. 2020 COM(2020)

10 Za pojedine države članice aktiviranje klauzule od strane Saveta EU automatski je podrazumevalo i aktiviranje nacionalne izlazne klauzule (Portugal), dok je, na primer, u Nemačkoj za aktiviranje izlazne klauzule bila neophodna odluka parlamenta, kojom je odobreno prekoračenje granice postavljene u nemačkom Ustavu o emitovanju državnih obveznica u iznosu koji je viši od 0,35% nominalnog BDP.

kojom je, s jedne strane, sprečen ekonomski sunovrat evropskih ekonomija, a s druge stvorena osnova za ekonomski oporavak. Ovakav pristup pomogao je državama da ekspanzivnom fiskalnom politikom ublaže posledice pandemije.

4. Deaktiviranje opšte klauzule o odstupanju

Aktiviranje opšte klauzule o odstupanju od primene fiskalnih pravila opravdano je potrebom za angažovanjem dodatnih fiskalnih resursa, a radi pokrivanja naraslih zdravstvenih troškova, odnosno ublažavanja posledica ekonomske krize izazvane pandemijom. Primena ekspanzivnih mera fiskalne politike nužno je vodila narušavanju fiskalne ravnoteže s obzirom na evidentan pad prihoda od poreza i porast javnih rashoda. S druge strane, i pored visokog stepena neizvesnosti u pogledu trajanja i dubine krize, aktiviranje izlazne klauzule ima privremeni karakter, što znači da sa prestankom razloga za njeno uvođenje treba započeti proces prilagođavanja fiskalnih indikatora vrednostima definisanim fiskalnim pravilima. Međutim, pravi izazov za institucije EU je procena trenutka vraćanja fiskalnih pravila. Ovo utoliko pre što se ekonomski uticaj krize uzrokovane pandemijom razlikuje od zemlje do zemlje; neke države članice su relativno brzo stavile pandemiju pod kontrolu i krenule u ekonomski oporavak, dok su kod drugih posledice krize još uvek vidljive. To otežava odluku Komisije i Saveta o donošenju odluke o deaktiviranju izlazne klauzule. Činjenica je da zemlje koje su pre izbijanja krize imale krhko stanje javnih finansija tokom krize su još više produbile fiskalnu neravnotežu, što je institucije Unije prisililo da, zbog ozbiljnosti krize i neizvesnosti u pogledu oporavka, produže važenje ove klauzule do marta 2023. godine.[11] Prilikom donošenja odluke o produženju važenja primene klauzule o odstupanju, Komisija je prvenstveno imala u vidu procenu stanja privrede država članica, odnosno nivo proizvodnje u EU ili evrozoni u poređenju sa stanjem pre krize. Posebanizazovzapovrataknačelufiskalnedisciplineječinjenica da su pojedine države članice prihvatile aktiviranje ove klauzule kao *de facto* odustajanje od primene fiskalnih pravila EU, opredeljujući se za fiskalnu ekspanziju kao da više neće postojati obaveza vraćanja fiskalnih indikatora (budžetskog deficita i javnog duga) u zadate okvire.

Marta 2020. godine parlament je odoborio emitovanje obveznica u iznosu od 156 milijardi evra (4,5% BDP). European Fiscal Monitor Special Update, March 2020.

11 Projekcije Komisije su bile da će klauzula o odstupanju, pre rata u Ukrajini, važiti do kraja 2023. godine.

Iskustvo EU tokom pandemije pokazalo je da je relativno lako donošenje mera o odstupanju od primene fiskalnih pravila, ali da je mnogo složeniji proces povratka fiskalnim ograničenjima. Politička dilema je očigledna. S jedne strane, EU ne želi da ugrozi ekonomski oporavak preranim aktiviranjem fiskalnih ograničenja, ali s druge strane postoji opasnost da države članice ovu klauzulu i pandemiju iskoriste kao prostor za nekontrolisano zaduživanje i povećanu javnu potrošnju, što bi, u svakom slučaju, dovelo do akumuliranja dugova, eksplozije deficita i pokretanja krize slične onoj iz 2007. godine. Sa gubljenjem zamaha pandemije postaje sve aktuelnije pitanje postupka deaktiviranja opšte klauzule o odstupanju. U Evropskoj uniji, za razliku od drugih zemalja, nije precizno uređen ovaj postupak, niti je definisan prelazni period u kome bi države članice narasli budžetski deficit i javni dug vratile u okvire definisane pravilima. Umesto toga, Komisija je odlukom o aktiviranju opšte klauzule vreme važenja vezala za epidemiološke i ekonomske uslove. Suzbijanje pandemije i ekonomski oporavak bi bio pravi momenat za postepeno ukidanje mera fiskalne podrške i početak procesa fiskalnog prilagođavanja. Ono što ovaj postupak čini složenim je to što je većina država članica tokom pandemije prekomerno povećala nivo zaduženosti i budžetskog deficita. Zbog toga je pravi izazov za institucije EU da prilikom aktiviranja fiskalnih pravila osiguraju ravnotežu između obezbeđivanja pravovremenog povratka fiskalnih pravila i izbegavanja naglih korekcija koje bi ugrozile ekonomski oporavak država članica. Za relativno bezbolan povratak fiskalnih ograničenja neophodno je definisanje određenog prelaznog perioda u kome bi države imale vremena da svoje fiskalne indikatore dovedu na nivo zadatih vrednosti.

Pored pitanja vremena reafirmacije fiskalnih pravila, pandemijska kriza pokrenula je i druga pitanja bitna za funkcionisanje fiskalnih okvira EU. Jedno od takvih tiče se dileme da li se sa prestankom krize opredeliti za put povratka starih pravila ili ovaj period faktičke suspenzije fiskalnih pravila iskoristiti za njihovu temeljnu promenu, budući da je KOVID 19 stvorio novu formu makroekonomske realnosti (inflacija, narasli deficiti, skok kamatnih stopa), u kojoj povratak na nepromenjeni Pakt o stabilnosti i rastu ne bi dao očekivane rezultate. U literaturi se kao glavna slabost važećih fiskalnih pravila EU ističe njihova kompleksnost, što u kriznim periodima otežava njihovu primenu (Blanchard, Leandro, Zettelmeyer, 2021: 4). Fiskalni okviri EU, definisani primarnim i sekundarnim zakonodavstvom EU, ali i međunarodnim ugovorima (Fiskalni sporazum), obuhvataju brojna i raznovrsna pravila,

vrlo često nekoherentna, što otvara prostor kontradikcijama i nedoslednostima u primeni. Na primer, pravilo o visini budžetskog deficita 3% primenjuje se uporedo sa pravilom o ciljnom strukturnom deficitu od 0,5%. Bez obzira na nastojanja institucija EU da očuvaju koherentnost, ovakav pristup definisanju ciljeva često vodi neželjenim rezultatima i faktički dovodi do izbegavanja primene pravila. Osim toga, insistiranje na primeni važećih pravila u postkovid fazi, na primer pravila o smanjenju javnog duga, predstavljalo bi veliki izazov za grupu zemalja koja je tokom pandemije znatno uvećala javni dug. Zbog toga, čine se opravdanim zahtevi da sadašnji period treba iskoristiti kao priliku za korekciju fiskalnih pravila EU. To se, pre svega, odnosi na pojednostavljenje fiskalnih pravila i stavljanje naglaska na ostvarivanje srednjoročnih ciljeva, koji bi fiskalnoj politici država članica ostavili dovoljno prostora za postupno prilagođavanje utvrđenoj fiskalnoj putanji. Reformisana fiskalna pravila svakako treba da obuhvate i detaljnije regulisanje postupka aktiviranja izlazne klauzule, vremenski okvir i put prilagođavanja fiskalnih indikatora vrednostima sadržanim u pravilima (u kom periodu fiskalna politika može odstupati od ciljeva predviđenih pravilima uz obavezu definisanja načina prilagođavanja zadatim vrednostima nakon prestanka krize), efikasan kontrolni mehanizam i dobru komunikacionu strategiju. Dosadašnje iskustvo sa funkcionisanjem fiskalnih okvira EU pokazalo je da postavljanje granica u pogledu visine budžetskog deficita, odnosno stepena zaduženja države čini samo jedan od segmenata mnogo šireg sistema fiskalne odgovornosti, koji, pored fiskalnih pravila, čine proceduralna pravila, kao i nezavisne fiskalne institucije (fiskalni savet), koji treba da obezbede disciplinu i odgovornost fiskalnih vlasti (Golubović, Dimitrijević, 2021: 82). Koncipiranjem zaokruženog sistema fiskalne odgovornosti stvorili bi se uslovi za fiskalno upravljanje koje će osigurati čvršću vezu između numeričkih ograničenja i ciljeva fiskalne politike, ali i dovoljno prostora i resursa za intervenciju u uslovima nepovoljnih ekonomskih kretanja.

5. Zaključak

Pandemija izazvana korona virusom, sa ozbiljnim implikacijama po zdravstveni sektor i ekonomsku aktivnost, zahtevala je brz i efikasan odgovor subjekata ekonomske poltike. U Evropskoj ekonomskoj i monetarnoj uniji centralizovana monetarna politika nije praćena i fiskalnim ujedinjenjem, što je i razlog da je u suzbijanju pandemijske krize dominantan decentralizovan pristup, gde države članice preuzimaju na sebe teret

preduzetih fiskalnih mera. Budući da primena mera za suzbijanje pandemijske krize (jačanje zdravstvenog sektora, povećanje likvidnosti preduzeća, očuvanje nivoa zaposlenosti i dohotka stanovništva) nužno vodi pogoršanju stanja javnih finansija, institucije EU su bile prinuđene da aktiviraju opštu klauzulu o odstupanju, koja zbog izuzetnih okolnosti i ozbiljnih ekonomskih poremećaja omogućava državama članicama da prekorače ograničenja u pogledu visine budžetskog deficita i javnog duga. Na taj način, izlazna klauzula omogućila je subjektima ekonomske politike da odstupe od fiskalnih ograničenja, pri čemu ta odstupanja nisu trajna već privremenog karaktera, s obzirom na to da važe dok postoji pandemijska kriza, što obavezuje vladu da, nakon krize, pripremi odgovarajući plan povratka na put fiskalne stabilnosti. Međutim, pravi izazov za institucije EU i ekonomsku politiku država članica nastaje nakon savladavanja pandemijske krize. U postkovid periodu sve države članice suočavaju se sa ozbiljnom fiskalnom neravnotežom, pre svega sa teretom naraslih javnih dugova koji uveliko prekoračuju granice postavljene Paktom o stabilnosti i rastu. Za razliku od aktiviranja opšte klauzule, proces deaktiviranja je mnogo složeniji i zahteva uvođenje prelaznog perioda, u kome će se omogućiti državama članicama da nacionalnu fiskalnu politiku usaglase sa utvrđenom fiskalnom putanjom. Zbog evidentnih nedostataka važećih fiskalnih okvira, ovaj period, takođe, treba iskoristiti za dalju reformu fiskalnih pravila i izgradnju zaokruženog sistema fiskalne odgovornosti.

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THE APPLICATION OF THE EUROPEAN UNION FISCAL RULES IN THE COVID-19 PANDEMIC CRISIS

Summary

The paper examines the application of the European Union fiscal rules in the conditions of disturbances caused by the COVID-19 pandemic. Faced with a severe economic crisis, the European Union (EU) institutions for the first time activated a "general escape clause", which allows for temporary deviation from the budgetary requirements set by the Stability and Growth Pact in March 2020. The clause was introduced as part of the 2011 fiscal rules reform (six-pack) and it allows member states to temporarily derogate from fiscal constraints due to severe economic disruptions. By activating the clause, the member states have been left with sufficient room for maneuver to take expansive fiscal policy measures, which mitigate the consequences of the crisis but also negatively affect the budget balance. Although conceived as a temporary deviation of fiscal indicators from the set values, in practice there was an extensive application of the general clause, which de facto led to the suspension of EU fiscal rules. This was also influenced by the decision of the European Commission and the Council of the EU to withdraw from initiating proceedings against member states with excessive budget deficits, due to the seriousness of the crisis and uncertainty regarding the recovery. The experience with the application of fiscal rules during the Coronavirus pandemic crisis imposes the need to redefine the institutional framework of fiscal governance in the EU, which will ensure a stronger link between numerical constraints and fiscal policy objectives but also provide enough space and resources for intervention during severe economic downturn.

***Keywords**: pandemic, economic crisis, fiscal rules, Stability and Growth Pact*

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*KLIMATSKE PROMENE, VANREDNE SITUACIJE IODGOVOR SRBIJE, CRNE GORE I HRVATSKE***

Apstrakt: *Cilj rada je ispitivanje karaktera veza između klimatskih promena i vanrednih situacija u pravnim sistemima tridržave. Prvi deo rada je posvećen odnosu Srbije, Crne Gore i Hrvatske prema klimatskim promenama i vanrednim situacijama. Analiziraju se norme zakona kojima se reguliše oblast klimatskih promena (sa stanovišta potencijalne relevantnosti za vanredne situacije), kao i zakona kojima se reguliše oblast vanrednih situacija (sa stanovišta potencijalne relevantnosti za klimatske promene). U drugom delu rada se ukazuje na pitanje članstva Srbije, Crne Gore i Hrvatske u relevantnim međunarodnim ugovorima. Razmatra se stav da pitanje odnosa između klimatskih promena i vanrednih situacija nije regulisano na celovit način, a veze između klimatskih promena i vanrednih situacija unutrašnji propisi prepoznaju nedosledno. U zaključku se konstatuje da su veze između klimatskih promena i vanrednih situacija u pravu prepoznate delimično i da postoji prostor za značajno jasnije određenje. Karakter veza između klimatskih promena i vanrednih situacija trebalo bi posmatrati u svetlu razvoja međunarodnog prava i specifičnosti pravnih sistema tri države, uključujući i njihov status u okviru EU integracija.*

Ključne reči: *klimatske promene, životna sredina, vanredne situacije, katastrofe, međunarodni ugovori, zakoni o klimatskimpromenama, Srbija, Crna Gora, Hrvatska, EU.*

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** Rad je izložen na Međunarodnoj naučnoj konferenciji „Delovanje institucija sistema u vanrednim situacijama: iskustva i izazovi“, održanoj 20. 4. 2022, na Pravnom fakultetu Univerziteta u Nišu.

1. Uvod

Mada se pitanje odnosa između klimatskih promena i vanrednih situacija čini „prirodnim", literatura koja je posvećena ovom pitanju pruža osnove i povode za različita tumačenja pojedinih konkretnih problema. U zavisnosti od pristupa, odnose između „klimatskih promena" i „vanrednih situacija" moguće je sagledavati na različite načine.[1] Negativne posledice klimatskih promena koje se karakterišu kao „katastrofe", pojava novih migracionih tokova i posledice takvih tokova izučavaju se sa posebnom pažnjom (UNHCR, 2021, Scott, 2014, Storey, 2021). Bez obzira na činjenicu da međunarodno pravo ne poznaje kategoriju „klimatskih izbeglica", ne može se negirati činjenica da je danas sve veći broj ljudi koji su raseljeni preko granica zbog katastrofa i klimatskih promena (Scott, 2016, 26). Barber naglašava vezu sa izbegličkim pravom kroz razmatranje prava na stanovanje (Barber, 2006). Različiti su predlozi za rešavanje problema koji nastaju usled neregulisanog odnosa između klimatskih promena, katastrofa i izbegličkog položaja. Promena definicije pojma „izbeglica" i redefinisanje koncepta izbeglištva samo je jedna od mogućnosti koja ima svoje utemeljenje u procenama stanja i posledica postojećeg stanja u ovoj oblasti (Store, 2021).

Pitanje veza između ljudskih prava, klimatskih promena i katastrofa razmatra se na različite načine (Scott, Salamanca2020). Međunarodnopravni okvir izgleda relativno određen u delu koji se odnosi na klimatske promene, nešto manje u delu koji se odnosi na ljudska prava i vrlo skromno

1 U ovom radu se, zbog ograničenog prostora, ne raspravlja posebno o definicijama pojmova „klimatske promene" i „vanredne situacije", iako bi detaljnija rasprava o ovim i srodnim pojmovima doprinela preciznijem izvođenju zaključaka. Okvirnom konvencijom UN o promeni klime (1992) je ustanovljen opšti okvir razumevanja pojma „klimatske promene", a značenje pojma „nepovoljni uticaji promene klime", koji se ovde čini bliži osnovnom predmetu analize, određuje se prema značaju štetnih posledica promena u fizičkoj životnoj sredini ili „bioti". U ovom slučaju su predmet zaštite prirodni i kontrolisani ekosistemi (njihov sastav, sposobnost obnavljanja ili produktivnost), kao i ljudsko zdravlje i „blagostanje". Najopštiji predmet zaštite je „funkcionisanje društveno-ekonomskih sistema". Čl. 1 Okvirne konvencije UN o promeni klime (1992), *Službeni list SRJ – Međunarodni ugovori*, 2/1997. S druge strane, Nacrt pravila o zaštiti osoba u slučaju katastrofa (UN ILC, 2016) se, pri definisanju pojma „katastrofe", ravna prema formulaciji „događaj ili niz događaja koji rezultiraju rasprostranjenim gubitkom života, velikom ljudskom patnjom i nevoljom, masovnim raseljavanjem, materijalnom štetom, ili štetom uživotnoj sredini." Šteta mora biti „velikih razmera" i njome se „ozbiljno narušava funkcionisanje društva". Videti: Čl. 3. Istovremeno, Komisija u svojim komentarima ukazuje na značaj „savremenog" razumevanja značenja ovog pojma iz Konvencije iz Tamperea i konferencija UN iz 2005. i 2007. godine.

u delu koji se odnosi na zaštitu žrtava katastrofalnih događaja.[2] Feris ova pitanja razmatra u okviru smanjenja rizika od katastrofa (polazeći od Hjogo deklaracije, 2005), zaštite posebnih (ranjivih) kategorija, a naročito žena, i pravila koja se odnose na unutrašnja preseljavanja stanovništva (Ferris, 2014). Komisija UN za međunarodno pravo je izradila Nacrt pravila o zaštiti osoba u slučaju katastrofa, čime su uključena i pitanja zaštite ljudskih prava osoba koje su pogođene katastrofama (UN ILC, 2016),[3] a u okviru nadzornih tela UN sprovedene i analize o primeni prava ljudskih prava pre i nakon katastrofalnih događaja (McDermott, et. al, 2017). Posebnim bi se moglo smatrati pitanje kako je regulisana oblast pružanja pomoći u slučaju katastrofa budući da ova oblast nije regulisana sveobuhvatnim ugovorom, već ugovorima koji su specifični s obzirom na predmet regulisanja (nuklearne katastrofe, katastrofe na moru, itd.). Ovome bi trebalo dodati i regionalne i subregionalne sporazume, kao i značajan broj bilateralnih sporazuma i instrumenata mekog prava (Sivakumaran, 2017, 1199). Otuda se pružanje pomoći u slučaju katastrofa u nekim okolnostima povezuje i sa pravilima međunarodnog humanitarnog prava (Gavshon, 2009; Weerasinghe, 2019).

Značaj rasprave o odnosima između klimatskih promena i vanrednih situacija proističe iz procenjene dinamike i posledica klimatskih promena, kao i vanrednih događaja koji se mogu dovesti u vezu sa klimatskim promenama. Aktuelnost teme je podstaknuta i činjenicom da se klimatske promene ponekad neopravdano doživljavaju kao nešto što se vezuje isključivo za budućnost, uz ogromne rizike zbog ignorisanja činjenice da se posledice klimatskih promena već sada mogu relativno jasno sagledati (Farber, 2013, 38).

U ovom radu se raspravlja prevashodno o unutrašnjepravnim okvirima regulisanja klimatskih promena u kontekstu pojave vanrednih situacija i reagovanja na vanredne situacije u tri države: Hrvatskoj, Srbiji i Crnoj Gori. Razmatraju se veze između klimatskih promena i vanrednih situacija u unutrašnjim propisima tri države. Odabrane su ove tri države polazeći od činjenice da one pripadaju istom regionu i da se može očekivati da su procene uticaja klimatskih promena slične (Bednar-Friedl, *et. al*, 2022), kao i zbog činjenice da sve tri države imaju donete posebne zakone kojima se reguliše oblast klimatskih promena i posebne zakone kojima se reguliše postupanje u vanrednim situacijama. Sličnosti

2 Kasnije će biti ukazano na status tri države u odnosu na međunarodnopravnu regulativu u oblasti klimatskih promena. Za osvrt na međunarodnopravni okvir saradnje u oblasti prirodnih katastrofa videti: Todić, Grbić, 2018.

3 Za osvrt na rad Komisije videti kod: Bartolini, 2017; Tladi, 2017.

i razlike se sagledavaju imajući u vidu i činjenicu da je prva od ove tri države članica EU, a da su druge dve članstvo u ovoj organizaciji proglasile svojim ciljem.

2. Unutrašnji propisi Srbije, Crne Gore i Hrvatske

2.1. Srbija. Osnovni propis koji reguliše oblast klimatskih promena u Srbiji, Zakon o klimatskim promenama (u nastavku: ZKP),[4] ne sadrži posebne odredbe kojima se upućuje na „vanredne situacije". Međutim, u delu ZKP koji se odnosi na „dokumenta planiranja" (II. Deo „Strategije i planovi") predviđeno je da se u oblasti klimatskih promena donose tri vrste dokumenata. Među njima je i „program prilagođavanja na izmenjene klimatske uslove", pored strategije niskougljeničnog razvoja i akcionog plana za sprovođenje strategije.[5] Program prilagođavanja sa akcionim planom priprema nadležno ministarstvo, a donosi Vlada,[6] pri čemu je učešće javnosti obavezno i sprovodi se u skladu sa zakonom kojim se propisuje izrada i usvajanje dokumenata javnih politika.[7] Istovremeno, ZKP jasno propisuje obavezan sadržaj programa prilagođavanja, uz naznaku da to mora biti u skladu sa zakonom kojim se uređuje planski sistem.[8] Obavezan sadržaj Programa obuhvata trinaest elemenata kojima su obuhvaćene mere prilagođavanja i ciljevi javne politike, kao i činioci koji uslovljavaju sadržaj predloga mera prilagođavanja među kojima su, npr. osmotrene promene klime, očekivane promene klime, uticaj promena klime, identifikacija „sektora i sistema" koji su najpogođeniji promenama klime, projekcija promena koje bi trebalo ostvariti, itd.[9] Zakon je najbliži određenju prema pitanju „vanrednih situacija" onda kada u članu 15 propisuje obavezu organa i organizacija nadležnih za sprovođenje mera prilagođavanja, kao i za izradu i sprovođenje dokumenata

4 Posmatrano sa stanovišta predmeta uređivanja ovaj zakon jasno razlikuje dve grupe mera. Pored mera koje se odnose na prilagođavanje na promene klime, Zakon uređuje i „sistem za ograničavanje emisija ..."U skladu sa tim, Zakonom su regulisane i obaveze u vezi sa donošenjem strateških i programskih dokumenata. Videti: Čl. 1 ZKP, *Sl. glasnik RS*, 26/21.

5 Videti: Čl. 6 ZKP.

6 Propisan je i razlog zbog kojeg se ovi dokumenti donose i on se sastoji u „identifikaciji uticaja klimatskih promena na sektore i sisteme i utvrđivanje mera prilagođavanja na izmenjene klimatske uslove ... za one sektore i sisteme u kojima je potrebno smanjiti nepovoljne uticaje." Videti: Čl. 13 ZKP.

7 Videti: Čl. 16 ZKP.

8 Videti: Zakon o planskom sistemu Republike Srbije. *Sl. glasnik RS, 30/18*.

9 Videti: Čl. 13 ZKP.

javne politike, da o pojavama kao što su poplave, ekstremne temperature, suše i njihovim posledicama dostavljaju Ministarstvu izveštaj o sprovedenim merama prilagođavanja do 15. marta svake godine.[10]

S druge strane, Zakon o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama (u nastavku ZSRKUVS)[11] na „klimu" upućuje na indirektan način. Kroz definiciju pojma „vanredne situacije" ZSRKUVS jasno upućuje na „životnu sredinu",[12] stanovništvo i materijalna i kulturna dobra kao predmete zaštite u postupku proglašavanja vanrednih situacija (od strane nadležnih organa). Definicijom su obuhvaćene i procene obima i intenziteta rizika i pretnji koji moraju biti takvi da se njihov nastanak ili posledice ne mogu sprečiti ili otkloniti „redovnim delovanjem nadležnih organa i službi", već je neophodno upotrebiti posebne mere, snage i sredstva uz pojačan režim rada.[13] Istovremeno, ZSRKUVS definiše još najmanje tri pojma koji su od neposrednog značaja za razumevanje pojma „vanredne situacije". To su pojmovi „katastrofa",[14] koji u sebe uključuju pojmove „elementarna nepogoda" i „tehničko-tehnološka nesreća". Veze između vanrednih situacija i klimatskih promena najbliže su uspostavljene kroz prepoznavanje posledica klimatskih promena u okviru pojma „elementarna nepogoda."[15]

10 Videti: Čl. 15, st. 2 ZKP. Inače, dokumenti javnih politika u sektorima najpogođenijim klimatskim promenama, kao i planski dokumenti autonomne pokrajine i jedinice lokalne samouprave izrađuju se uzimajući u obzir ciljeve Programa prilagođavanja.

11 Zakon o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama, *Sl. glasnik RS,* 87/2018.

12 U detaljnijoj analizi ovde bi trebalo razmotriti i sadržaj pojma „životna sredina" iz Zakona o zaštiti životne sredine, *Sl. glasnik RS*, 135/2004, 36/2009, 72/2009 – dr. zakon, 43/2011 – US, 14/2016,76/2018, 95/2018 – dr. zakon.

13 Videti: Čl. 2, t. 7 ZSRKUVS.

14 Ugrožavanje bezbednosti, života i zdravlja većeg broja ljudi, materijalnih i kulturnih dobara ili životne sredine u većem obimu obuhvaćeno je pojmom „katastrofa" (elementarna nepogoda ili tehničko-tehnološka nesreća).

15 Ovaj pojam obuhvata pojave različitog porekla kada su one nastale delovanjem prirodnih sila, među kojima su i ekstremne temperature vazduha, poplave, bujice, oluje, suše, klizišta. Pojam, takođe, obuhvata i druge prirodne pojave kada su one „većih razmera" i mogu da ugroze bezbednost, živote i zdravlje „većeg broja ljudi", kao i materijalna i kulturna dobra. Da bi „životna sredina" bila obuhvaćena ovim pojmom ona mora biti ugrožena „u većem obimu".

„Praćenje klimatskih promena i prilagođavanje zajednice na očekivane posledice" obuhvaćeno je formulacijom „smanjenje rizika od katastrofa".[16] Na ovom mestu ZSRKUVS smanjenje rizika od katastrofa vezuje za sistem mera i aktivnosti koje su utvrđene Nacionalnom strategijom iz oblasti smanjenja rizika od katastrofa i upravljanja vanrednim situacijama, Nacionalnim programom upravljanja rizikom od katastrofa, zakonom kojim se propisuje obnova nakon elementarne i druge nepogode, i drugim aktima. Cilj je formulisan kao sprečavanje novih i smanjenje postojećih rizika kroz implementtaciju ekonomskih, socijalnih, edukativnih, normativnih, zdravstvenih, kulturnih, tehnoloških, političkih i institucionalnih mera kojima se jača otpornost i pripremljenost zajednice za odgovor i ublažavanje posledica od nastalih katastrofa, odnosno čime se postiže jačanje otpornosti zajednice. Na „stanje klime i voda" ZSRKUVS upućuje i u delu koji se odnosi na „rano upozoravanje, obaveštavanje i uzbunjivanje"[17] i prekršaje odgovornog lica u državnom organu, organu teritorijalne autonomije i organu jedinice lokalne samouprave.[18]

2.2. Crna Gora. I osnovni zakon koji reguliše oblast klimatskih promena u Crnoj Gori, Zakon o zaštiti od negativnih uticaja klimatskih promena (u nastavku: ZZNUKP),[19] propisuje obavezu donošenja Plana prilagođavanja na klimatske promene, pored Strategije o niskougljeničnom razvoju.[20] Propisan je obavezan sadržaj Plana prilagođavanja na klimatske promene koji se donosi „radi identifikacije uticaja klimatskih promena na

16 Videti: Čl. 11, st. 2, t. 9 ZSRKUVS.

17 Videti: Čl. 94 ZSRKUVS. Propisana je obaveza subjekata sistema smanjenja rizika od katastrofa i upravljanja vanrednim situacijama koji operativno prikupljaju podatke, uključujući i podatke iz međunarodne razmene, da obaveštavaju Službu 112 o stanju klime i voda, da dostavljaju analize, prognoze i upozorenja o hidrološkim, meteorološkim i geološkim pojavama, elementarnim nepogodama i drugim opasnostima, sadržaju opasnih materija u vazduhu, zemljištu i vodama iznad dozvoljenih vrednosti, kao i sve druge prikupljene podatke o pojavama koje mogu ugroziti ljude, materijalna i kulturna dobra i životnu sredinu. Videti: Čl. 94, st. 2 ZSRKUVS.

18 Videti: Čl. 116 ZSRKUVS.

19 Zakon o zaštiti od negativnih uticaja klimatskih promena, *Sl. list Crne Gore*, 73/2019. Za razliku od ZKP u Srbiji, predmet regulisanja zakona u Crnoj Gori je već u svom naslovu fokusiran na zaštitu od negativnh uticaja klimatskih promena, pored smanjivanja emisija gasova sa efektom staklene bašte, zaštite ozonskog omotača i drugih pitanja koja se odnose na zaštitu od negativnih uticaja klimatskih promena. Videti: Čl. 1 ZZNUKP.

20 Videti Čl. 5 ZZNUKP. Zakon govori o „dokumentima zaštite od negativnih uticaja klimatskih promena."

osetljive sektore i smanjivanja negativnih posledica na te sektore".[21] Obavezan sadržaj ovog dokumenta uključuje, između ostalog, i opis postojećeg stanja nastalog usled klimatskih promena, identifikaciju osetljivih sektora, analizu uočenih promena klime i ekstremnih klimatskih uslova, prikaz očekivanih klimatskih promena sa procenom ključnih rizika, itd.[22]

Zakon o zaštiti i spasavanju (u nastavku: ZZS)[23] „vanredne događaje" vezuje za nesreće izazvane elementarnom nepogodom i drugom nesrećom kada postoji mogućnost da se ugrozi zdravlje i život ljudi, materijalna dobra i životna sredina i ako se posledice ne mogu sprečiti ili otkloniti redovnim delovanjem nadležnih organa.[24] Ako posledice nije moguće otkloniti ili sprečiti redovnim delovanjem nadležnih organa (zbog veličine, intenziteta i iznenadne pojave), onda se radi o katastrofi, pri čemu ZZS prepoznaje „elementarnu nepogodu" ili „drugu nesreću", kao I „veću nesreću", „tehničko-tehnološku nesreću", „akcident" i „incident". Dakle, ZZS ne spominje klimatske promene, ali se odnosi na „životnu sredinu" budući da pod „katastrofom" obuhvata i elementarnu nepogodu ili drugu nesreću koja „veličinom, intenzitetom i iznenadnom pojavom ugrožava ... životnu sredinu".[25] Takođe, ugrožavanje „životne sredine" je element i pojmova „druga nesreća", „tehničko-tehnološka nesreća", „vanredni događaj", „rizik" i „opasna materija".[26] Posledice klimatskih

21 Plan donosi Vlada na period od deset godina, a izveštaj o sprovođenju Plana prilagođavanja sačinjava (na period od dve godine) Ministarstvo i dostavlja Vladi. Organi državne uprave nadležni za energetiku, industriju, poljoprivredu, šumarstvo i saobraćaj, dužni su da dvogodišnje dostavljaju Ministarstvu izveštaj o sprovedenim merama prema strateškim dokumentima, radi sprečavanja negativnih uticaja klimatskih promena, kao i podatke o poplavama, sušama, ekstremnim temperaturama i drugo. Videti: Čl. 10 ZZNUKP.

22 Plan, takođe, obuhvata i analizu uticaja klimatskih promena, glavne ciljeve prilagođavanja klimatskim promenama, opis institucionalnog okvira za prilagođavanje klimatskim promenama, prikaz postojećih planova i strateških dokumenata u oblasti prilagođavanja na klimatske promene sa ocenom napretka u primeni i primerima dobre prakse, itd.

23 Zakon o zaštiti i spasavanju, *Sl. list CG*, 13/07, 5/08, 86/09-dr. zakon, 32/11, 54/16, 146/21)

24 Videti: Čl. 4, t. 6 ZZS.

25 Pored zdravlja, života ljudi i materijalnih dobara. Videti: Čl. 4 ZZS. Ovde bi, kao i u slučaju Srbije i Crne Gore, u detaljniju analizu trebalo uključiti i pitanje sadržaja pojma „životna sredina" („okoliš") i normativnih veza između životne sredine, klimatskih promena i vanrednih situacija. Videti: Zakon o zaštiti okoliša, *Narodne novine*, 80/13, 153/13, 78/15, 12/18, 118/18.

26 Videti: Čl. 4, t. 1 ZZS.

promena se jasno prepoznaju i u pojmu „elementarna nepogoda" čiji sadržaj ZZS, slično kao i u relevantnom zakonu Republike Srbije, vezuje za različite događaje (hidrometeorološkog, geološkog ili biološkog porekla) kad su prouzrokovani delovanjem prirodnih sila . Te prirodne sile se u ZZS nabrajaju obuhvatajući ekstremne temperature vazduha, suše, poplave, bujice, oluje, jake kiše, klizanje zemljišta, itd.[27]

2.3. Hrvatska. Zakon o klimatskim promjenama i zaštiti ozonskog sloja (u nastavku: ZKPZOS)[28] propisuje da se mere za prilagođavanje klimatskim promenama i zaštitu ozonskog omotača, zajedno sa merama za ublažavanje klimatskih promena, određuju, između ostalog, i radi izbegavanja, sprečavanja ili smanjenja štetnih posledica na ljudsko zdravlje, kvalitet življenja i životnu sredinu „u celini".[29] ZKPZOS predviđa donošenje „Strategije prilagodbe klimatskim promjenama u Republici Hrvatskoj" i akcionog plana za sprovođenje ove strategije,[30] pored drugih „temeljnih dokumenata". Razlike u odnosu na rešenja koja sadrže zakoni u Srbiji i Crnoj Gori vide se i u broju dokumenata koje ovaj zakon smatra „temeljnim dokumentima", osim dokumenata koji se odnose na prilagođevanje klimatskim promenama.[31] Slično kao i u slučaju Srbije i Crne Gore, ZKPZOS propisuje obavezan sadržaj Strategije, s tim što

27 Videti: Čl. 4, t. 2 ZZS.

28 Zakon o klimatskim promjenama i zaštiti ozonskog sloja, *Narodne novine*, 127/2019. Obim materije koju reguliše ovaj zakon propisan je na nešto drugačiji način u odnosu na zakone u Srbiji i Crnoj Gori. Osim pitanja prilagođavanja klimatskim promenama, propisano je da se Zakonom određuju nadležnost i odgovornost za ublažavanje klimatskih promena, dokumenati o klimatskim promenama i zaštiti ozonskog sloja, praćenje i izveštavanje o GHG emisijama, sistem trgovine GHG emisijama, vazduhoplovne delatnosti, sektori izvan sistema trgovine GHG emisijama, Registar Unije, finansiranje ublažavanja klimatskih promena, informacioni sistem za klimatske promene i zaštitu ozonskog sloja, upravni i inspekcijski nadzor. Razlike u odnosu na srpski i crnogorski zakon ogledaju se, između ostalog, i u činjenici da se donošenjem hrvatskog zakona prenosi u pravni sistem te države 9 direktiva EU i 37 drugih akata EU u oblasti klimatskih promenta.

29 Videti: Čl. 6 ZKPZOS.

30 Videti: Čl. 10, t. 2 i 4 ZKPZOS.

31 Zakon „temeljnim dokumentima" smatra i Strategiju niskougljeničnog razvoja i Akcioni plan za sprovođenje Strategije, zatim „Integrirani energetski i klimatski plan Republike Hrvatske" i Program ublažavanja klimatskih promjena, prilagodbe klimatskim promjenama i zaštite ozonskog sloja. Međutim, u slučaju Srbije, obaveza donošenja Integrisanog nacionalnog energetskog i klimatskog plana propisana je kasnijim izmenama Zakona energetici (2021), gde se u članu 8a pravi referenca ka preuzetim obavezama iz međunarodnih ugovora. Videti: Zakon o energetici, *Sl. glasnik RS,* 145/14, 95/18 – dr. zakon, 40/21.

se u slučaju hrvatskog zakona govori o Strategiji čiji vremenski period važenja je određen na period do 2040. godine s pogledom na 2070. godine. Takav dokument obavezno sadrži, između ostalog, klimatske modele i projekcije buduće klime, procenu uticaja klimatskih promena na društvo i životnu sredinu, procenu ranjivosti i rizika, itd.[32] Za razliku od situacije u Srbiji, gde dokument koji se odnosi na prilagođavanje klimatskim promenama donosi Vlada, u Hrvatskoj ovaj dokument donosi Hrvatski sabor.[33] Takođe, hrvatskim zakonom je precizno propisano i koji organi treba da učestvuju u pripremi dokumenta.[34]

Zakon o sustavu civilne zaštite (u nastavku: ZSCZ)[35] prepoznaje „izvanredni događaj", „katastrofe" i „velike nesreće". Nema posebnog upućivanja na klimatske promene kao element nekog od ovih pojmova, ali se „prirodni" događaji pojavljuju i u definiciji „katastrofa" i u definiciji „velike nesreće".[36] Slično kao u slučaju Srbije i Crne Gore, pod „katastrofom" se podrazumeva stanje izazvano prirodnim i/ ili tehničko-tehnološkim događajem koji (obimom, intenzitetom i neočekivanošću) ugrožava životnu sredinu, pored zdravlja i života većeg broja ljudi i imovine veće vrednosti, a čiji nastanak nije moguće sprečiti ili posledice otkloniti delovanjem snaga sistema civilne zaštite područne (regionalne) samouprave. Hrvatski zakon u značenje pojma „katastrofe" uključuje i opisane događaje, ako oni predstavljaju posledice nastale terorizmom i ratnim delovanjem, dok se u slučaju srpskog zakona posledice ratnog razaranja ili terorizma vezuju za definiciju „tehničko-tehnološke nesreće,"[37] a u slučaju crnogorskog zakona za definiciju pojma „druga nesreća."[38]

32 To uključuje i: prioritetne mere i aktivnosti, međunarodne obaveze i međunarodnu saradnju Republike Hrvatske, smernice za naučna istraživanja iz područja procene uticaja i prilagođavanja klimatskim promenama, procenu sredstava za sprovođenje, analizu troškova i koristi sprovođenja mera prilagođavanja klimatskim promenama, okvir za praćenje i vrednovanje s pokazateljima.

33 Videti: Čl. 14, st. 3 ZKPZOS.

34 Nosilac izrade Strategije prilagođavanja klimatskim promenama je telo državne uprave nadležno za zaštitu životne sredine u saradnji s telima državne uprave i drugim pravnim licima koja imaju javna ovlašćenja, nadležnim za poslove meteorologije, zaštite prirode, zaštite životne sredine, poljoprivrede, ribarstva, šumarstva, vodoprivrede, energetike, industrije, prostornog uređenja, saobraćaja, mora, turizma i zaštite ljudskog zdravlja.

35 Zakon o sustavu civilne zaštite, *Narodne novine,* 82/15, 118/18, 31/20, 20/21.

36 Videti: Čl. 7, t. 8 i t. 33 ZSCZ.

37 Videti Čl. 2, t. 3 ZSRKUVS.

38 Videti Čl. 4, t. 4 ZZS.

3. Članstvo Srbije, Crne Gore i Hrvatske u međunarodnim ugovorima

Detaljnije razmatranje karaktera normativnih odnosa između klimatskih promena i vanrednih situacija podrazumevalo bi uvažavanje većeg broja činilaca među kojima bi se pitanje odnosa unutrašnjeg prava prema obavezama iz međunarodnih ugovora moglo smatrati jednim od opštih činilaca.[39] Ako se za kriterijum uzme članstvo u međunarodnim ugovorima u oblasti klimatskih promena, onda bi se moglo konstatovati da postoji usaglašenost u pogledu članstva u tri ključna međunarodna ugovora. Sve tri države (Hrvatska, Srbija i Crna Gora) su članice Okvirne konvencije UN o promeni klime, Kjoto protokola uz Okvirnu konvenciju o promeni klime i Pariskog sporazuma o klimi.[40] Kada se radi o amandmanu na Aneks B Kjoto protokola (2006, koji još nije stupio na snagu), za sada su ovaj dokument potpisali Hrvatska i Srbija,[41] dok su Doha amandman na Kjoto protokol (2012) prihvatile sve tri države.[42] Razlike u pogledu članstva u ovim međunarodnim ugovorima mogu se sagledavati kroz brzinu potvrđivanja međunarodnih ugovora, kroz status u režimu koji je uspostavljen Kjoto protokolom, kao i ispunjavanje obaveza iz Pariskog sporazuma. Ove razlike bi se mogle, najvećim delom, vezivati za činjenicu da je Hrvatska članica EU i da po tom osnovu ispunjava svoje obaveze koje proističu iz međunarodnih ugovora (Todić, 2019).

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39 Zbog predviđenog obima rada ovde će biti ukazano samo na pitanje članstva tri države u relevantnim međunarodnim ugovorima u oblasti klimatskih promena, imajući u vidu (moguće) korelacije između zakona koje su one donele i ovih međunarodnih ugovora. Ovo naročito u delu obaveza koje propisuju međunarodni ugovori, a tiču se primene (i obaveštavanja o primeni) mera prilagođavanja na klimatske promene, što zaslužuje posebnu analizu. Mere prilagođavanja na promene klime predstavljaju suštinu i najznačajniji deo obaveza iz relevantnih međunarodnih ugovora, zajedno sa merama smanjenja emisija gasova za efektom staklene bašte, odnosno ograničenja rasta prosečne globalne temperature (Mayer, 2021a; Mayer, 2021b). Specifičan položaj zemalja u razvoju u savremenom međunarodnopravnom sistemu zaštite klime jedan je od ključnih činilaca koji determiniše, između ostalog, i karakter prava i obaveza država u delu koji se odnosi na prilagođavanje na promene klime (Todić, 2018).

40 Preuzeto 18. 9. 2022. https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-a&chapter=27&clang=_en; https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en.

41 Preuzeto 18. 9. 2022. https://treaties.un.org/pages/ ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-b&chapter=27&clang=_en.

42 Preuzeto 18. 9. 2022. https://treaties.un.org/pages/ ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&clang=_en.

4. Umesto zaključka

Unutrašnji propisi tri države (Srbije, Crne Gore i Hrvatske) sadrže značajan nivo sličnosti u delu koji se odnosi na veze između klimatskih promena i vanrednih situacija. Preplitanje „klimatskih promena" i „vanrednih situacija" može se pratiti kako sa stanovišta definicija ključnih pojmova, tako i kroz različite obaveze, uključujući i obaveze koje se odnose na prilagođavanje na klimatske promene. Obaveza usvajanja „dokumenata planiranja" propisana je u zakonima u oblasti klimatskih promena u sve tri države i ona obuhvata, između ostalog, i donošenje odgovarajućeg dokumenta koji se odnosi na prilagođavanje klimatskim promenama. Analiza obaveznog sadržaja ovih dokumenata pokazuje da postoje značajne sličnosti, ali i određene razlike. S druge strane, osnovni zakoni kojima se reguliše oblast upravljanja vanrednim situacijama na različite načine prepoznaju klimatske promene kao element vanrednih situacija (katastrofa, prirodnih nepogoda, itd). Moguće je uočiti nekoliko tačaka u kojima propisi tri države imaju zajednički sadržaj i karakteristike (životna sredina, zdravlje, život, imovina veće vrednosti, itd. – kao predmet zaštite), ali i izvesne razlike. Postojanje određenih razlika uslovljeno je, najvećim delom, činjenicom da je Hrvatska članica EU, a druge dve države kandidati za članstvo u ovoj organizaciji. Ovo se odnosi i na deo koji se tiče međunarodnih ugovora, bez obzira na činjenicu da postoji usklađenost u pogledu članstva tri države u međunarodnim ugovorima u oblasti klimatskih promena.

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CLIMATE CHANGE, EMERGENCY SITUATIONS AND THE RESPONSE OF SERBIA, MONTENEGRO, AND CROATIA

Summary

The aim of the paper is to examine the relationship between climate change and emergency situations in the legal systems of three states: Serbia, Montenegro, and Croatia. The first part of the paper presents the attitudes of Serbia, Montenegro and Croatia towards climate change and emergency situations. The author analyzes the laws regulating the field of climate change (from the standpoint of potential relevance for emergency situations) and the laws regulating the field of emergency situations (from the standpoint of potential relevance for climate change). The second part of the paper points to the membership of Serbia, Montenegro and Croatia in relevant international agreements in the field of environment. The author discusses the position that the relationship between the climate change and emergency situations is not regulated in a comprehensive manner, and that this issue has been partially and inconsistently recognized in international law regulations. In that regard, there is room for a significant clarification on their correlations. The character of the links between climate change and emergency situations should be viewed in light of the development of international law and the specific features of the legal systems of the three countries, including their status within the EU integration process.

***Keywords**: climate change, environment, emergency situations, disasters, international agreements, climate change laws, Serbia, Montenegro, Croatia, EU.*

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CHALLENGES OF HIGHER EDUCATION AS A PUBLIC SERVICE DURING THE COVID-19 PANDEMIC: STUDENTS' PERSPECTIVE[**]

Abstract: *In this paper, the authors present the key challenges encountered by the higher education as a public service during the COVID-19 pandemic. The paper aims to examine the opinions of full-time and part-time students on the organization of the educational process during the pandemic. The key hypothesis set in this paper is that the observed higher education institution ensured an efficient educational process and maintained appropriate teacher–student relations during the COVID-19 pandemic. The respondents in the survey were full-time and part-time students of the professional undergraduate administrative study programme at the Faculty of Law, Josip Juraj Strossmayer University of Osijek, and the Administrative Department of the College of Applied Sciences Lavoslav Ružička in Vukovar. The survey results were expected to either prove or disprove the basic hypothesis. The research results were analyzed by applying the descriptive statistics method. The scientific contribution to administrative science is evident in*

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the theoretical background for conducting the empirical research at the Faculty of Law in Osijek and the College of Applied Sciences in Vukovar, the analysis of major challenges encountered by teachers and students, the final conclusions and proposals for improving the organization of the educational process in future extraordinary circumstances.

Keywords: *higher education, public service, COVID-19 pandemic, students, organization.*

1. Introduction

In the course of the COVID-19 pandemic all stakeholders in the higher education system faced numerous challenges. At the outset of the pandemic, over a relatively short period of time, all the participants in the higher education system were forced to use Internet platforms in order to ensure timely distribution of teaching materials to students, to teach classes according to the schedule, to organize exams, seminars, exercises etc. The managing stakeholders made decisions, issued recommendations, guidelines and instructions to facilitate the simplest and easiest adjustment of the teaching process in this extraordinary situation. It was neither an easy nor a simple task, especially for those administrations whose organizational capacities have not been oriented towards adaptive organizational structures. For such administrations, the adjustment itself was even more difficult. In retrospective, it may be said that all these challenges have ultimately contributed to the improvement of the teaching processes, not only in "normal" circumstances but also in extraordinary situations.

This paper presents the results of the empirical research which was conducted among full-time and part-time (1st, 2nd, and 3rd year) students at the Faculty of Law, *Josip Juraj Strossmayer* University of Osijek, and the College of Applied Sciences *Lavoslav Ružička* in Vukovar, Croatia. The starting hypothesis of the research was as follows: the observed higher education institution ensured the efficiency of the teaching process and maintained adequate teacher-student relations during the COVID-19 pandemic. The paper aims to examine the opinions of fill-time and part-time students on the organization of classes during the pandemics. The contribution to administrative science is evident in the theoretical background, the research methodology and research results, and the conclusions relating to content analysis.

2. Theoretical background of research

Higher education (HE) is a part of public administration which is called public services. As stated by Koprić *et al*. (2021), public services are highly complex

since they refer to a segment of public administration diverse in activities. They represent various activities containing more or less economic-commercial elements performed in the public interest under a special legal regime, for which the public authority ensures at least part of the financial, organizational and other types of burdens (Koprić, Marčetić, Musa, Đulabić, Lalić Novak, 2021: 233-234). In addition to the concept of public service, it is very significant to highlight one of the key tendencies in the development of administration, the tendency towards informatization of administration, which has become even more dominant during the COVID-19 pandemic. According to Pusić (2002), the term informatization implies the use of information technology which encourages forming the horizontally coordinated networks of work teams along with vertical coordination through hierarchy (Pusić, 2002: 106).

The organization of the teaching processes during the COVID-19 pandemic was conditioned by organizational specificities of the observed institutions. The Faculty of Law in Osijek (hereinafter: Faculty of Law) is a legal person incorporated in *Josip Juraj Strossmayer* University (hereinafter: University). Even though the Faculty of Law has a certain degree of autonomy, it should fit the standards prescribed by the General Acts of the University regarding the organizational and working procedures. The internal organization of the Faculty of Law is determined by the Decision of the Faculty Council in accordance with the Decision of the University Senate, whereas all the issues regarding student rights, obligations and status are regulated by the General Acts of the University. In accordance with the Statute[1], the Faculty of Law in Osijek organizes and performs integrated undergraduate, graduate and postgraduate academic study programs, professional graduate study programs, and postgraduate specialist study programs (Article 9, para. 1, items 1, 2 and 3 of the FL Statute). The College of Applied Sciences *Lavoslav Ružička* in Vukovar (hereinafter: College) is an independent legal person founded by the Regulation of the Government of the Republic of Croatia on establishing the College of Applied Sciences *Lavoslav Ružička* in Vukovar.[2] The internal organization and other important issues regarding the functioning of the College are determined pursuant to the Regulation, the Statute and all general acts of the College based on the CAS Statute.[3] The College

1 The Statute of the Faculty of Law in Osijek, *JJ Strossmayer* University of Osijek (2022); https://www.pravos.unios.hr/download/2022-statut-pravos-16-05-2022.pdf (accessed on 12.8.2022)

2 The Regulation of the Government of the Republic of Croatia on establishing the College of Applied Sciences *Lavoslav Ružička* in Vukovar, *Official Gazette of the Republic of Croatia,* no. 92/2005, 119/2013.

3 The Statute of the College of Applied Sciences *Lavoslav Ružička* in Vukovar (2021); https://vevu.hr/wp-content/uploads/2021/08/49StatutVEVUprociscenitekst.pdf, (accessed on 12.8.2022).

is a public college which performs undergraduate and graduate professional study programs (Article 2 of the CAS Statute).

3. Research methodology

With the aim of verifying the set hypothesis, the research was conducted on a sample of 60 full-time and 60 part-time students in 1st, 2nd and 3rd year of professional administrative studies (120 students from all three years of studies in total). The sample is considered representative and relevant for obtaining insight into organization of the teaching process during the COVID-19 pandemic since it includes part of full-time students and all part-time students in professional administrative study program at the Faculty of Law in Osijek and all the full-time and part of part-time students in the professional administrative study program at the College in Vukovar.

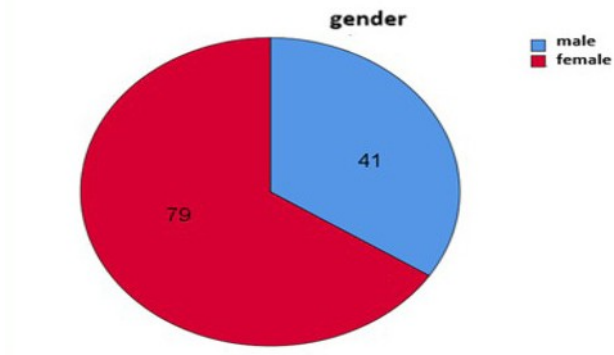
A questionnaire comprising 25 questions was composed for research purposes: the first four questions referred to general information about the participants (gender, institution, student status, and year of study); 14 close-ended questions (5 to 18) referred to the organization of classes and the teaching process during the COVID-19 pandemic; 6 close-ended questions (19 to 24) referred to students' perception on successful performance of obligations during online classes; and the open-ended question (25) referred to additional student observations. The Likert 5-point type scale was used to rank the levels of satisfaction (1 – *I completely disagree*; 2 – *I mainly disa*gree; 3 – *I neither agree, nor disagree*; 4 – *I mainly agree*; 5 – *I completely agree*). The research was conducted during the first week of classes in the summer semester in the academic year 2021/2022, from February 28th to March 4th 2022. Questionnaires were distributed personally by the research team members who were present during the questionnaire completion in case additional clarifications and instructions were needed. The respondents completed the questionnaires individually, in several groups, depending on the year of study and student status.

The analysis of the obtained data was performed by using the IBM SPSS Statistics 26 (SPSS Inc., Chicago, Illinois, USA, 2019) statistical software. Descriptive statistics and normality test on the distribution of the dependent variables across all levels of the independent variable was applied on the obtained results by using the Kolmogorov-Smirnov test. In cases where the distribution normality was affected, methods of nonparametric statistics were applied. For determining the differences in answers based on gender, organization, student status and year of study, the General Linear Model Multivariate analysis was used. The significance level was $p \leq 0.05$.

4. Research results

As previously mentioned, the research included the matching number of students attending the Faculty of Law and College (60 participants from each), as well as the matching number of full-time and part-time students from each institution (30 full-time and 30 part-time students). The results show that the student status (as full-time or part-time students) caused no significant differences in the obtained answers (p=0.54). Almost 66% of the respondents were female but the results show that gender had no effect on statistically significant differences in answers (p=0.54). Although the respondents were offered the possibility not to state their gender, no one used this option. *Chart 1* shows the respondents' gender structure. The results of the General Linear Model Multivariate analysis indicated that gender had no influence on the statistically significant differences in answers (p=0.54).

Chart 1. Gender structure of the respondents



Source: Authors` statistical analysis of the collected data (2022)

The research was conducted in March 2022 and it included the following respondents:

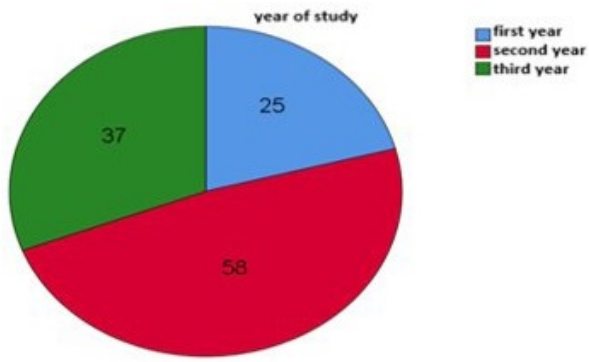
a. students who started their first year of study in the academic year 2021/2022. This group of students had only one semester of online classes (the first/winter semester);

b. students who started their second year of study in the academic year 2021/2022. This group of students had three semesters of online classes (first and second semester in the academic year 2020/2021, and third semester in the academic year 2021/2022);

c. students who started their third year of study in the academic year 2021/2022. This group of students had four semesters of online classes, from the outset of the COVID-19 pandemic in March 2020 (the second/summer semester of the academic year 2019/2020, the third and fourth semester in the academic year 2020/2021, and the fifth semester in the academic year 2021/2022).

Taking into consideration the aforesaid facts, the most relevant answers should be those provided by the third year students who spent almost the entire period of study attending online classes. In order to ascertain the validity of this assumption, additional General Linear Model Multivariate analysis was performed on the four chosen questions. The results show the level of statistical significance of $p \leq 0.05$. These results will be presented later in the paper when analyzing individual answers. *Chart 2* shows the number of students per year of study.

Chart 2. Participants (respondents) per year of study



Source: Authors` statistical analysis of the collected data (2022)

The overall questionnaire results indicate that the both institutions demonstrated a significant level of organizational preparedness to act in unpredictable extraordinary circumstances caused by the COVID-19 pandemic. In a very short period of time, the institutions had to design new ways of organizing the teaching process and instruction.

At the very outset of the COVID-19 pandemic in early March 2020[4], the classes were not held at all.[5] In line with the Recommendation of the Ministry of Science and Education,[6] HE institutions had to opt for a distance learning model, depending on the availability of Information technology (IT) resources to both teachers and students. Thus, teachers initially resorted to using email communication and posting teaching material (chapters to be covered) and assignments on the official institutional websites. After realizing that the situation might be permanent, the institutions began organizing online classes. For the purposes of holding online classes, teachers needed a certain level of IT skills and technical equipment, as well as additional time for preparing online classes. The entire process was fast and spontaneous: teachers used various platforms (Skype, Google Meet, Zoom, Moodle, MS Teams) and other distance learning tools they had already been familiar with, or which were recommended by the institution. As the central infrastructural institution the Republic of Croatia in charge of the entire science and higher education system in Croatia, the University Computing Centre of the University of Zagreb (SRCE)[7] very promptly prepared the instructions for organizing and holding online classes by using different online platforms and organized webinars for educating the teaching staff. In addition, institutions organized short training sessions for their teaching staff covering the basics of Moodle and Merlin systems. In March 2020, at the outset of the COVID-19 pandemic, the Faculty of Law organized workshops on the available remote learning systems (Merlin-SRCE, Loomen e-classroom, Merlin e-classroom), where interested teachers (using their personal computers) were instructed how to use these remote learning systems. Initially, the College did not organize

4 In the Republic of Croatia, the COVID-19 epidemic was officially declared on 11 March 2020 by *the Decision on declaring the epidemic of the COVID-19 desease caused by the SARA-CoV-2 virus,* issued by the Ministry of Health of the Republic of Croatia (RC); See: Ministry of Health RC (2020) https://zdravlje.gov.hr/UserDocsImages//2020%20CORONAVIRUS//ODLUKA%20O%20PROGLA%C5%A0ENJU%20EPIDEMIJE%20BOLESTI%20COVID-19.pdf:

5 On 13 March 2020, the Government of the Republic of Croatia adopted the Decision on the suspension of teaching activities at universities, secondary and primary schools, preschool education institutions, and the establishment of distance learning ("*Narodne novin*e", no. 29/20 and 32/20) (Ministry of Science and Education 2020:5) See also : Ministry of Health (2020): https://mzo.gov.hr/UserDocsImages/dokumenti/Vijesti/2020/Uputa%20-%20visoka%20ucilista%20-%2019.%203.%202020..pdf

6 Ministry of Science and Education RC (2020). Recommendations to higher education institutions regarding the organization of the distance learning process, 11 March 2020,. https://mzo.gov.hr/UserDocsImages/dokumenti/Vijesti/2020/Preporuke%20visokim%20ucilistima%20vezano%20uz%20organizaciju%20obrazovnog%20procesa%20na%20daljinu%20te%20dostava%20povratnih%20informacija.pdf

7 See: University of Zagreb University Computing Centre (SRCE - *Sveučilišni računski centar, Sveučilište u Zagrebu);* https://www.srce.unizg.hr/en/about-srce (accessed on 20.10.2022)

educational workshops for the teaching staff, who independently explored the instructions on using the Merlin system (which was recommended by the College). The first education for using the MS Teams was held in June 2020. Thus, the instruction during the first (summer) semester at the College was quite versatile and uneven (unstandardized), as it largely depended on the resourcefulness and commitment of every individual teacher. The research results indicate that the teachers responded to the challenge quite well. However, our analysis shows a statistically significant difference (p=0.001) between the answers provided by the students attending the Faculty of Law (PRAVOS) and those attending the College (VEVU). [8] *Chart 3* shows the difference in students' responses to the question whether the teachers in the two institutions were properly prepared to teach online classes. It cannot be said that the difference is merely a result of workshops organized by the Faculty of Law; it was most probably influenced by the teachers' previous professional training, preparedness and commitment to face a new challenge.

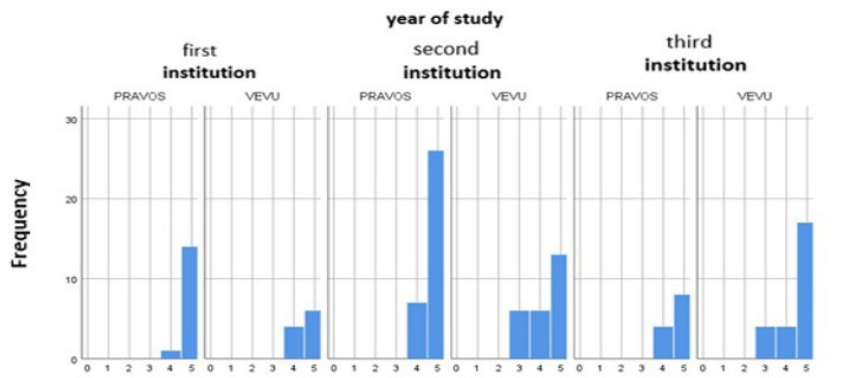
Chart 3. Teachers' preparedness for online classes

Source: Authors` statistical analysis of the collected data (2022)

Further analysis of students' responses per year of study at the two institutions showed no statistically significant differences regarding this question (Faculty of Law p=0.23; the College p=0.42), nor did the third year students at the Faculty of Law provide any statistically different responses to those provided by the third year students attending the College, as shown in *Chart 4*.

8 For the purposes of presenting information in charts, the Faculty of Law in Osijek is referred to as PRAVOS, while the College of Applied Sciences in Vukovar is referred to as VEVU.

Chart 4. Distribution of respondents' answers on teachers' professional education and preparedness to teach online according to the respondents' years of study and institution



Source: Authors` statistical analysis of the collected data (2022)

To avoid further confusion, the analysis focused on students' attitudes and opinions about online classes without special indication of the academic year. Therefore, the results presented below show the overall impression about online classes at the two institutions.

4.1. Online classes and their quality

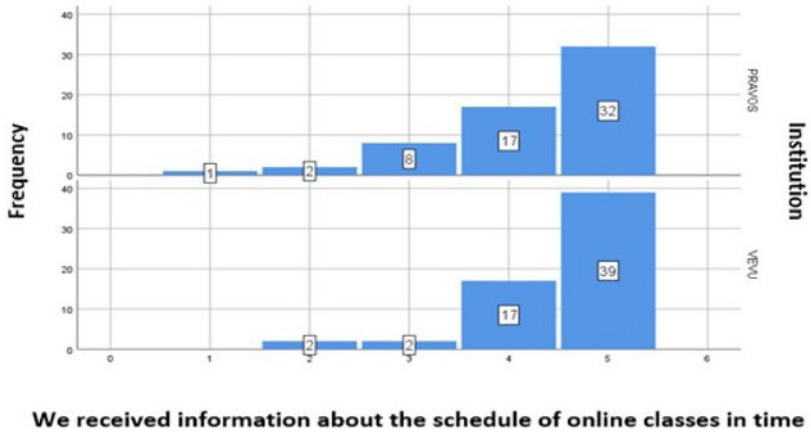
When the lock-down was declared in March 2020, the two HE institutions faced a challenge of maintaining a continuous teaching process, regardless of the given circumstances. Therefore, we wanted to investigate whether, in the opinion of the research participants, the continuity of the teaching process was preserved in the given circumstances, and to what extent. Thus, in response to the question whether the online classes enabled a regular (continuous) teaching process during the pandemic, a total of 56,66% of respondents attending the Faculty of Law and 71,66% of respondents attending the College chose the answer 5 - *I completely agree. Chart 5* shows the participants' responses to this question.

Chart 5. The frequency of regular classes during the COVID-19 pandemic

Source: Authors` statistical analysis of the collected data (2022)

Although the classes were not held in-person on the premises of the two HE institutions, there was a fixed schedule for online classes, which was published on the institutional websites and which had to be abided by. At the College, teachers were obligated to send students additional notifications by email about the scheduled lectures, in accordance with the instructions provided by the administration, even though the schedule had already been published on the institution`s official website. It is most probably for this reason that the students attending the College provided more positive answers to the question on being timely notified in advance about the scheduled lectures than the students attending the Faculty of Law. *Chart 6* shows that 93,33% of the College students expressed a very high or the highest level of satisfaction, as opposed to 81,67% of students from the Faculty of Law.

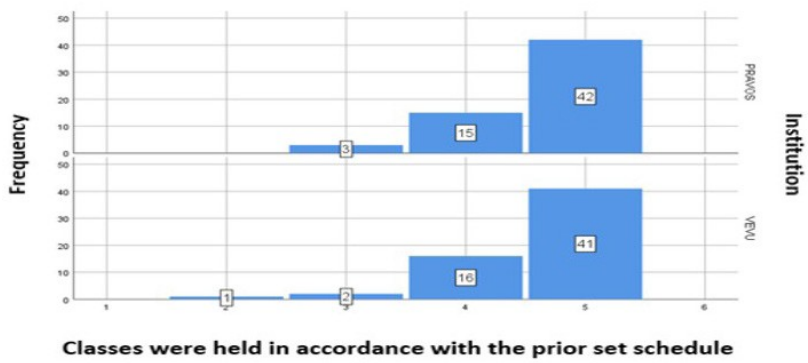
Chart 6. Timely notifications regarding the scheduled lectures during online classes



Source: Authors` statistical analysis of the collected data (2022)

Online classes were a challenge for all participants in the teaching process, especially during the lock-down. Professional and private obligations had to be well organized and handled, teachers (and some students) faced additional responsibilities with their own children who were not attending school at that moment, some of them had COVID-related health problems, etc. Despite all the difficulties and challenges, the obtained results show the classes were held quite regularly. *Chart 7* shows that 70% of students attending the Faculty of Law and 68,33% attending the College expressed the highest level of satisfaction regarding the frequency of instruction in line with the planned schedule.

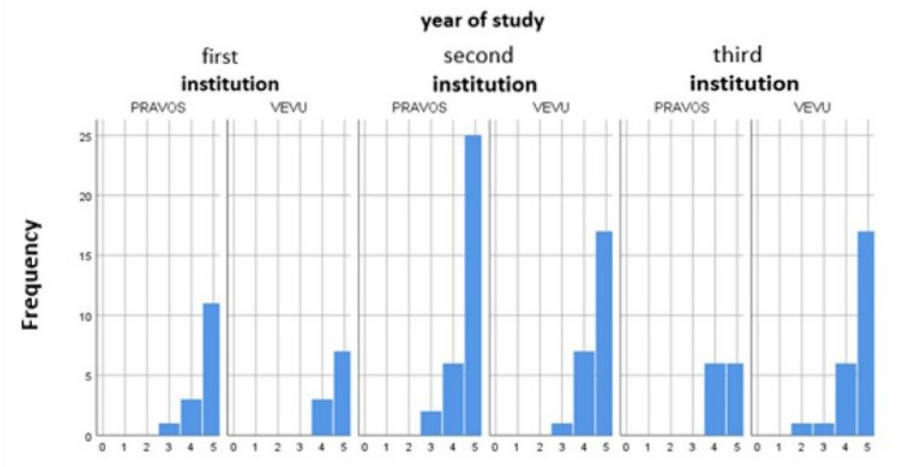
Chart 7. Frequency of holding classes in accordance with the planned schedule



Source: Authors` statistical analysis of the collected data (2022)

Additional analysis was conducted to examine whether there is a difference between the participants` answers to this question depending on the year of study and institution. It showed that there was no statistically significant difference between the first, second and third year students attending the College (p=0.82) and the first, second and third year students attending the Faculty of Law (p=0.60). Regardless of the fact that some students spent only one, three or even five semesters attending online classes, the provided answers show similar values. In addition, no statistically significant difference was noticed between the answers given by the third year students attending the Faculty of Law and the third year students attending the College. *Chart 8* shows the distribution of respondents' answers per year of study and institution regarding the frequency of instruction.

Chart 8. Distribution of respondents' answers according to the year of study and institution regarding the frequency of instruction in accordance with the planned schedule.

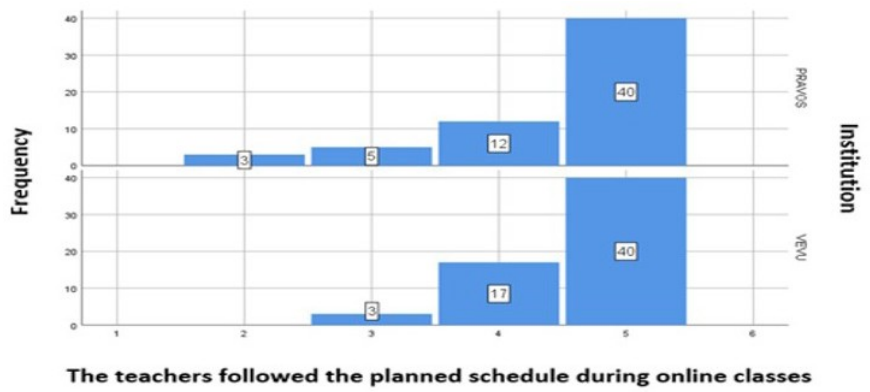


Source: Authors` statistical analysis of the collected data (2022)

Regardless of the given circumstances, the teachers were required to observe the planned schedule and teach the required weekly number of hours prescribed in the institutional curricula and syllabi. On the other hand, considering the available technical equipment and personal working and living conditions, students followed their online classes from home, from their offices, while travelling to and from work, while doing chores, or while helping their own children handle their online classes. Many teachers had similar experiences. Thus, students were asked to what extent their teachers observed the planned schedule and

held the specific number of online classes. *Chart 9* presents the respondents' answers, which indicate that teachers at both institutions held online classes most regularly.

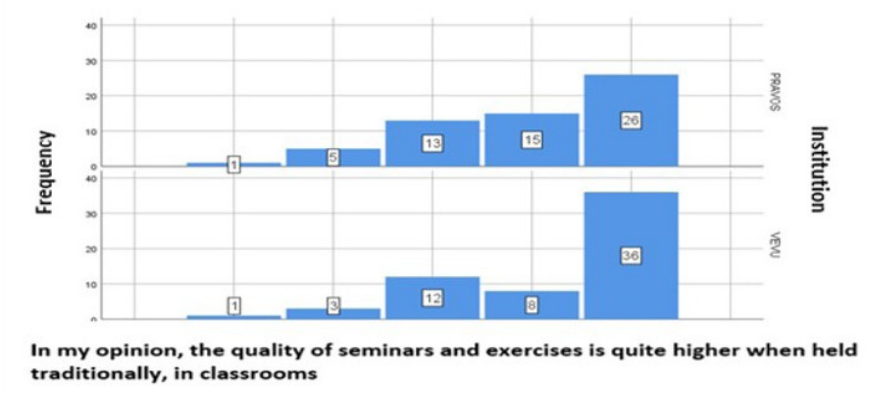
Chart 9. Respondents' answers about the number of held online classes



Source: Authors` statistical analysis of the collected data (2022)

The regular holding of online classes was necessary to keep the teaching process active, but it is quite difficult to imagine that this way of teaching may completely substitute the traditional classes held in person. Due to the limited technical possibilities of the virtual environment, it is difficult to develop a constructive debate or establish a working relationship with students. The process of writing and presenting seminar papers aims to develop students` speaking and rhetoric abilities as well as to encourage their critical thinking. Some activities, such as organizing and holding practice hours including problem-solving and analyzing individual tasks, require a high level of teacher and student engagement. Experience showed that it was rather difficult to achieve these goals in online classes. It was also confirmed by participants` answers. Chart 10 shows the respondents' opinions about the quality of instruction (seminars and exercises), indicating that students considered that the quality of instruction was higher in the traditional classroom settings than in online classes. The analysis did not indicate the presence of a statistically significant difference on this issue between the students attending the Faculty of Law and the College.

Chart 10. Student opinions about the quality of in person classes

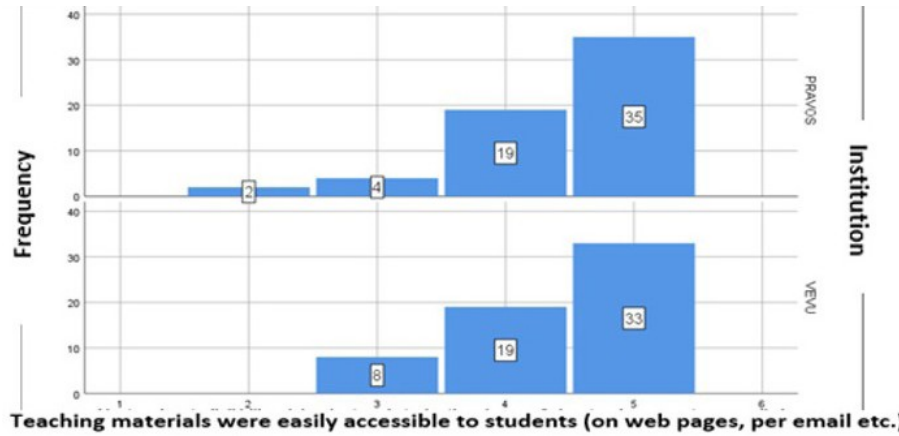


Source: Authors` statistical analysis of the collected data (2022)

4.2. Access to literature during online classes

In addition to challenges referring to the organization of online classes in general, there was a special challenge related to attempts to access the necessary literature for preparing seminar papers, doing course assignments and preparing for tests. Literature necessary for administrative study programs is quite extensive and it consists of a large number of textbooks, scientific and professional research papers which are not available in electronic form. Given the fact that students were unable to physically access libraries at their HE institutions, adequate solutions had to be found to enable students' access to such literature. In solving this problem, the teachers played the key role and demonstrated their creativity by allowing access to such learning material in a number of different ways. They prepared PowerPoint presentations, scanned the textbooks, compiled scripts and manuals which were published on the official websites of each institution. Certainly, when sharing materials in such a way, special attention had to be given to copyright issues. Some teachers even sent their students materials by email. Distance learning platforms (such as Merlin and Moodle) proved quite useful for practice hours (exercises) because they have in-built program solutions for this concept of teaching. According to the obtained results, both the Faculty of Law and the College showed rather satisfying levels of organizational resourcefulness and preparedness. *Chart 11* shows that students at both institutions were largely satisfied with the provided access to learning material. Only two respondents from the Faculty of Law expressed dissatisfaction, whereas there were no dissatisfied respondents from the College.

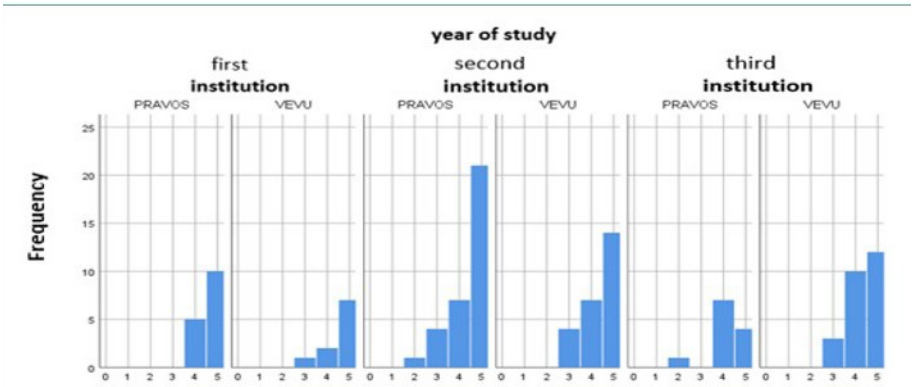
Chart 11. Access to learning materials



Source: Authors` statistical analysis of the collected data (2022)

The accessibility of learning materials was further analyzed according to the respondent's year of study and institution. The results presented in *Chart 12* show that there was no statistically significant difference between the opinions of students from the two institution (the Faculty of Law p=0.25, the College p= 0.67). It also proved to be the case with responses provided by third year students at both institutions. This even distribution of respondents' answers additionally proves the relevance of the obtained research results.

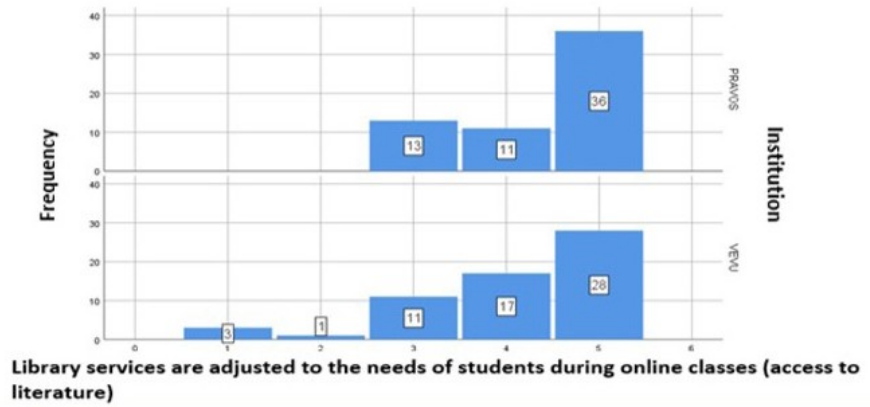
Chart 12. Distribution of respondents' answers on the accessibility of learning materials according to the year of study and institution



Source: Authors` statistical analysis of the collected data (2022)

In terms of access to literature, library services are also very important at both institutions. The Faculty of Law currently employs five librarians with a university degree who quite promptly and successfully handled both teachers or students' requests for literature by e-mailing the digitalized version of the requested texts in accordance with copyright law prescriptions. The FL library is well-equipped with both compulsory and non-compulsory literature, as well as with referential literature intended for preparing seminar papers. In order to simplify access to relevant literature and facilitate quality online instruction in the extraordinary pandemic circumstances, the librarians digitalized more than 600 units of compulsory literature. Free access to e-books that were made available by foreign publishers was more than welcome. It was necessary for certain courses to be held, and it was coordinated by professors teaching such courses. An additional advantage was the fact that the FL library enabled access to a huge number of databases: 30 multi-disciplinary databases (bibliographic and complete texts), 23 databases (containing over 11,542 titles of electronic magazines and 8,429 e-books) which were available via the subscription paid by the Croatian Ministry of Science and Education, and 9 databases (containing 5,116 different magazine titles) which were available via the subscription provided by the Faculty of Law. The access to all the subscription-based digital content was facilitated via the Faculty proxy server and AAI user name and password. Given the fact that the Faculty of Law had been continuously renewing the subscription for the Legal Legislations Portal (IUS-info) for the past 10 years, students had continuous online access to all the positive legal regulations envisaged in their course assignments. On the other hand, the College library has only one employee, a significantly lower number of books, and does not pay subscription to any of the relevant databases. These objective differences are to some extent visible in the research results; namely, this was the only question where less than 50% of students attending the College completely agreed with the statement that library services were adjusted to students` needs during online classes. However, regardless of these circumstances, statistical analysis presented in *Chart 13* shows that there is no significant statistical difference between the two institutions concerning the extent to which their library services were adjusted to students` needs during online instruction.

Chart 13. Level of adjustment of library services to students` needs

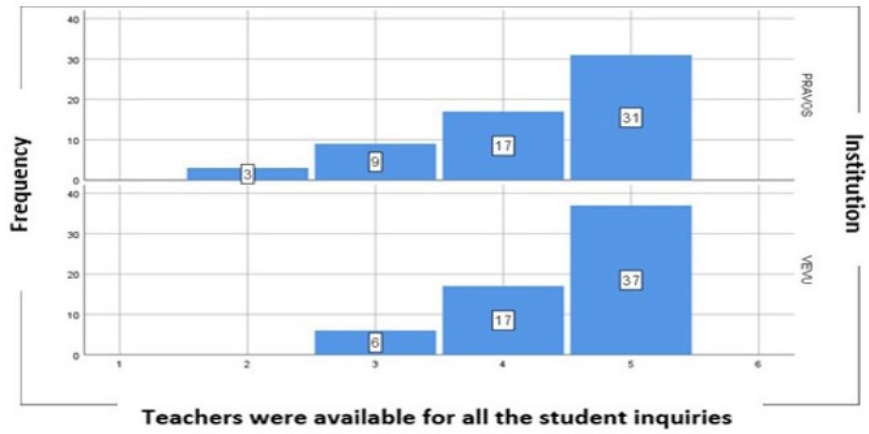


Source: Authors` statistical analysis of the collected data (2022)

4.3. Teachers' availability

In case of having a dilemma or an issue concerning the teaching/learning process, students commonly address their teachers. In order to clarify dilemmas and resolve issues arising from the highly specific online teaching circumstances, technical difficulties, psychological difficulties caused by physical isolation, illness or other factors, it was of utmost importance for students to receive timely, complete and accurate information. Thus, the survey participants were asked to evaluate the extent to which their teachers were available for consultation and student inquiries. The results presented in *Chart 14* show that 90% of students attending the College and 80% of students attending the Faculty of Law were either very satisfied or completely satisfied with the level of availability of their teachers during online classes.

Chart 14. Availability of teachers for consultation and student inquiries



Source: Authors` statistical analysis of the collected data (2022)

In addition to their teachers, the students could also contact their mentors (if necessary). The Strategy for Education, Science and Technology,[9] adopted by the Croatian Parliament in 2014, includes recommendations for establishing and improving the mentorship system at all levels of instruction. In the area of higher education, within the context of modernization, internationalization and strengthening the capacities of education, the Strategy envisages a number of measures aimed at improving the study programs and efficiency of education by consistently implementing the concepts of the Bologna Reform Process and redefining the learning outcomes and competences. One of the measures is to design and implement the mentorship system at all HE institutions, to provide education for teachers and assistants in terms of developing mentoring competencies, to ensure regular student counseling with their mentors and students' evaluation of mentors' work (Measure 1.2.3. of the Strategy).

Even before this Strategy was adopted, the College in Vukovar adopted the General Rules on Mentorship in 2013[10] and introduced the mentorship system in

9 Strategy for Education, Science and Technology, *Official Gazette of the Republic of Cro*atia, no. 124/2014;
https:// narodne-novine.nn.hr/clanci/sluzbeni/2014_10_124_2364.html (accessed 12. 03. 2022)

10 General Rules on Mentorship, College of Applied Sciences *Lavoslav Ružička* in Vukovar, R. Croatia, 4. December 2013, http://www.vevu.hr/uploads/50Pravilnik%20o%20mentorskom%20radu%20nastavnika.pdf
In 2022, the College in Vukovar adopted new General Rules on Mentors' Work; https://www.vevu.hr/wp-content/uploads/2022/04/Pravilnik-o-mentorskom-radu-nastavnika-2022.pdf (accessed 26 August 2022).

order to improve the quality and efficiency of education (Article 2). The General Rules on Mentorship (2013, 2022) envisage the mentors' tasks and obligations as follows:

a. to inform students about the College organization, its administrative and professional service, its building and ethical principles of the academic community,

b. to inform students about teaching activities and current events, as well as about students' rights and obligations during the study period,

c. to provide counseling and guidelines for students during the study period,

d. to talk to students about possible difficulties during the study period and advise them how to overcome those difficulties (Article 12 of General Rules).

In addition, mentors are obliged to regularly meet students at least once a month and directly assist them with their work (either collectively or individually), to keep notes (for mentor's report) on students` work and submit the mentor's reports once a month to the Head of the Department and the Vice-Dean of Studies and Students' Affairs, and to submit the final mentorship report (on mentoring sessions) to the Vice-Dean of Studies at the end of each semester (Article 11 of the General Rules). At the end of each semester, Vice-Dean of Studies and Students' Affairs informs the College Council about the mentor's work, number of meetings held, potential issues and possible solutions. It may be concluded that mentors' work at the College is adequately regulated and efficiently organized, and it proved to be quite a useful means of information exchange and problem-solving during the pandemic.

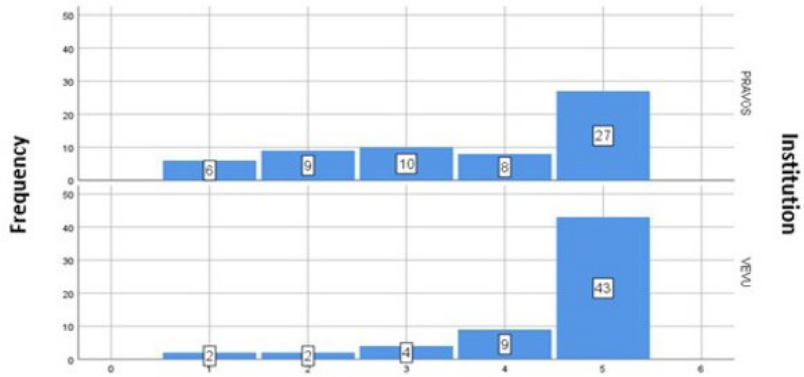
At the Faculty of Law in Osijek, the mentorship system has been primarily used in the Doctoral Study Program, where the Mentors' Council decides on the appointment of mentors who guide, assist and monitor the doctoral students' work of in preparing their disserataions, encourage their scientific research, mobility, and publication of reserach results.[11] In September 2021, the Academic Council of the Faculty of Law Osijek decided to name a moderator for full-time and part-time study programs in the academic year 2021/2022.

In the research questionnaire, four questions addressed the quality of mentor's work. In response to the first question about the frequency of meetings held by mentors, the analysis presented in *Chart 15* shows the presence of a statistically significant difference (p=0.04) between the answers provided by the respon-

11 Faculty of law Osijek, J.J. Stossmayer University of Osijek (2022): Council of Mentors, Appointment of mentors; https://www.pravos.unios.hr/doktorski-studij/appointment-of-mentors#; https://www.pravos.unios.hr/doktorski-studij/council-of-mentors; (accessed on 28.10.2022)

dents attending the Faculty of Law and those attending the College. It is obvious that the students attending the College had more experience with mentorship and demonstrated higher levels of satisfaction with their mentors` work than the students from the Faculty of Law.

Chart 15. Frequency of regular monthly meetings with mentors

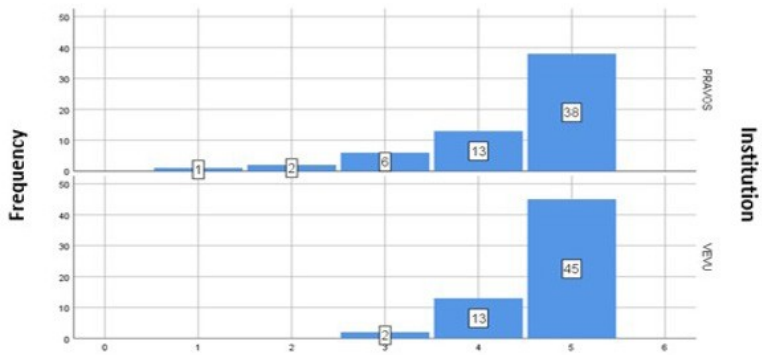


Monthly meetings were regularly held by mentors assigned to a particular study year

Source: Authors` statistical analysis of the collected data (2022)

Apart from holding regular meetings, mentors were obligated to be available to students for their inquiries. Although the analysis did not show statistically significant difference, *Chart 16* clearly indicates that mentors from the College were frequently more accessible to their students that those form the Faculty of Law.

Chart 16. Availability of mentors at the two institutions

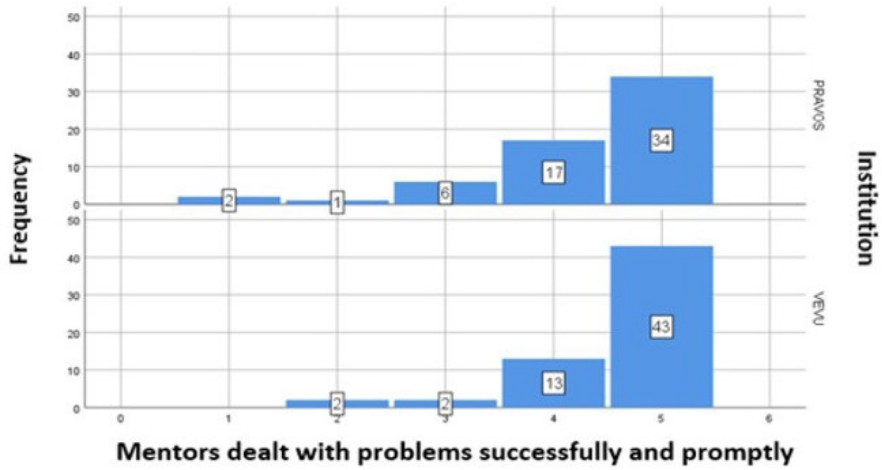


Despite regular meetings, mentors were available for student inquiries

Source: Authors` statistical analysis of the collected data (2022)

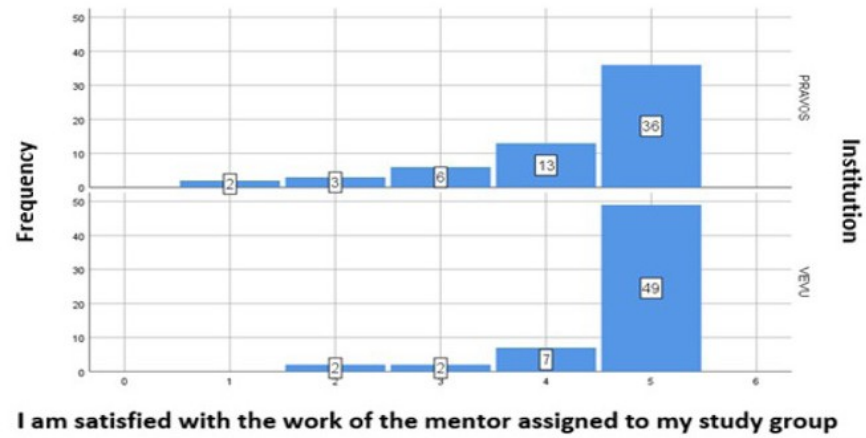
Considering the question whether mentors had successfully resolved the emerging issues in a timely manner, the distribution of frequency of statement 5 (*I completely agree*) was quite similar. *Chart 17* shows that the answers provided by the students attending the College resulted in higher marks for their mentors. It also proves to be true in terms of the question about the students' satisfaction with their mentors` work, as shown in *Chart 18.*

Chart 17. Frequency of mentors` successfulness and promptness in problem solving



Source: Authors` statistical analysis of the collected data (2022)

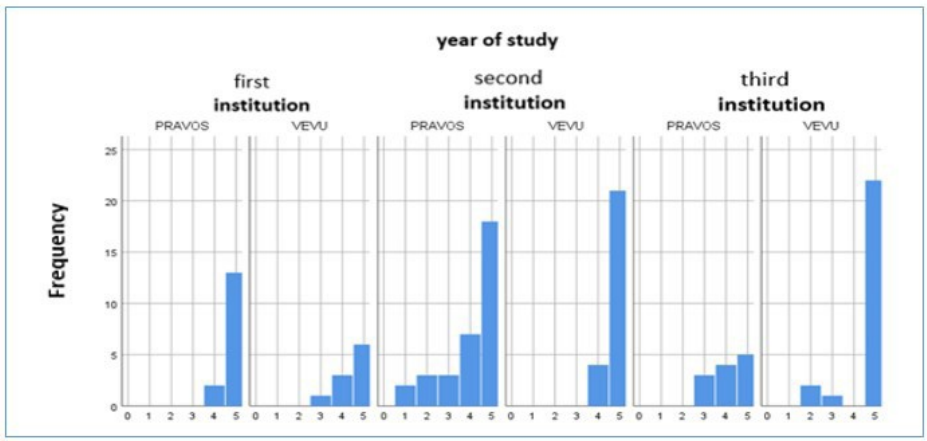
Chart 18. Students' satisfaction with their mentors` work



Source: Authors` statistical analysis of the collected data (2022)

Considering the observed difference in the satisfaction levels with mentors` work expressed by the students attending the Faculty of Law and those attending the College, further analysis was performed relating to the duration of study. There was no statistically significant difference (p=0.40) among the answers provided by the first, the second and the third year students attending College with regard to their mentors` work. However, the answers provided by the first, the second and the third year students attending the Faculty of Law showed a statistically significant difference (p=0.05). The first year students average grade of their mentors` work was 4.87±0.35, the second year students' grade was 4.09±1.26, and the third year students' grade was 4.17±0.84. as shown in *Chart 19*. Further analysis was also conducted addressing the answers provided by the third year students attending College and those attending the Faculty of Law, which indicted the presence of a statistically significant difference (p=0.04). As shown in *Chart 19*, the average grade of the third year students attending the Faculty of Law was 4.17±0.84, in contrast with the average grade 4.68±0.90 provided by the students attending College.

Chart 19. The levels of students' satisfaction with their mentors` work according to the year of study at both institutions



Source: Authors` statistical analysis of the collected data (2022)

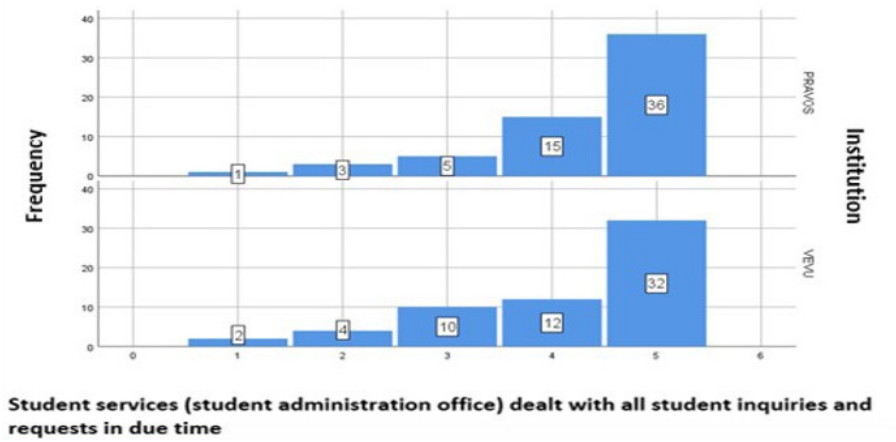
Source: Authors` statistical analysis of the collected data (2022)

4.4. The quality of work of other services

In order to obtain a complete picture about the work of the observed institutions during the COVID-19 pandemic, the questionnaire included a set of questions about the work of other services: student administration office, IT services, legal

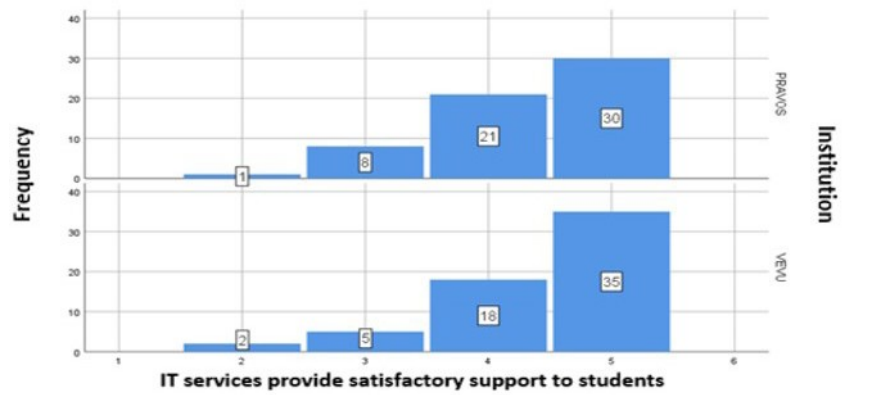
services, and the Vice Dean of Studies and Student Affairs, which had to adjust their work to the pandemic conditions. Student administration office was the first service to be contacted in case students need any assistance. IT services were especially helpful during online classes, while numerous legal matters, otherwise resolved in person, were handled electronically. Although the respondents attend two different institutions, their answers about the work of other services do not reveal any statistically significant differences. The research results indicate a similar distribution of answers provided by students from the two institutions. *Chart 20* shows the distribution of answers concerning the statement: Student services dealt with student inquiries and requests in due time. *Chart 21* presents the distribution of answers referring to the statement: IT services offered satisfactory support to students. *Chart 22* displays the distribution of answers regarding the statement: inquiries, requests and other official matters addressed to other services were handled in due time.

Chart 20. Level of students' satisfaction with the work of student services



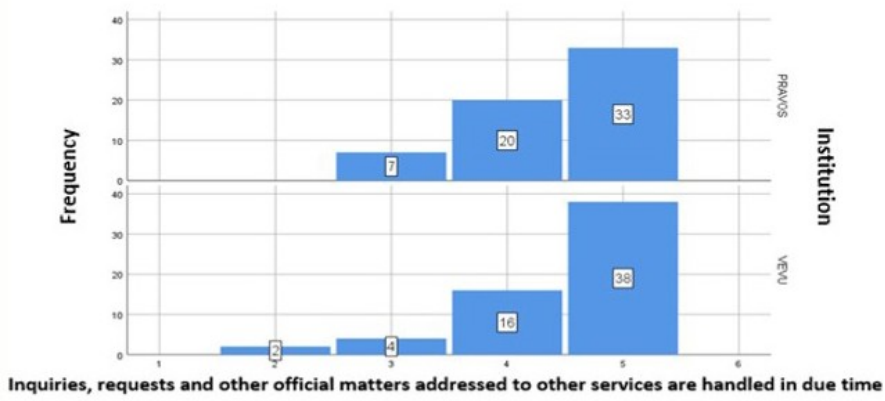
Source: Authors` statistical analysis of the collected data (2022)

Chart 21. Level of students' satisfaction with the work of IT services



Source: Authors` statistical analysis of the collected data (2022)

Chart 22. Level of satisfaction with the work of other services



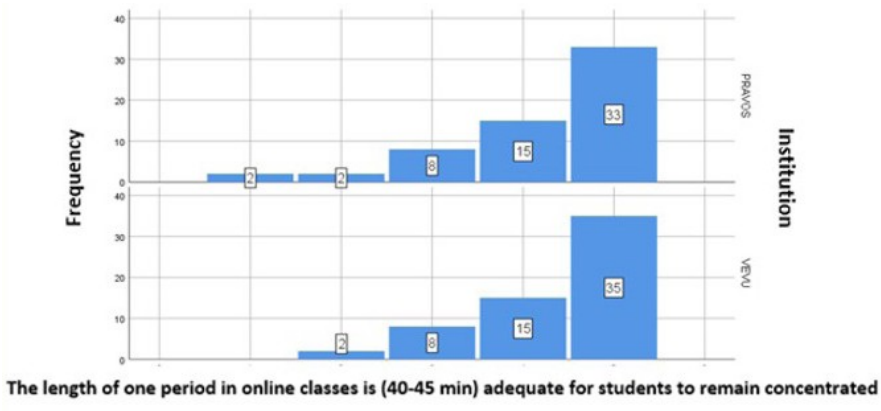
Source: Authors` statistical analysis of the collected data (2022)

Generally, when compared to the teaching process and teachers, the work of other services was rather poorly graded, although the results are still quite satisfactory.

4.5. ***Successfulness in managing student obligations***

In previous questions, the respondents were asked to grade the teaching process and its key elements. The last part of the questionnaire aimed to research the students' perception relating to assessment of their own success during online classes, i.e. the extent to which online classes influenced their success. First, the authors wanted to know whether the length of individual classes corresponded with the students` concentration span. In August 2020, the Croatian Institute for Public Health, in conjunction with the Ministry of Science and Education, issued Recommendations for University Instruction during the COVID-19 pandemic and the application of anti-epidemic measures;[12] among other things, they included a recommendation to shorten classes, which should last 40 minutes (per class) in order to allow for the classrooms to be disinfected. The 40-minute classes were also introduced in online classes. The results shown in *Chart 23* indicate that students did not experience any issues with the lack of concentration, and that there was no statistically significant difference between the responses of students attending the Faculty of Law and the College.

Chart 23. Distribution of students' answers referring to the length of individual classes and its impact on students' concentration span



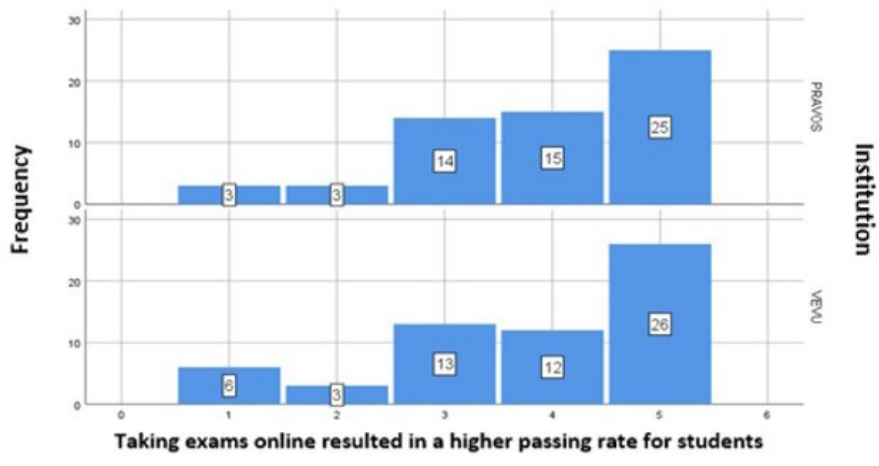
Source: Authors` statistical analysis of the collected data (2022)

During online classes, one of the most challenging and particularly complex issues was the organization and taking of exams. Frequent network overload caused interruptions which none of the participants in the teaching process

12 Recommendations for University Instruction during the COVID-19 pandemic and the application of anti-epidemic measures, Croatian Institute for Public Health,31 August 2020. https://www.srednja.hr/app/uploads/2020/09/PREPORUKE_visoka_ucilista_31_08_2020.pdf, (28.8.2022).

could have controlled, but such disturbances could have influenced the exam results. This last argument was often used as an excuse by students which could not have been verified by teachers. Despite numerous program solutions for distant learning, it was practically impossible to determine who was actually taking the test, whether there was someone helping students during online testing and whether the student was using additional (inadmissible) materials while taking the test. Thus, there was the general perception of students being more successful in online testing. Two statements were aimed at analyzing students' opinions on this matter. The first statement (*Taking exams online resulted in higher passing rates*) referred to better exam results in online testing when compared to traditional testing. The results are presented in *Chart 24.*

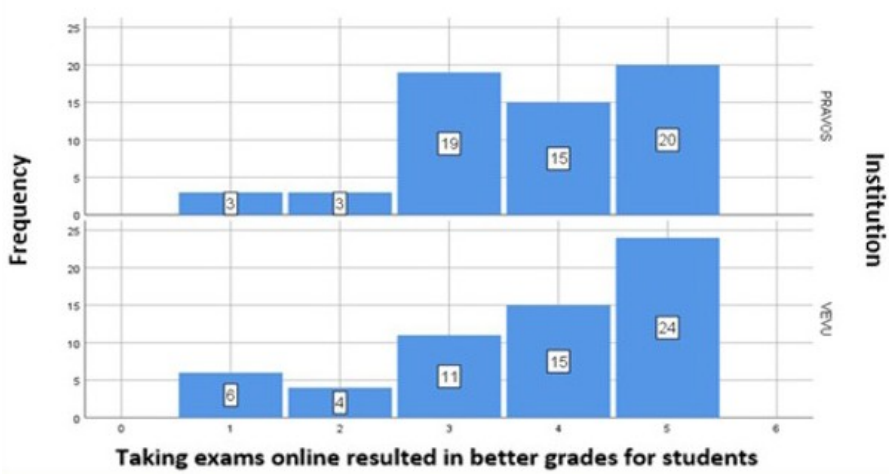
Chart 24. Student opinions about online testing and better exam results



Source: Authors` statistical analysis of the collected data (2022)

The second statement related to the students' results in test (*Taking exams online resulted in better student grades)*, i.e. whether students thought that they got higher grades in online testing. Chart 25 indicates that statistical analysis of students' responses did not reveal any significant deviations among the respondents with regard to individual variables (gender, student status, year of study, and institution).

Chart 25. Answers referring to achieving better grades in online testing

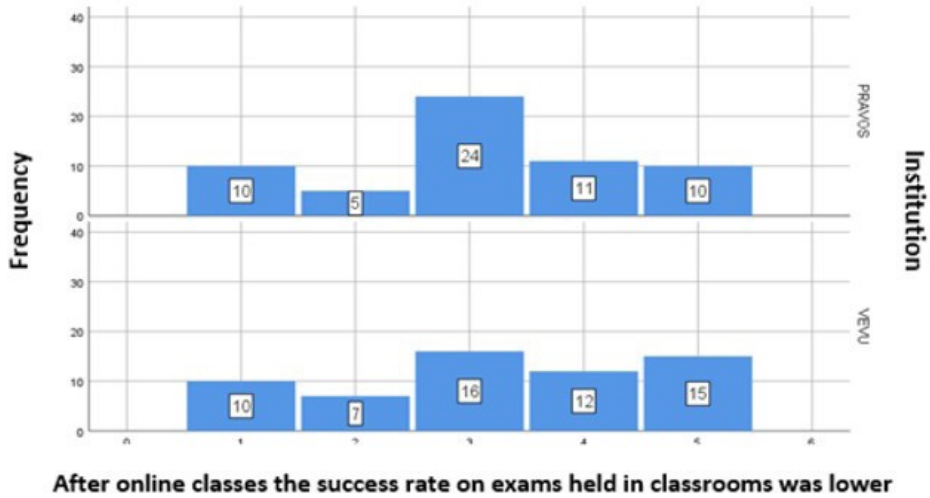


Source: Authors` statistical analysis of the collected data (2022)

For the purposes of this analysis, it is interesting to observe the numbers of students who opted for response 3 (*I neither agree nor disagree*). As shown in Charts 24, 25 and 26, this type of frequency in students' answers is present only in this part of the questionnaire (relating to success in online testing) and nowhere else. There are several possible explanations for this distribution of answers, such as the fact that students had no other reference for comparison (the first year students attended their classes for only one semester prior to this research), or that students perhaps did not want to be fully honest since the testing was organized and conducted by their teachers, or they simply could not objectively assess this statement on their own. One can only guess what the real reasons are, but students` answers do not support the general perception about online testing being easier.

The respondents` opinion about the way online classes influenced the rate of success when the tests were taken in the traditional classroom settings was used as a control question to learn whether the students obtained the knowledge necessary for achieving successful test results. The results presented in *Chart 26* confirm the previously expressed positive attitudes about the quality of the teaching process. Even though the frequency of response 3 (*I neither agree nor disagree*) is quite high, only a small number of respondents (16.67% from the Faculty of Law, and 25% from the College) claimed they had difficulties with taking tests in the traditional classroom setting as a result of attending online classes.

Chart 26. Students' answers related to the statement: The rate of success in exams taken in the traditional classroom setting was lower as a result of having online classes



Source: Authors` statistical analysis of the collected data (2022)

The last question in the questionnaire was an open-ended question, where the respondents were encouraged to write additional comments about the organization of classes and their success in managing their student obligations. This question was answered by 8 students only, and their comments are presented in *Table 1*.

Table 1. Students' comments provided in the open-ended question

Institution	Student status	Year of study	Gender	Comment
PRAVOS	Regular	II.	F	I consider online classes are better due to personal safety.
PRAVOS	Part-time	I.	F	In my opinion, live classes are better than online classes. Better concentration, better communication between students and teachers, better understanding of the subject matter.
PRAVOS	Part-time	I.	F	I express criticism regarding the length of some lectures which took more than 2 hours, making it difficult to concentrate.

Institution	Student status	Year of study	Gender	Comment
PRAVOS	Part-time	I.	F	I consider online classes impractical especially because of exams. Teachers are not able to explain the subject matter fully, whereas students are having a hard time to adjust.
PRAVOS	Part-time	II.	F	Organization of classes during the pandemic was much better and easier to follow online for us who travel to university.
VEVU	Part-time	II.	M	Online classes are not good.
VEVU	Part-time	III.	M	Only online.
VEVU	Part-time	II.	F	For those of us who travel, it is much easier to follow online classes. I personally have nothing against taking tests in classrooms.

Source: Authors` statistical analysis of the collected data (2022)

5. Discussion and conclusion

Even though the number of participants is quite small (120 participants in total), it is without any doubt representative for the observed institutions. The research was conducted a in controlled environment where participants could not have influenced each other`s answers. The questionnaire covered all the areas relevant for proper work of a higher institution, and it provided an objective overview of online classes.

The author's analysis did not show any statistically significant differences between the answers provided by students attending the Faculty of Law and those attending the College, although they are two significantly different institutions. Statistically significant differences are found in two segments only: teachers' preparedness to teach online classes and mentors' work, which were explained in detail in the results' interpretation.

In general, the observed institutions received very good grades for their work during online classes. Participants from both institutions provided quite positive answers (*I mainly agree*; *I completely agree*) to most of the questions. What is the reason for such responses? The observed institutions are bureaucratic institutions with well-defined relations of power, hierarchy, procedures and outcomes

to be achieved. The precisely defined procedures ensure regular and consistent practice, which is especially evident in mentors' work. Mentor`s obligations are clearly and explicitly prescribed; they are observed by mentors and regularly monitored by competent bodies. On the other hand, the observed institutions also proved to be adaptive institutions which quickly react to changeable incentives from their environment. The COVID-19 pandemic could not have been foreseen, and there were no prior established rules of conduct. However, the institutions quickly adapted to the new circumstances by changing the way they function, by educating their employees and thus ensuring a quality level of performance for all the participants. Regardless of the fact that neither of the institutions had been previously accredited for distance learning, according to the obtained results, they applied the distance learning model quite successfully. Online classes could have led to complete alienation between teachers and students, but it was just the opposite. Teachers developed a collaborative relationship with students, they assisted students in finding literature and resolving other issues, and they applied creative teaching methods which were clearly acknowledged in students' responses. Even though the online teaching process was encouraged by the institutions, the achieved results are a direct result of quality work of the most important factor in every institution –human activity.

Based on all the above, we consider the initially set hypothesis confirmed: the observed institutions of higher education ensured efficiency of the teaching process and maintained adequate teacher-student relations during the COVID-19 pandemic. In this context, it is important to note that the National Plan for the Development of Public Administration in the period 2022-2027[13] focuses on the user-oriented administration. The research results have confirmed the user-friendly approach to public services provided by the two HE institutions by establishing a collaborative relationship between teachers and students. Moreover, the obtained research results provide an insight in the process of teaching online classes from the student point of view and, as such, they can be used as the basis for further research.

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IZAZOVI VISOKOG OBRAZOVANjA KAO JAVNE SLUŽBE U VRIJEME TRAJANjA PANDEMIJE KOVID–19 IZ PERSPEKTIVE STUDENATA

Rezime

Autori u radu nastoje prikazati ključne izazove u području visokog obrazovanja kao javne službe za vrijeme trajanja pandemije KOVID–19. Cilj je rada ispitivanje stajališta redovitih i izvanrednih studenata vezanih uz organizaciju nastavnog procesa u vrijeme pandemije. Temeljna hipoteza postavljena u tekstu rada glasi: Visokoobrazovna ustanova osigurava učinkovito djelovanje nastavnog procesa i zadržava primjeren odnos nastavnik–student u vrijeme pandemije KOVID–19. Samo istraživanje provedeno je u okviru stručnih upravnih studija na dvama odabranim institucijama, Pravnom fakultetu u Osijeku te u okviru Upravnog studija Veleučilišta Lavoslav Ružička u Vukovaru, a njime su obuhvaćeni redoviti i izvanredni studenti prve, druge i treće godine. Nalazima istraživanjanastoji se doći do potvrđivanja odnosno opovrgavanja temeljne hipoteze rada. Za potrebe rada korištena je deskriptivna statistika. Doprinos izučavanju nauke o upravi ogleda se u cjelinama kojima autori pružaju teorijsku podlogu za provedbu empirijskog istraživanja u okviru Sveučilišta Josipa Jurja Strossmayera u Osijeku te Veleučilištu Lavoslav Ružička u Vukovaru, analiziranju ključnih izazova stavljenih pred nastavnike i studente, donošenju zaključaka te prijedloga za poboljšanje organizacijenastavnog procesa u budućim izvanrednim situacijama.

Ključne reči: *visoko obrazovanje, javna služba, KOVID–19 pandemija, studenti, nastava.*

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Rad primljen: 29.09.2022.
Rad prihvaćen: 02.11.2022.

PRAVA NA RADU MEDICINSKIH RADNIKAZA VREME VANREDNOG STANjA[**]

Apstrakt**:** *Tokom proglašenog vanrednog stanja usled pandemije virusa KOVID 19 u Republici Srbiji 2020. godine, medicinski radnici izvršavali su svoje radne zadatke u posebnom režimu rada, sa specifičnim ograničenjima u skladu sa Odlukom o vanrednom stanju, Zakonom o odbrani, Zakonom o vojnoj, radnoj i materijalnoj obavezi, kao i odlukama Vlade Republike Srbije i Ministarstva zdravlja. Njihov radnopravni položaj bio je kompleksno uređen a radne dužnosti specifično organizovane. Istraživanje obuhvata opštu normativnu analizu njihovog radnopravnog položaja tokom trajanja vanrednog stanja, sa posebnim osvrtom na režim rada uspostavljen uvođenjem radne obaveze na osnovu propisa koji nisu na adekvatan način odgovorili postojećem stanju prouzrokovanom pandemijom virusa. Dodatno, u radu se ukazuje na fleksibilizaciju rada u okolnostima vanrednog stanja, dobre i loše karakteristiketrenutnog zakonskog okvira, kao i na dobru i lošu praksu koja je u ovom pogledu uočena tokom trajanja vanrednog stanja. Poseban osvrt se daje na nezakonito prolongiranje trajanja vanrednih merarada i nakon ukidanja vanrednog stanja. Daju se preporuke koje su od značaja za kvalitetnije normativno uređenje ovih pitanja, kao i za osnaživanje mehanizama zaštite prava po osnovu rada medicinskih radnika, u specifičnim (vanrednim) okolnostima uzrokovanim medicinskim razlozima.*

Ključne reči*: prava po osnovu rada, radno vreme u posebnom režimu rada, vanredno stanje, radna obaveza, promena mesta rada.*

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1. Uvodna razmatranja

U mnogim zemljama širom sveta pandemija virusa KOVID 19 izazvala je tektonske promene na tržištu rada i promenila svakodnevicu celog sveta u različitim područjima života. Osećaji obespravljenosti, straha, brige za zdravlje, egzistenciju i posao manifestirali su se na različite načine (Maganić, 2021: 116).

Međutim, iako je neminovno da su se svi ljudi, a ne samo radnici susreli sa posebnim, nestandardnim režimom rada i života, pojedine kategorije radnika bile su značajno više ugrožene u odnosu na druge. Reč je o medicinskim radnicima koji su se tokom trajanja pandemije našli, opravdano, imajući u vidu prirodu posla, na prvoj liniji odbrane. U skladu sa time očekivano je bilo da se medicinskim radnicima omogući adekvatna pomoć kako bi isti bili u mogućnosti da pomognu drugima. Nažalost, mnoge mere koje su primenjene nisu na adekvatan način odgovorile tom izazovu, te se, posledično, medicinskim radnicima više onemogućavalo da obavljaju radne zadatke u uslovima koji su bili potrebni nego što im se pomagalo. Ovo pre svega vredi, imajući u viduda su se na organizaciju rada primenjivale odredbe propisa koji nisu u potpunosti podobni za okolnosti uzrokovane vanrednim stanjem usled pandemije smrtonosnog virusa. Stoga, izvesno je bilo da se određeni negativni aspekti moraju ispoljiti i da režim rada koji nije adekvatno uređen da odgovori na izazove kakvo je vanredno stanje usled pandemije smrtonosnog virusa ne može pokazati dobre rezultate.

U radu se polazi od hipoteze da je medicinskim radnicima tokom vanrednog stanja obezbeđen niži stepen i kvalitet radnih prava od onog koje poznaje međunarodno pravo, a pre svega usled činjenice da je medicinskim radnicima neustavno i nezakonito produžen režim rada u radnoj obavezi.

2. Prava na radu za vreme vanrednog stanja

Vanredno stanje u Republici Srbiji usled epidemije virusa KOVID 19 uvedeno je Odlukom o proglašenju vanrednog stanja od 15. marta 2020. godine[1] a ukinuto Odlukom o ukidanju vanrednog stanja od 6. maja 2020. godine[2] (vid. više: Stanić, Đorđević, 2021: 51–65).

1 Odluku su supotpisali predsednik Republike, predsednica Narodne skupštine i predsednica Vlade. *Sl. glasnik* RS, 29/2020.

2 Odluku je donela Narodna skupština Republike Srbije, *Sl. glasnik RS*, 65/2020.

U ovom periodu važio je specifičan pravni režim tokom vanrednog stanja, koji je u Republici Srbiji uglavnom uređen Zakonom o odbrani[3]. Navedeni Zakon svakako nije bio najpodobniji izvor za uređenje vanrednog stanja koje je uzrokovano pandemijom virusa kada je reč o režimu rada, pa je, kao posledica, parcijalizacija uređenja radnih odnosa i rada uopšte izvršena kroz niz drugih propisa. Ipak, u fokusu je bio režim radne obaveze za vreme vanrednog stanja, u kojem je radio veliki broj zaposlenih lica, kao i svi zdravstveni radnici.

2.1. Osnovni izvori radnog prava za vreme vanrednog stanja

Zakonom o odbrani regulisana su osnovna pitanja vezana za organizaciju i izvršenje radne obaveze. Prema ovom Zakonu, radna obaveza uvodi se u ratnom i vanrednom stanju, njoj podležu sva punoletna lica koja nisu ostvarila prava iz penzijskog i invalidskog osiguranja, a nemaju utvrđen ratni raspored.[4] Radna obaveza je suštinski nametanje zadataka koji su od značaja za odbranu zemlje u konkretnim okolnostima, u skladu sa Planom odbrane Republike Srbije. Ona predstavlja dužnost svakog građanina u situaciji kada je potrebno da pojedinac učestvuje u poslovima koje u redovnim okolnostima ne bi obavljao, ili bi ih obavljao na neki drugačiji način. Radnoj obavezi podležu svi za rad sposobni građani koji su navršili 18 godina života i imaju do 65 godina (muškarci), odnosno do 60 godina (žene), a nisu raspoređeni na službu u Vojsci Srbije (Ministarstvo odbrane Republike Srbije, N/D).

Iako su radnom obavezom obuhvaćeni praktično svi – kako javni sektor tako i privatni, uključujući i preduzetnike, osnovno pravilo kod radne obaveze jeste da u slučaju proglašenja ratnog ili vanrednog stanja, sva lica nastave da rade na svojim redovnim poslovima, dok se ne rasporede na neke druge poslove u skladu sa potrebama u konkretnim okolnostima. Radna obaveza se prevashodno vrši u mestu prebivališta ali se u slučaju potrebe može obavljati i u drugom mestu. Za vreme vršenja radne obaveze, njeni obveznici plaćeni su u skladu sa odredbama o zaradi u radnom odnosu. Konačno, Zakon o odbrani navodi i izuzetke, kome se ne može utvrditi radna obaveza. Ti izuzeci obuhvataju sledeće:

- roditelju, staratelju ili hranitelju koji samostalno vrši roditeljsko pravo nad detetom koje nije navršilo 15. godinu života ili nad

3 Zakon o odbrani, *Sl. glasnik RS*, 116/2007, 88/2009, 88/2009 – dr. zakon, 104/2009 – dr. zakon, 10/2015 i 36/2018.

4 Čl. 50–55 Zakona o odbrani, *Sl. glasnik RS*, 116/2007, 88/2009, 88/2009 – dr. zakon, 104/2009 – dr. zakon, 10/2015 i 36/2018.

maloletnim detetom sa smetnjama u razvoju ili nad punoletnim detetom nad kojim je produženo roditeljsko pravo samo jednom roditelju;

- roditelju, staratelju ili hranitelju deteta koje nije navršilo 15. godinu života, roditelju maloletnog deteta sa smetnjama u razvoju ili roditelju punoletnog deteta nad kojim je produženo roditeljsko pravo, ako roditelji zajednički vrše roditeljsko pravo, a drugi roditelj je angažovan na poslovima odbrane;
- supružniku ili vanbračnom partneru ili drugom odraslom članu porodičnog domaćinstva staratelja ili hranitelja deteta koje nije navršilo 15. godinu života ili maloletnog deteta sa smetnjama u razvoju, ako je staratelj ili hranitelj angažovan na poslovima odbrane;
- ženi za vreme trudnoće;
- licu čiji je supružnik ili vanbračni partner korisnik tuđe negei pomoći;
- licu nesposobnom za rad.

Odredbe iz Zakona o odbrani dalje razrađuje Zakon o vojnoj, radnoj i materijalnoj obavezi[5]. Najpre treba napomenuti da ovaj Zakon ponavlja odredbu da je radna obaveza isključivo vezana za okolnosti uvođenja ratnog ili vanrednog stanja. Dalje, ovim odredbama utvrđeno je da se radna obaveza vrši u skladu sa propisima koji se odnose na odbranu, civilnu zaštitu i rad.[6] Uređeno je da se radna obaveza utvrđuje kroz akt o ratnoj organizaciji i sistematizaciji, spisku dužnosti i Planu popune, kao i da se utvrđena radna obaveza smatra ratnim rasporedom tog lica. Lice nadležno za utvrđivanje radne obaveze u pravnom licu jeste direktor, i to čini donošenjem rešenja. Licu koje odbije da izvršava radnu obavezuprestaje radni odnos, a može biti i prekršajno gonjeno.[7]

Zakon o zaštiti stanovništva od zaraznih bolesti[8] i Zakon o smanjenju rizika od katastrofa i upravljanju vanrednim situacijama[9] sadrže niz

5 *Sl. glasnik RS*, 88/2009, 95/2010 i 36/2018.

6 Čl. 82–94 Zakona o vojnoj, radnoj i materijalnoj obavezi, *Sl. glasnik RS*, 88/2009, 95/2010 i 36/2018.

7 Čl. 16 Zakona o odbrani, *Sl. glasnik RS*, 116/2007, 88/2009, 88/2009 – dr. zakon, 104/2009 – dr. zakon, 10/2015 i 36/2018.

8 *Sl. glasnik RS*, 15/2016, 68/2020 i 136/2020.

9 *Sl. glasnik RS*, 87/2018.

mera koje poslodavci moraju primeniti u slučaju epidemije zaraznih bolesti, kao i odredbe koje su od značaja za delovanje medicinskih radnika u okolnostima epidemije.

Zakon o zdravstvenoj zaštiti[10] značajan je u ovoj analizi u odnosu na primenu pravila posebnog režima rada medicinskih radnika.

Zakon o radu[11] primenjuje se kao izvor radnog prava, u skladu sa već pomenutim ograničenjima i specifičnostima rada u posebnom režimu medicinskih radnika.

Krivični zakonik[12] relevantan je u pogledu eventualne krivične odgovornosti vezane za organizaciju rada i izvršavanje, odnosno neizvršavanje, radne obaveze u toku vanrednog stanja.

Uredba o merama za vreme vanrednog stanja[13] relevantna je pre svega u smislu uređivanja potencijalnog mesta rada zdravstvenih radnika. Naime, prema članu 3a. ove Uredbe (koji je više puta modifikovan tokom trajanja vanrednog stanja) uvedeno je pravilo da zdravstveni radnici mogu biti upućeni na izvršavanje radne obaveze u bilo koju javnu zdravstvenu ustanovu ili u privremenu bolnicu kojoj nedostaje potreban broj izvršilaca, na osnovu usmenog naloga svog rukovodioca, a u skladu sa planom popune zdravstvenih ustanova i drugim odlukama Kriznog štaba za suzbijanje zarazne bolesti *KOVID 19*. Oni su svoju radnu obavezu izvršavali u javnoj zdravstvenoj ustanovi ili privremenoj bolnici u koju su upućeni na rad, a prava iz radnog odnosa ostvarivali u ustanovi u kojoj su zaposleni (iz koje su upućeni), bez zaključivanja posebnih ugovora ili aneksa ugovora o radu. Takođe, zdravstvenom radniku koji odbije da postupi po usmenom nalogu o upućivanju na izvršavanje radne obavezeu drugu javnu zdravstvenu ustanovu, rukovodilac je bio dužan da izda rešenje o radnoj obavezi. Obvezniku radne obaveze koji ne postupi po rešenju svog rukovodioca o upućivanju na izvršavanje radne obaveze u drugu javnu zdravstvenu ustanovu, prestao bi radni odnos.[14]

10 *Sl. glasnik RS*, 25/2019.

11 *Sl. glasnik RS*, 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – odluka US, 113/2017 i 95/2018 – autentično tumačenje.

12 *Sl. glasnik RS*, 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 i 35/2019.

13 *Sl. glasnik RS*, 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, 60/2020 i 126/2020.

14 Uredba o merama za vreme vanrednog stanja. *Sl. glasnik RS*, br. 31 od 16. marta 2020, 36 od 19. marta 2020, 38 od 20. marta 2020, 39 od 21. marta 2020, 43 od 27. marta 2020, 47 od 28. marta 2020, 49 od 1. aprila 2020, 53 od 9. aprila 2020, 56 od 15. aprila 2020,

Uredba o organizovanju rada poslodavca za vreme vanrednog stanja[15] doneta je kao primarni akt uređenja određenih aspekata radnog odnosa u okolnostima proglašene epidemije zarazne bolesti i ima samo posredan značaj za analizu radnopravnog položaja medicinskih radnika.

Poseban kolektivni ugovor za zdravstvene ustanove čiji je osnivač Republika Srbija, autonomna pokrajina i jedinica lokalne samouprave[16] (u daljem tekstu: Poseban kolektivni ugovor) izmenjen je u toku trajanja vanrednog stanja kako bi se medicinskim radnicima koji obole od bolesti *KOVID 19* omogućila puna naknada zarade za vreme privremene sprečenosti za rad. Ovaj kolektivni ugovor je značajan izvor prava, obaveza i odgovornosti medicinskih radnika u redovnim okolnostima i kao takav će biti analiziran u daljem tekstu.

2.2. Režim rada i nedostaci u režimu rada pod radnom obavezom medicinskih radnika u Republici Srbiji

Medicinskim radnicima je nakon proglašenja vanrednog stanja po pravilu dodeljivana radna obaveza. Medicinske ustanove su modifikovane u kovid bolnice, raspored rada i prioriteti u radu su izmenjeni, a mnogi odnjih upućivani su u druge medicinske ustanove koje su beležile veliki priliv zaraženog stanovništva. U takvim okolnostima mogla se uočiti nespremnost sveta rada u odgovoru na krizu, ali i manjkavosti postojećeg sastava uređenja radnih odnosa ne samo u Republici Srbiji već i u drugim zemljama sveta (Učur, 2021: 407).

Radna obaveza formalno je uvođena rešenjem koje je donosio direktor medicinske ustanove i koje je važilo za sve vreme trajanja ratnog ili vanrednog stanja. Na osnovu rešenja, medicinski radnik bio je upućen da obavlja one poslove koje je i do tada obavljao u skladu sa ugovorom o radu koji je zaključio sa tom medicinskom ustanovom, uz napomenu da će zarada zaposlenog ostati onakva kakva je originalno ugovorena i da će ovlašćeno lice upoznati obveznika radne obaveze sa konkretnim dužnostima. Ponovljena je zakonska odredba o prestanku radnog odnosa i prekršajnoj odgovornosti ukoliko obveznik radne obaveze ne ispunjava svoje dužnosti u skladu sa rešenjem. Rešenje je bilo konačno i nije postojala mogućnost žalbe a sudska zaštita bila je moguća u upravnom sporu.

57 od 16. aprila 2020, 58 od 20. aprila 2020, 60 od 24. aprila 2020, 126 od 23. oktobra 2020, čl. 3a.

15 *Sl. glasnik RS*, 31/2020.

16 *Sl. glasnik RS*, 96/2019 i 58/2020 – Aneks 1.

Može se zaključiti da se radi o pojedinačnom upravnom aktu koji je napisan na formularan način, sa očiglednom namerom da se isti obrazac primeni na što veći broj medicinskih radnika. Zaposleni ovim rešenjem suštinski nije menjao ni vrstu poslova ni mesto rada. Oni zaposleni koji nisu bili upoznati sa zakonskim rešenjima nisu mogli imati u vidu mogućnost da će tako nešto moći da se dogodi kada se odredbe iz zakona konkretizuju u skladu sa potrebama za medicinskim osobljem. Otuda je utvrđenje radne obaveze na samom početku vanrednog stanja bilo izvedeno formalno korektno, ali je istovremeno otkrivalo veoma specifičnu prirodu vanrednosti u kojima su se medicinski radnici našli – nije bilo moguće predvideti kada, gde i u kojoj meri će njihovi radni potencijali biti konkretno iskorišćeni putem radne obaveze. Zdravstveni radnici su se tako našli na prvoj borbenoj liniji, a većina zdravstvenih sistema nije imala dovoljno zdravstvenih radnika koji mogu zbrinuti veliki broj zaraženih pacijenata (Puvača et al., 2021). Valja naglasiti i da je broj zdravstvenih radnika inače mali, a ujedno su u velikoj opasnosti da se lako zaraze virusom, te ih je ova situacija činila posebno značajnim i važnim i dodatno stavljala akcenat na neophodnost brige o njima i njihovu zaštitu koja je neopravdano izostala. Visoka stopa zaraze i smrtnosti zdravstvenih radnika bila je velika pretnja u borbi protiv KOVID 19 pandemije, posebno u zdravstvenim sistemima koji su se borili sa nedostatkom radne snage zbog nedostatka osoblja, migracija kvalifikovane radne snage i geografski loše raspodele radnika (Bandyopadhyay et al., 2020).

Međutim, ono što posebno vredi istaći jeste da realizacija radne obaveze u odnosu na medicinske radnike nije uvek i u potpunosti bila sprovedena u skladu sa standardima dostojanstvenog i bezbednog rada. Ovo je zaključak koji se nameće imajući u vidu neke specifičnosti njihovog radnog angažovanja u toku trajanja vanrednog stanja. Kako navodi Rajić Ćalić, „donošenjem propisa za vreme vanrednog stanja nije došlo do preciziranja radne obaveze kako bi se dao odgovor na pitanje radnog vremena, prava na godišnji odmor, poštovanje radnopravnih odredaba o obaveznom dnevnom i nedeljnom odmoru“ (Rajić Ćalić, 2021: 109).

Upravo je ovaj nedostatak osećaja za bliže regulisanje specifičnih uslova u kojima se rad „na prvoj liniji“ odvijao, a naročito radnika kojima je utvrđena radna obaveza, doveo do stvaranja nezakonitih, nekonzistentnih praksi, ali i nemogućnosti da ti radnici ostvare neka od Ustavom i zakonom garantovanih prava po osnovu rada.

Najpre, mora se napomenuti da je kroz opisano rešenje o usmenom nalogu za upućivanjemedicinskogradnikaizmatičneudrugumedicinskuustanovu[17], stvorena nesigurnost ali i nekonzistentnost i diskontinuitet u radu medicinskih radnika. Oni su u praksi bili upućivani na izuzetno kratko vreme, koje se ponekad merilo i radnim danima, da bi se potom vraćali u matične ustanove ili bili transferisani u treće ustanove. Usmeni nalog, bez ostavljanja pisanog traga, činio je veoma otežanim praćenje kretanja medicinskih radnika, ali i dokazivanje da su radnici odista obavljali radnu obavezu u ustanovama u koje su bili upućeni, te se opravdano ovako postupanje ističe kao ono koje značajno podriva pravnu sigurnost (Rajić Ćalić, 2021: 109). Potonje je naročito važno u slučaju sporenja oko broja radnih sati, broja i mesta upućivanja, odgovornosti za pacijente sa kojima su radili u ustanovama u koje su upućeni na ovakav način. U njihovim pravima po osnovu rada starala se matična ustanova, međutim, jasno je da je tako nešto bilo faktički nemoguće u situacijama kada medicinski radnik izvršava radnu obavezu kod poslodavaca i na poslovima sa kojima matični poslodavac nema nikakvog dodira, niti informacije o istima. Budući da su upućivani po osnovu usmenog naloga, medicinski radnici mogli su biti zaduženi za izvršavanje radnih obaveza koje nisu u potpunosti u skladu sa njihovom specijalizacijom ili dotadašnjom praksom, što je svakako moglo uticati na kvalitetpruženih medicinskih usluga.

I druge nepravilnosti koje su uočene u praksi pojavljivale su se kao posledica ovakvog pristupa upućivanju radnika (Reljanović, Bradaš, Sekulović, 2020: 21). Jedna od karakterističnih je duže trajanje radnog vremena od svakog ograničenja propisanog Zakonom o radu i Zakonom o zdravstvenoj zaštiti, kao i Posebnim kolektivnim ugovorom. Ovakva praksa značajno narušava sigurnost uslova rada koji se odnose pre svega na zaštitu zdravlja radnika (Bruno, 2020: 27). Povezano sa time je i nepoštovanje standarda kada je reč o trajanju odmora radnika (u toku dnevnog rada, dnevnog i nedeljnog). Ovakvo stanje jasno je kršenje Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima[18], o čemu se izjasnio i Komitet za ekonomska, socijalna i kulturna prava u svom Opštem komentaru broj 23 o pravu na pravične i povoljne uslove rada. Komitet prepoznaje potrebu da se u izuzetnim (vanrednim) okolnostima

17 Na osnovu Uredbe o merama za vreme vanrednog stanja, 6. 4. 2020. godine doneta je Naredba ministra zdravlja (broj 112-01-404/2020-02) o angažovanju svih zdravstvenih radnika iz Plana mreže zdravstvenih ustanova, kao i o njihovom upućivanju u skladu sa potrebama na terenu.

18 Čl. 7, *Sl. list SFRJ*, br. 7/71.

rad uredi drugačije od uobičajenih međunarodnih standarda, ali takođe preporučuje da se zaposlenima koji rade u nestandardnom radnom vremenu kompenzuje nedostatak dnevnog ili nedeljnog odmora, kao i da raspored rada u takvim uslovima bude rezultat konsultacija između poslodavaca i radnika, odnosno sindikata (UN Committee on Economic, Social and Cul- tural Rights, 2016). Nažalost, u slučaju Republike Srbije navedeno se nije dogodilo, imajući u vidu da je raspored rada jednostrano menjan od strane poslodavaca (zdravstvenih ustanova), često bez ikakve predvidivosti rasporeda i trajanja radnog vremena, čime je bezbednost i zaštita radnika izostala kao primarni cilj kojim se trebalo voditi prilikom donošenja odluka o načinu na koji će rad biti organizovan (Alli, 2008: 21).

Druga nepravilnost koja je dugoročno gledano ostavila teške posledice po zdravstvene radnike u celini jeste odsustvo odgovornosti poslodavca (matičnog ili kod kojeg je medicinski radnik upućen) za obezbeđivanje mera bezbednosti i zaštite zdravlja na radu. Budući da se profesionalne opasnosti javljaju na radnom mestu, to je odgovornost poslodavaca da osiguraju da radno okruženje bude bezbedno i zdravo (Ewing, Hendy, 2020: 523). Ali odgovornost poslodavaca ide dalje, podrazumevajući poznavanje profesionalne opasnosti i posvećenost da se osigura bezbednost i zdravlje na radu, a posebno u onim okolnostima koje nadmašuju uobičajene rizike kakvo je vanredno stanje usled pandemije zaraznih bolesti.

Primećeno je, naročito u početnim nedeljama vanrednog stanja i epidemije, da je postojao hroničan nedostatak zaštitnih sredstava za medicinske radnike, kao i da nije poštovano stručno-metodološko uputstvo (Stručno-metodološko uputstvo za kontrolu unošenja i sprečavanje širenja novog korona virusa SARS-COV-2 u Republici Srbiji, 2020) o upotrebi tih sredstava.

Kao drastične primere možemo izdvojiti i usmene i pisane naredbe o zabrani nošenja zaštitne opreme koje su pojedini direktori zdravstvenih ustanova izdavali u prvim nedeljama epidemije (Reljanović et al. 2021: 23–24; vid. više: Živić, 2020; Sovilj, 2020). Iako je Komitet za ekonomska, socijalna i kulturna prava ocenio da radnici kojima se ne pruže dovoljne garantije bezbednosti na radu i rizika od zaražavanja mogu odbiti rad (UN Committee on Economic, Social and Cultural Rights, 2020: 4), tako nešto je praktično onemogućeno medicinskim radnicima u Srbiji, pod pretnjom otkazom, prekršajnom, pa čak i krivičnom odgovornošću. Uvezi sa time je i dopis ministra zdravlja od 3. marta 2020. godine koji je upućen direktorima zdravstvenih ustanova, a u kojem se nimalo suptilno nameće obaveza direktorima da po svaku cenu obezbede učešće što

većeg broja medicinskih radnika u (vanrednom) procesu rada, upadljivo stavljajući u prvi plan dopisa sve mere koje direktori mogu pokrenuti protiv zaposlenih koji odbiju da izvršavaju radnu obavezu, uključujući i veoma široka i tendenciozna tumačenja krivičnih dela „Nepostupanje po zdravstvenim propisima za vreme epidemije" i „Neukazivanje lekarske pomoći".[19] Time je država propustila da kao organizacioni autoritet medicinskim radnicima obezbedi bezbedne uslove rada.

3. Nezakonito uvođenje radne obaveze nakon okončanja vanrednog stanja

Nakon ukidanja vanrednog stanja 6. maja 2020. godine, nije više postojao pravni osnov za rad u režimu radne obaveze. Radna obaveza se, kako je više puta napomenuto u prethodnom tekstu, vezuje isključivo za postojanje (proglašenje) ratnog ili vanrednog stanja u oba relevantna zakonska teksta, Zakonu o odbrani i Zakonu o vojnoj, radnoj i materijalnoj obavezi. Međutim, neposredno nakon ukidanja vanrednog stanja medicinskim radnicima je neustavno i nezakonito nametnuta radna obaveza, čime su oni zapravo ušli u režim simuliranja kontinuiranog vanrednog stanja. Ovo se može smatrati posebno opasnim po mentalno zdravlje medicinskih radnika koji su svakako već bili, više nego druga lica, izloženi stresu i riziku od razvoja kratkoročnih i dugoročnih problema mentalnog zdravlja, usled čega je Svetska zdravstvena organizacija upozorila na potencijalni negativan uticaj krize KOVID 19 na mentalno blagostanje zdravstvenih i socijalnih radnika (Pollock, Campbell, Cheyne et. al, 2020).

Navedeno, nažalost, nije sprečilo takozvani krizni štab, koji u tom trenutku ne postoji kao telo u bilo kojem od zakona kojima se regulišu vanredne situacije, kao i zaštita stanovništva od zaraznih bolesti,[20] da zaključkom uvede radnu obavezu medicinskim radnicima 23. juna 2020. godine[21]. Jasno je da ovaj zaključak predstavlja akt organa koji nije

19 Dopis ministra zdravlja Zlatibora Lončara broj 500-01-334-1/2020-02 od 3. 4. 2020. godine.

20 Krizni štab uveden je kao moguće telo Vlade Republike Srbije nešto kasnije, krajem 2020. godine, kroz izmene i dopune Zakona o zaštiti stanovništva od zaraznih bolesti, *Sl. glasnik RS*, 136/2020. Međutim, čak ni sa tim naknadnim ozakonjenjem postojanja takozvanog kriznog štaba, nije moguće da ovo telo – koje i dalje nema definisane zakonske nadležnosti i ovlašćenja – donosi bilo kakve akte koji su direktno suprotni zakonima Republike Srbije. Za detaljniju analizu pravnog položaja takozvanog kriznog štaba, videti: (Mandić, 2020; Rakić Vodinelić, 2020).

21 Zaključak Kriznog štaba za suzbijanje zarazne bolesti COVID-19 broj 53-00-5135/2020-4 od 23. juna.

ovlašćen da donosi obavezujuće akte. Čak i da se takozvani krizni štab posmatra kao legalno ustanovljeno telo, što u datom trenutku nije moguće, zaključkom se direktno krše odredbe Zakona o odbrani i člana 82 Zakona o vojnoj, radnoj i materijalnoj obavezi.[22] Ovim članovima predviđenoje jasno i nedvosmisleno da je radna obaveza pravni institut koji se vezuje isključivo za ratno ili vanredno stanje, i koji se samo u takvim okolnostima može primeniti. Odredbe su imperativne i nije ostavljena nikakva mogućnost izuzetka od navedenog pravila.

Ipak, zaključak takozvanog kriznog štaba koristio se veoma efikasno kao pravni osnov za ponovno uvođenje režima radne obaveze. Sama sadržina zaključka predstavlja praktično prepisivanje odredbi o radnoj obavezi iz pomenuta dva relevantna zakona, zajedno sa navođenjem pretnje otkazom ugovora o radu ako medicinski radnik ne postupi po rešenju kojim se (nezakonito) utvrđuje radna obaveza.

Na osnovu zaključka, direktori medicinskih ustanova donosili su rešenja[23] o utvrđivanju radne obaveze medicinskim radnicima. Za razliku od rešenja koja su donošena u toku trajanja vanrednog stanja, nova rešenja nisu se pozivala na zakonski osnov za uvođenje radne obaveze jer zakonskog osnova nije bilo. Umesto toga, reč je bila o pojedinačnim aktima poslodavca koji imaju nedorečenu i neutemeljenu pravnu prirodu na bilo kojem pravnom izvoru.

Na osnovu uvida autora u takva rešenja koja su izdata u periodu leto 2020. – proleće 2022. godine[24], može se zaključiti da je u njima kao pravni osnov navođeno više pravnih i nepravnih izvora, od kojih nijedan nije relevantan niti može predstavljati osnov uvođenja radne obaveze (Reljanović: 2020).

22 Čl. 50 Zakona o odbrani, *Sl. glasnik RS*, 116/2007, 88/2009, 88/2009 – dr. zakon, 104/2009 – dr. zakon, 10/2015 i 36/2018 i čl. 82 Zakona o vojnoj, radnoj i materijalnoj obavezi, *Sl. glasnik RS*, 88/2009, 95/2010 i 36/2018.

23 Imajući u vidu nekonzistentnu praksu, može se reći da u pregledanom uzorku akata kojima se utvrđuje radna obaveza dominiraju rešenja ali su donošene i naredbe, radni nalozi i odluke, u istom cilju i sa istom sadržinom.

24 Autori su u toku pisanja rada imali uvid u rešenja o utvrđivanju radne obaveze koja su doneta od strane rukovodilaca Opšte bolnice Požarevac, Opšte bolnice Valjevo, Doma zdravlja Merošina, Doma zdravlja Rakovica (Beograd), Doma zdravlja Vračar (Beograd), Instituta za ortopedsko-hirurške bolesti Banjica (Beograd), Klinike za psihijatrijske bolesti „Laza Lazarević“ (Beograd).

Prvi od pomenutih izvora jeste Naredba o proglašenju epidemije zarazne bolesti KOVID 19[25], akt ministra zdravlja koji je donet nakon proglašenja vanrednog stanja, a kojim se formalno utvrđuje da je reč o zaraznoj bolesti većeg epidemiološkog značaja, kako bi se mogao primeniti Zakon o zaštiti stanovništva od zaraznih bolesti, kao i drugi vezani propisi. Kuriozitet naredbe je da ona ima samo dva reda koja glase:

- Proglašava se epidemija zarazne bolesti KOVID 19, epidemijom od većeg epidemiološkog značaja – za teritoriju Republike Srbije;
- Ova naredba stupa na snagu danom objavljivanja u „Službenom glasniku Republike Srbije". Rešenje se ne poziva na sam Zakon o zaštiti stanov- ništva od zaraznih bolesti, na osnovu kojeg je ova naredba doneta, verovatno zato što u tekstu tog Zakona ne postoji pominjanje radne obaveze.

Drugi izvor jeste Zaključak takozvanog kriznog štaba za suzbijanje zarazne bolesti KOVID 19 od 23. juna 2020. godine i Usmeni nalog državnog sekretara Ministarstva zdravlja Aleksandra Stefovskog od 16.7.2020. Ovaj usmeni nalog je poseban pravni kuriozitet budući da se njime svesno stvara neustavna i nezakonita situacija, suprotna načelu vladavine prava[26] i načelu hijerarhije pravnih akata[27] iz Ustava Republike Srbije.

Treći izvor vredan pomena jeste Usmeni nalog direktora konkretne medicinske ustanove – uz argument koji je istaknut u prethodnoj tački, može se dodati da ovde direktor donosi rešenje na osnovu usmenog naloga direktora, pa se postavlja pitanje da li je to direktor sam sebi naredio donošenje naloga (i to usmenim putem).

Četvrti jeste član 192 Zakona o radu – u pitanju je opšta zakonska odredba kojom je predviđeno da o pravima, obavezama i odgovornostima iz radnog odnosa odlučuje nadležni organ kod poslodavca.[28] U ovom slučaju je to svakako direktor, ali naravno ovo ovlašćenje ne podrazumeva donošenje nezakonitih akata.

Peti izvor je navođenje odgovarajućeg člana Statuta konkretne medicinske ustanove. Iako ovi akti uglavnom nisu dostupni na internet prezentacijama medicinskih ustanova, svakako je u pitanju pozivanje na

25 Naredba ministra zdravlja Zlatibora Lončara od 19. marta 2020. godine, *Sl. glasnik RS,* 37/2020.

26 Čl. 3, stav 2 *Sl. glasnika RS*, 98/2006 i 16/2022.27 Čl.

167 *Sl. glasnika RS*, 98/2006 i 16/2022.

28 *Sl. glasnik RS*, 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – odluka US, 113/2017 i 95/2018 – autentično tumačenje.

član kojim se reguliše ovlašćenje direktora da donosi pojedinačne akte kojima uređuje radnopravni položaj zaposlenih u toj ustanovi.

Pojedina novija rešenja o utvrđivanju radne obaveze u koja su autori takođe imali uvid, a koja su izdata krajem 2021. i tokom 2022. godine[29], navode pravne osnove koji su izmenjeni u odnosu na prethodnu praksu, ali i dalje ne odgovaraju zakonskim odredbama o radnoj obavezi:

Pre svega, to su članovi 82 i 84–87 Zakona o vojnoj, radnoj i materijalnoj obavezi – ironično je što se navode članovi u kojima se jasno utvrđuje da radna obaveza ne može biti uvedena bez proglašenja ratnog ili vanrednog stanja. Ovde je dakle reč o navođenju pravnog osnova u kojem se doslovce brani uvođenje radne obaveze u okolnostima u kojima se ona uvodi medicinskim radnicima.

Potom, član 62, stav 1, tačka 9) Zakona o zdravstvenoj zaštiti – ovom odredbom ustanovljena je obaveza zdravstvene ustanove da organizuje i sprovodi mere u slučaju kriznih i vanrednih situacija. Ova odredba jeste relevantna u najširem smislu reči, ali svakako ne ukazuje na uvođenje radne obaveze. Mere koje se sprovode moraju biti zakonite i opšta formulacija iz Zakona o zdravstvenoj zaštiti svakako ne ostavlja mogućnost nezakonitog delovanja u sprovođenju ovih mera, uz masovno kršenje niza drugih zakona.

Odredba Zakona o zaštiti stanovništva od zaraznih bolesti, odnosno člana 51, reguliše sprovođenje mera u vanrednim situacijama. Kao i u prethodnim slučajevima, nema nikakvog pomena o radnoj obavezi i, naravno, podrazumeva se da se ovim članom ne ostavlja mogućnost nezakonitog postupanja u cilju sprovođenja niza mera koje se ovim članom Zakona navode.

Statut konkretne medicinske ustanove, odnosno član koji se odnosi na ovlašćenja direktora da odlučuje o pravima i obavezama zaposlenih, u skladu sa zakonom.

Dopis Ministarstva zdravlja koji je upućen konkretnoj ustanovi, a kojim se utvrđuje potreba za hitnim ustupanjem medicinskog osoblja. Ustupanje medicinskog osoblja nije međutim predviđeno važećim zakonima, a Zakon o radu upućivanje na rad kod drugog poslodavca reguliše na način koji se ne može primeniti na konkretnu situaciju. Zakon o zaposlenima u javnim

29 Autori su u toku pisanja rada imali uvid u rešenja o utvrđivanju radne obaveze koja su doneta od strane rukovodilaca Instituta za ortopediju Banjica i Opšte bolnice Smederevska Palanka.

službama[30] bi mogao da stvori pravni osnov za tako nešto. Ovaj propis se u najvećem delu, pa i u delu koji uređuje ustupanje zaposlenih[31], međutim ne primenjuje do 1. januara 2025. godine. Trenutno dakle ne postoji zakonski osnov da zaposleni medicinski radnik promeni poslodavca (medicinsku ustanovu u kojoj obavlja rad) bez raskida trenutnog i zaključenja novog ugovora o radu – ovo ne samo da nije slučaj, već „ustupljenim" medicinskim radnicima nije ponuđen niti aneks postojećeg ugovora o radu.

U jednom rešenju kao pravni osnov naveden je član 24 Zakona o zaposlenima u javnim službama[32]. Ovo je posebno problematično, jer navedena odredba Zakona nije počela da se primenjuje – prema članu 163 (*Stupanje na snagu zakona*) primenjivaće se od 1. januara 2025. godine.

Ukupno gledano, kada se uporede rešenja iz 2020. i 2022. godine može se reći da je promenjen pristup i da su u rešenju iz 2022. godine navedeni navodni zakonski osnovi, za razliku od veoma egzotičnog pristupa iz 2020. godine. Međutim i navodni pravni osnovi koji se navode u skorijim rešenjima o uvođenju radne obaveze podjednako su irelevantni kao i u onim prethodnim, i predstavljaju očigledno kršenje Zakona o odbrani, Zakona o vojnoj, radnoj i materijalnoj obavezi, kao i Zakona o radu i Zakona o zdravstvenoj zaštiti.

Kratak pregled sadržine, forme i načina utvrđenja radne obaveze ukazuje na činjenicu da je ovde reč o izvršenju krivičnog dela iz člana 163 Krivičnog zakonika, „Povreda prava po osnovu rada i socijalnog osiguranja": „Ko se svesno ne pridržava zakona ili drugih propisa, kolektivnih ugovora i drugih opštih akata o pravima po osnovu radai o posebnoj zaštiti na radu omladine, žena i invalida ili o pravima iz socijalnog osiguranja i time drugom uskrati ili ograniči pravo koje mu pripada, kazniće se novčanom kaznom ili zatvorom do dve godine."

Naime, uvođenjem radne obaveze bez pravnog osnova zaposlenima u medicinskim ustanovama se uskraćuje čitav niz prava po osnovu rada, koja bi oni inače mogli ostvarivati. Dalje, ovakvim postupanjem se stvara prividni osnov za upućivanje radnika iz jedne medicinske ustanove u drugu, koje podrazumeva sve napred navedene rizike i kršenje osnovnih međunarodnih standarda rada.

Konačno, navedena situacija se jasno uklapa u definiciju prinudnog rada, kako je definisana Konvencijom 29 Međunarodne organizacije rada

30 *Sl. glasnik RS*, 113/2017, 95/2018, 86/2019, 157/2020 i 123/2021.

31 Članovi 24 i 43–44 *Sl. glasnika RS*, 113/2017, 95/2018, 86/2019, 157/2020 i 123/2021.

32 *Sl. glasnik RS*, 113/2017, 95/2018, 86/2019, 157/2020 i 123/2021.

(Forced Labour Convention, 1930 (No. 29)) (obavljanje rada ili pružanje usluga koja se od bilo kojeg lica iznuđuje pod pretnjom kazne bilo kakvog tipa, a za koji se dotična osoba nije dobrovoljno ponudila), čime se krši i član 26 Ustava Republike Srbije kojim se zabranjuje prinudni rad.[33]

Ozbiljnost i dalekosežnost posledica ovakvog rešenja vidi se ne samo u masovnosti njegove zloupotrebe, što će potencijalno izazvati hiljade novih radnih sporova, već i u činjenici da se isti režim radne obaveze upotrebljava i godinu i više dana kasnije, odnosno u prvoj polovini 2022. godine. Reč je dakle o kontinuiranom nezakonitom kreiranju vanrednog stanja u situaciji kada ono nije formalno uvedeno, u odnosu na određenu profesiju, odnosno medicinske radnike zaposlene u javnim zdravstvenim ustanovama.

4. Zaključna razmatranja

Osnovni zaključak koji se može izvesti jeste da su medicinski radnici u toku epidemije, kako u vanrednom stanju tako i nakon njegovog okončanja, bili izloženi veoma teškim uslovima rada u kojima su bila ugrožena neka od njihovih osnovnih prava po osnovu rada.

Jedan deo odgovornosti za tako nešto svakako je na samim donosiocima odluka u sistemu zdravstvene zaštite i uspostavljenim mehanizmima (zlo)upotrebe režima rada u radnoj obavezi, kao i na manjku svesti o pravilnoj organizaciji rada u izuzetno složenim uslovima koji su bili nametnuti epidemiološkom situacijom. Drugi deo problema je bez sumnje normativne prirode. Radna obaveza regulisana je vojnim zakonodavstvom. Zakon o odbrani, kao i Zakon o vojnoj, materijalnoj i radnoj obavezi, predložilo je ministarstvo nadležno za odbranu zemlje, a pod njegovim okriljem su oni i nastali. Stoga nije neuobičajeno da je akcenat u ovim zakonima na pitanjima od značaja za odbranu u ratnom stanju, dok se svakako može zaključiti da tvorci ovih pravila uopšte nisu imali na umu da bi ona mogla biti primenjena u okolnostima opšte zdravstvene pretnje po stanovništvo. Ovaj problem se direktno reflektovao na veoma kompleksan i normativno (ali i praktično) šizofren položaj svih radnika pod radnom obavezom, uključujući i medicinske radnike. Sama činjenica da su oni svoje rasporede rada formalno dobijali na osnovu ratnog rasporeda, odnosno na osnovu kriterijuma zaduženja na odbrani zemlje, pokazuje jednodimenzionalnost postojećih normativnih rešenja.

33 *Sl. glasnik RS*, 98/2006 i 16/2022.

Radna obaveza u vanrednom stanju morala bi da bude posebno regulisana nekim drugim propisom. I više od toga, ceo sistem reakcije na vanrednostanje, ali i na vanredne situacije (bez uvođenja vanrednog stanja) morao bi da se redefiniše iz „civilnog" ugla reakcije na nevojne pretnje, kao što je epidemija smrtonosnog virusa sa kojom smo se suočili. Zbog toga je jasno da bi trebalo ponovo reafirmisati ideju o jedinstvenom zakonu o vanrednom stanju, ili makar posebnom zakonskom tekstu koji bi uredio vanredno stanje i vanredne okolnosti zasnovane na nevojnim pretnjama po stanovništvo. Na ovaj način bi se postigla specijalizacija zakonskih rešenja tako da ona budu logično postavljena u odnosu na prirodu specifične pretnje. Takođe, omogućilo bi se i da se radni zadaci – pa i radna obaveza – uvode fleksibilnije, bez kršenja niza zakona kao što je to trenutno slučaj.

Uvođenje radne obaveze u redovnom stanju (iako je proglašena vanredna situacija) nije moguće u skladu sa važećim propisima, kako je analizirano u prethodnom tekstu. Ovo rešenje je nepraktično i valjalo bi ga zameniti drugim rešenjem u kojem bi se radna obaveza (u ograničenom obimu, odnosno ograničenog dometa i trajanja) mogla uvesti i na osnovu proglašenja vanredne situacije. Imajući to u vidu, valja napomenuti i to da je potrebno redefinisati radnu obavezu, odnosno dati novi kontekst ovom pravnom institutu u svetlu poštovanja osnovnih standarda prava na radu i u vezi sa radom, a koja su u prethodnom periodu – vanrednogi redovnog stanja – u Republici Srbiji grubo kršena u odnosu na više kategorija radnika, uključujući i medicinske radnike.

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MEDICAL PROFESSIONALS' RIGHTS AT WORK DURING THE STATE OF EMERGENCY

Summary

During the state of emergency declared in the Republic of Serbia in early 2020 due to the Coronavirus (COVID-19) pandemic, medical professionals in the Republic of Serbia were subject to a special regime of work. In performing their professional duties, they were subject to specific restrictions in accordance with the Decision on the State of Emergency, the Defence Act, the Act on Military, Labour and Material Obligations, and the decisions of the RS Government and the Ministry of Health. Their employment position was subject to complex regulations and the organization of their professional duties was highly specific as well. The authors' research includes the normative analysis of their employment status during the state of emergency, with specific reference to some labour-related issues: working hours, work schedule, change of workplace, and the mandatory duty regime based on regulations that did not adequately respond to the current situation caused by the COVID-19 pandemic. The paper points to a more flexible approach to work in the state of emergency, the good and bad characteristics of the current legal framework, and the good and bad practices observed in this regard. Special attention is given to the illegal prolongation of the duration of emergency measures even after the termination of the state of emergency. The author gives recommendations for better regulation of these issues and for strengthening the mechanisms of protection of labour rights of medical professionals in specific (extraordinary) circumstances caused by medical reasons.

***Keywords**: medical professionals, rights at work, working hours in a special mode of work, state of emergency, mandatory duty, change of workplace.*

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PUBLIC ADMINISTRATION DURING THE COVID-19 PANDEMIC AND REFORM DIRECTIONS[**]

Abstract: *During the COVID-19 pandemic, caused by the SARS-CoV-2 virus, every form of company organization and operation has undergone certain changes. The global crisis has highlighted the role of the state and the public sector in emergency situations and tested their readiness to respond to the challenges posed by the pandemic by instituting adaptable and pragmatic solutions while respecting the rule of law. During the pandemic, state and local officials have faced huge challenges. Being obliged to deal with rapidly and constantly changing circumstances, they often had to resort to improvisations. In such an extremely difficult context, it was of great importance to avoid administrative barriers, which could result in the loss of valuable time during the crisis. The pandemic has revealed many weaknesses in the functioning of state and local governments across Europe, including organization issues, change of workplace (from office to home environment), a new mode of interaction with citizens, etc. In developing countries, inadequate legislative provisions, technical solutions and insufficient digitalization have contributed to slowing down the administrative procedures. The aim of this paper is to indicate the problems faced by state administrations and local governments during the COVID-19 pandemic, to highlight the examples of good practices, and to indicate the reform directions after the pandemic.*

Keywords: *civil servants, human resources, organization, transparency, decentralization.*

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1. Introduction

On 30 January 2020, a panel of experts of the World Health Organization (WHO) declared the outbreak of SARS-CoV2, causing the Coronavirus disease 2019 (COVID-19), which was declared to be a Public Health Emergency of International Concern (PHEIC).[1] Each crisis, including the one caused by the COVID-19 virus pandemic, provides an opportunity to identify deficiencies in the public administration, to learn some lessons, and take the path of reform. Major crises, such as the one caused by the COVID-19 pandemic, affect the core of democracy and pose challenges to the capacity of public administration, both for organizational capacity and for the legitimacy and trust of citizens in public administration. In addition to the differences between countries in economic terms, this pandemic has shown the unpreparedness of the public administration of many countries that lack the mechanisms, material and human resources to adequately respond and continue to work without significant setbacks. On the other hand, it is also the opportunity to identify their weaknesses and shortcomings and to learn from countries that had more adequate solutions and institutional responses. In times of emergency, "the need for a swift response favors the entrenchment of the administrative state at the expense of representative, democratic legitimacy" (Ching-Fu,Chien-Huei, Chuan-Feng, 2016:892).

The public administration faced the challenge of preserving democracy, human rights, the economy, and human lives. In achieving this goal, states were making decisions and adapting them to the new situation on the go, and there were often differences in the attitudes and actions of experts and authorities. On the other hand, as the level of government that is closest to the citizens, local self-government units have played a vital role in the conditions of the pandemic but they also faced challenging tasks not only in terms of organizing their work and continuing their regular activities so that citizens are not denied their rights but also in terms of contributing to a safe environment and the preservation of people's health in the local community.[2]

2. Some aspects of the functioning of the public administration during the pandemic

These are some issues that we will try to address further in this paper. How did the state administration and local self-government units respond to the

1 WHO (2020): COVID-19 Public Health Emergency of International Concern (PHEIC), World Health Organization (WHO), 12 February 2020; https://www.who.int/publications/m/item/covid-19-public-health-emergency-of-international-concern-(pheic)-global-research-and-innovation-forum (accessed 1.11.2022)

2 For more, see: Ansell, Sørensen, Torfing, 2020: 1-12.

COVID-19 pandemic during the state of emergency? Was the legal framework adequate for their successful operation, and to what extent did cities and municipalities have institutional mechanisms and strategic-planning documents and procedures usable in pandemic management? Is the degree of digital literacy of public officials and citizens at a satisfactory level so that they can use digital services? Another key issue is mutual communication and coordination between competent public administration institutions and services, which raises new questions. What kind of cooperation was developed among these institutions, as well as between the institutions and politicians, and the institutions and the civil sector? Finally, which governance models have proved to be better in crisis management: the centralized or the decentralized governance models?

In Great Britain, the Oxford Policy Management (OPM) team of experts singled out some lessons for the public administration and local governments during the COVID-19 pandemic.[3] First, it is necessary to eliminate institutional overlaps by establishing a clear division of functions between the state administration and local self-governments, different social sectors and other branches of local self-government. Crisis response is impossible without a clear demarcation of who makes decisions and who does what. Second, local self-governments should be encouraged to have emergency management plans, in addition to national plans. Third, there is a need to enhance integration by creating platforms for mutual coordination and communication (e.g. the Corona Virus Local Responses in the USA, or global platforms such as C40[4]) in order to quickly allocate people and resources where they are most needed. It would enable local self-governments to share information and learn from the experiences of others. Fourth, it is necessary to empower citizens and ensure their participation and public action. Fifth, it is essential to strengthen the system resilience. In order to respond to the changing reality and citizens' needs, the system has to be flexible. Moreover, "for a government to work effectively in the worst of times, it needs to have well-oiled systems, practices and resource flows in the best of times". Therefore, investment in the local government is "key to successful recovery and long-term resilience" (OPM, 2020).

In the context of crisis management, it is inevitable to draw attention to the use of digital services, considering the fact that those public administrations that had already invested in digital capacities were in a better position during the

3 Oxford Policy Management (2020): Five lessons for local governments during COVID-19, by M. Rajadhyaksha, April 2020; https://www.opml.co.uk/blog/five-lessons-for-local-governments-during-covid-19 (access 20.06.2022)

4 C40 Cities is a global network of city mayors collaborating to deliver urgent action to confront the climate crisis and create a future for everyone and everywhere to thrive. See: C40 CITIES (2022), About C40; https://www.c40.org/about-c40/ (accessed 20 June 2022)

COVID-19 pandemic. In addition, it was necessary to maximize the flexibility of absence from work during the pandemic. For example, Germany increased the special leave provisions for certain groups (e.g. parents) for up to 30 days.[5]

In case of having a large number of infected employees or officials who were absent from work due to isolation, local self-governments and state administration bodies had the possibility to cooperate with each other and send their employees to another body or municipality for temporary work, so that the organization could keep on working.

Shortly after declaring the state of emergency on 15 March 2020,[6] the Government of the Republic of Serbia adopted the Conclusion on suspending direct contact and work with clients in all state administration bodies, the Autonomous Province of Vojvodina and local self-government units, public enterprises and other organizations whose founder or majority owner is the Republic of Serbia, autonomous provinces and local self-government units (2020).[7] This document envisaged that all public institutions had to ensure their continuous and uninterrupted work, without direct contact with the parties, via written communication, electronic mail or by telephone.[8] In addition, institutions were obliged to publish e-mail addresses on their official websites where citizens could send their submissions, questions, requests, etc. It was stipulated that citizens' submissions would be acted upon even in case they were not submitted by using the prescribed forms which are provided in regular circumstances. The suspension valid until the 6 May 2020, when the RS Parliament issued the Decision on lifting the state of emergency.[9]

Both at the state administration and the local self-government level, the institutions faced a lot of problems due to the lack of technical capacities for work but also due to inadequate IT knowledge of employees, especially older genera-

5 Handbook Germany (2022). Coronavirus: work; https://handbookgermany.de/en/coronavirus-work (20.09.2022)

6 Decision on declaring a state of emergency, issued by the President RS, President of the National Assembly and President of the Government (PM), *Official Gazette of R. Serbia*, no. 29/2020.

7 The Government RS Conclusion No. 53-2561/2020 on suspending direct contact and work with clients in all state administration, autonomous province and local administration bodies, *Official Gazette RS*, No. 35/2020, 37/2020.

8 Notably, the Customs Administration of the Ministry of Finance, the Post Office Serbia (JP "Pošta Srbije") and some counters of the Tax Administration and Treasury Administration of the Ministry of Finance and the public utility company Electric Power Industry of Serbia (JP "Elektroprivreda Srbije") were exempted from the suspension.

9 The Parliament RS Decision on lifting the state of emergency, *Official Gazette RS,* No. 65/2020.

tions. The COVID-19 pandemic accelerated the digitalization process in the EU candidate countries but, for some unknown reason, this process often entails outdated procedures which ultimately lead to delays in handling individual cases. To change this, it is necessary to encourage institutions to allocate financial resources and ensure staff training in regular circumstances.

Shortly after the declaration of the state of emergency, the Government RS issued the Decree on organizing the work of employers during the state of emergency (2020).[10] On the basis of this document, the Ministry of State Administration and Local Self-Government issued a Recommendation on organizing the work in public administrations and state institutions (2020).[11] This document stipulated that employees should be allowed to work from home (outside the employer's official premises) in line with the employer's working plan; while performing their work from home, employees were obliged to be available during the official working hours to the manager via telephone, electronic and direct communication, as well as to submit the completed work to the employer for information purposes or employer's approval. The state of affairs showed the lack of technical resources, poor staff training, as well as the resistance and unwillingness of older staff employed in the public administration to move forward and accept the inevitability of technological progress and the transition to a different way of working, which includes e-services and digitization of administrative procedures, leaving behind dusty archives and binders. Although Serbia recorded a huge advance in E-Participation, Online Services and E-Government indexes in 2016 (UN, 2016)[12], the UN E-Government biannual surveys indicate some of the problem areas (UN E-Government Knowledgebase, 2020, 2022).[13] In many local self-governments across the OECD counties, it was impossible to organize remote work because public servants did not have adequate digital literacy skills or there was inadequate IT infrastructure. The OECD reported that local governments had different approaches to remote work and degrees of efficiency due to inadequate IT infrastructure, uneven or incomplete digitalization, lack of

10 Decree on organizing the work of employers during the state of emergency*, Official Gazette RS, No.* 31/2020.

11 Ministry of State Administration and Local Self-Government (2020): Recommendation on organizing the work in public administrations and state institutions, 18.3.2020.

12 UN (2016.) UN E-Government Survey 2016: E-Government in Support of Sustainable Development, Department of Economic and Social Affairs, New York, 2016; (accessed on 30 July 2022) https://publicadministration.un.org/egovkb/Portals/egovkb/Documents/un/2016-Survey/E-Government%20Survey%202016.pdf

13 See: UN E-Government Knowledge Database (2020, 2022): Serbia: https://publicadministration.un.org/egovkb/en-us/Data/Country-Information/id/151-Serbia/dataYear/2020; https://publicadministration.un.org/egovkb/en-us/Data/Country-Information/id/151-Serbia/dataYear/2022

digital competences, etc. (OECD, 2020a).[14] At the outset of the COVID-19 pandemic in April 2020, the OECD reported on positive responses of some states; for example, the Netherlands developed an online toolbox for public servants containing information and short videos about working from home and maintaining a work-life balance by providing mental health support services (OECD, 2020b).[15] On the other hand, citizens are insufficiently informed about the catalogue of e-government and services offered to them, and some citizens still do not have the basic IT skills. For example, 42% of families in the poorest regions of Italy have no access to a computer/tablet at home (OECD, 2020a).

In the Republic of Serbia, The National Open Data Portal (OGDP) was launched in 2017,[16] and the Electronic Administration Act was adopted in 2018.[17] The survey conducted by the Statistical Office of the Republic of Serbia (in February 2020), just before the outbreak of the COVID-19 pandemic, showed that 74.3% of the surveyed Serbian population had access to computers in their households, while a total of 81% had access to the Internet in their households (87.1% of urban households and 70,4% of rural households) (Statistical Office RS, 2020:11-13). It means that about 20-26% of the respondents did not have a means of accessing the state administration and local self-government e-services. About 20% of respondents never used computers/Internet (SO, 2020: 33-34), and 10% reported the lack of IT skills (SO, 2020:31).[18] Moreover, the statistics show that 37.0% of the respondents used Internet services instead of personal contacts or visiting

14 OECD (2020a): OECD Policy Responses to Covid-19: The territorial impact of COVID-19: Managing the crisis across levels of government, 10 November 2020; https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/ (accessed 30 July 2022). The results of research conducted before the COVID-19 pandemic on the use of digital information systems by local self-governments across the OECD countries suggest that the degree of digitization is higher for local services in spatial planning, construction, tourism, culture and sports, and lower for social services (OECD, 2020a).

15 OECD (2020b): OECD Policy Responses to Covid-19: Public servants and the Coronavirus (COVID-19) pandemic: Emerging responses and initial recommendations, 17 April 2020; https: // www.oecd.org/coronavirus/policy-responses/public-servants-and-the-coronavirus-covid-19-pandemic-emerging-responses-and-initial-recommendations-253b1277/ (accessed 30 July 2022)

16 Information Technologies and E-Government Office/ITE ((2022): Open Data Portal, Government of the Republic of Serbia, Belgrade, https://www.ite.gov.rs/tekst/en/30/open-data-portal.php

17 the E-Government Act, *The Official Gazette of the Republic of Serbia*, No. 27/18

18 Statistical Office of the Republic of Serbia (2020) Usage of Information and Communication Technologies in the Republic Of Serbia 2020: Households/Individuals Enterprises, Statistical Office of the Republic of Serbia, Belgrade 2020; https://publikacije.stat.gov.rs/G2020/PdfE/G202016015.pdf

public institution or public authorities. In this population group, 34% used public administration electronic services to obtain information, 25% to download information, and 24% to submit completed forms (SO, 2020: 25).

The E-Government Portal (officially launched in 2010) shows a wide range of e-services which have been made available by the state administration and may be accessed electronically:[19] e-Family, including e-Baby service which enables the registration of newborn babies (since 2017) and e-Kindergarten as a new service which enables the registration of children for enrollment in preschool institutions (since 2020); e-Diary for keeping primary and secondary school pedagogical records; e-Diaspora; e-Foreigner; e-Business and Finance; e-Inspection; e-Health, including Health Protection, Health Insurance and special COVID-19 services where citizens can choose a vaccine against COVID-19, schedule vaccination, take a self-assessment test on the COVID-19 symptoms, view the results of the PCR test, establish contact with the selected doctor; etc. (E-Government, 2022).

However, it should be noted that a large number of e-services which may be found on the websites of local self-governments cannot actually be fully performed in a digital environment. For example, if you submit an electronic request to a local municipality to issue a certificate (of birth, citizenship, etc.), the original payment form for such a service has to be sent to the local self-government either by post or by mail, which is not an e-service because it cannot be paid electronically and cannot be fully performed in an online environment. Many services cannot be launched at all although they are offered at local government websites. Thus, out of 124 e-services posted on the web-portal of the City of Šabac, only four services can be fully performed electronically. On the other hand, the local governments of Loznica, Zrenjanin, Novi Pazar and Vrnjačka Banja offer a large number of fully implementable e-services (Swiss Pro, 2019).[20] The municipality of Tutin was among the first to introduce e-services on its website/portal but the instructions and forms have not been updated for some time. The quality and accuracy of many published e-services is also questionable. For example, Vrnjačka Banja reported a serious problem with mispaid taxes, due to outdated information on the E-Government portal.

19 See: E-Government (2022): Electronic services in the Republic of Serbia; https://euprava.gov.rs/; E-Health services https://euprava.gov.rs/%C5%BEivotna-oblast/17; https://euprava.gov.rs/usluge/5886, https://www.e-zdravlje.gov.rs/landing/?v=20210418 (accessed 10 September 2022

20 Swiss PRO, Procena stanja elektronske uprave u jediniama lokalne samouprave (Assessment of the state of E-Government in local self-government units), Swiss Agency for Development and Cooperation, April 2019, https://www.swisspro.org.rs/uploads/files/148-676-sp_rezime_procena_statusa_euprave_u_jls_final.pdf.

Although governments commonly resort to centralization in times of crisis, it is not always considered an appropriate option for crisis management. The government of Great Britain was criticized for the high degree of centralization in managing the COVID-19 pandemic, which led to the impossibility of allocating resources to local governments. The entire COVID-19 episode was marked by centralization and non-involvement of decentralized units (Joyce, 2021: 543). In Italy, relations between the central government and regional and local authorities have proven to be conflictual during the COVID-19 pandemic (Mandato, 2020:6). This was particularly evident in the case of the ambiguous wording of Decree-Law no. 6 of 23 February 2020, which granted undetermined "competent authorities" the power to take undetermined "further measures" to prevent the spread of the COVID-19 pandemic, thus causing a conflict between different levels of government. Contrary to the instituted central government measures, regional governments restricted citizens' freedoms. Thus, the Regional Administrative Court in Ancona suspended a Decree by which the president of the Marke region ordered the closure of schools, universities and museums, and banned public events of any nature for seven days, regardless of the fact that there were no confirmed cases of infection in the region at that time. (Mandato, 2020:7). Then, the Italian Decree-Law of 25 March 2020 resolved the conflict between the central and the decentralized levels of government and allowed the regions to adopt measures with local efficiency, provided that they: 1) aim to act in the absence of measures adopted by the central government; and 2) are justified by the "exceptional deterioration of health risk" in that particular region. However, even after the entry into force of the aforesaid Decree-Law, there was a new conflict of competence between the central government and regional authorities, when the regional government of the Calabria region was allowed to operate catering services and table service in restaurants although it was prohibited at the state level. This time, the regional measures proved less restrictive than those imposed by the central government. Thus, after the central government challenged the decree, the Administrative Court declared it illegal (Mascio, Natalini, Cacciatore, 2020:628)

In the Republic of Serbia, cooperation with civil society organizations was ineffective during the COVID-19 pandemic. This cooperation was not at a satisfactory level even before the pandemic. During the pandemic, civil society organizations pointed to the abuse of the powers of local self-governments. For example, the City Headquarters for Emergency Situations in the city of Bor adopted 11 orders introducing measures to derogate human and minority rights, referring to the Disaster Risk Reduction and Emergency Management Act. The city of Bor was not in an emergency situation but in a state of emergency. In the opinion of many civil society organizations that reacted to these decisions

and demanded their withdrawal, the Headquarters introduced measures that departed from the authorities they were vested with under the Constitution and positive legislation. According to the Constitution of the RS[21], during a state of emergency, when the National Assembly is not in a position to convene, the Government may prescribe measures providing for the derogation from human and minority rights, by issuing a decree which shall include the President of the Republic as a co-signatory (Article 200, para.5 of the Constitution). It does not prescribe such authority of the city emergency headquarters. One of the orders referred to the prohibition of the registry office from issuing any documents for persons temporarily working abroad, or persons who do not have a permanent residence in the territory of Bor during the state of emergency. Such an order constituted impermissible discrimination of those persons.

Immediately after the state of emergency was declared, the Government of the Republic of Serbia adopted the Decree on the Application of Time Limits in Administrative Proceedings during the State of Emergency (2020)[22], which prescribes the procedure regarding the application of deadlines in administrative proceedings in the circumstances of the declared state of emergency. This Decree stipulates that, during the state of emergency in the Republic of Serbia, the parties in proceedings brought before state bodies and organizations, autonomous province bodies and organizations, and local self-government units, institutions, public enterprises entrusted with general powers may not bear the consequences of their failure to act within the deadlines prescribed or determined in line with the legislative acts governing general administrative procedure or special administrative procedures In terms of the application of the prescribed deadlines, the submission of written claims in administrative proceedings and delivery of notification acts, from which non-extendable deadlines begin to run and which were submitted or delivered during the state of emergency, will be considered to have been submitted or delivered 15 days after the date of lifting the state of emergency (Article 2). The deadlines referring to initiating administrative actions, the completion of administrative proceedings and the decision on the declared legal remedies, which expire during the state of emergency, will be considered expired 30 days after the date of lifting the state of emergency. The prescribed deadlines for declaring a legal remedy against the oral decision of the competent authority made during the state of emergency, in the process of implementation of emergency measures to prevent the spread of the infectious COVID-19 disease caused by the SARS-CoV-2 virus, as well as

21 Constitution of the Republic of Serbia, *Official Gazette RS*, br. 98/2006; http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution

22 Decree on the Application of Time Limits in Administrative Proceedings during the State of Emergency, *Official Gazette RS*, no. 41/2020, and 43/2020.

the prescribed deadlines for submitting a request for the delivery of a written copy of that decision, begin to run from termination of the state of emergency (Article 3). In the proceedings for establishing, payment, collection and control of public revenues of tax and customs payers, the application of this Decree is limited exclusively to the deadlines for submitting legal remedies against the first-instance decisions and conclusions of the competent tax and customs authorities (Article 3a). In terms of the suspension of procedural deadlines, we should bear in mind that the public administration body must enable all parties in the administrative procedure to respond, to state their opinions on the evidence and other material in that administrative matter, and to address all requests submitted by that body. Parties clearly did not have that opportunity during the suspension of the procedural deadlines, which was evident in the fact that many decisions were contested for formal (substantive) and procedural reasons.

The situation was similar in Poland. In response to the first COVID-19 pandemic wave, the Polish legislator decided to suspend substantive and procedural rules related to the statute of limitations, administrative silence and deadlines for administrative proceedings. Notably, the Administrative Procedure Act of Poland was amended on 18 April 2020 in order to facilitate the citizens' communication with the administrative authorities during a state of emergency through an electronic service using the ICT system. Under the new provision, any document issued by the authority during the administrative procedure may be delivered in the form of an electronic copy. In order to be delivered the document in an electronic format, the party must meet certain conditions: a) submit the request in the form of an electronic document via an electronic master box; and b) give the authority its e-mail address or express consent to the delivery of documents in the procedure in this way. This is a new solution in the Polish Administrative Procedure Act, "involving a manner of serving documents issued in the course of the proceedings in the form of an electronic document different to service using electronic communication" (Klich, 2021: 685).

Citizens' trust in public administration is one of the most critical factors in its successful functioning. The COVID-19 crisis seems to have raised concerns about trust, stemming from the increasing citizens' mistrust in the public administration. The problem was generated by the contradictory statements of the public authorities and professionals, as well as by the insufficient clarity and interpretation of the measures adopted during the state of emergency. The European Commission emphasized the importance of "clear and timely communication" with citizens, transparency and social dialogue (EC, 2020)[23]

23 See: European Commission (2020a). Joint European Roadmap towards lifting COVID-19 containment measures 2020/C 126/01, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020XC0417(06)

because citizens' trust is a pillar on which public administration must rest in normal circumstances in non-crisis times. Trust is not built "overnight"; it is a continuous process. Therefore, the citizens must have a trustworthy public administration, which is transparent, efficient, reliable and competent, which takes them seriously and acts in a responsible and responsive manner. Thus, the development of public administration services must move in the direction of understanding the end-user experience, especially when innovative digitized services are put in place and when the digital environment and artificial intelligence bring new challenges.

Citizens' trust is primarily based on their satisfaction with the quality of delivered public services. The OECD Recommendation on Public Service Leadership and Capability (2019)[24] highlights the drivers of confidence related to competencies and values. Competencies refer to the ability of governments to deliver services to citizens at the level of quality they expect, in an accountable and reliable manner. Values are principles and drivers that should guide and shape the actions of governments, such as openness, integrity and fairness. In Norway, for example, a high level of citizens' trust of in the public administration was recorded during the pandemic, but the authors emphasized that it is a long-term process which certainly did not happen "overnight", and that citizens' trust was built over many years (Christensen, Lægreid, 2020:775).

3. Directions of public administration reforms in Serbia

The successful implementation of the public administration reform process is crucial because it conditions the proper development of reform processes in other areas of society (Marković, 1998: 279). In the Republic of Serbia, the key strategic document for public administration reform processes is the Public Administration Reform Strategy for 2021-2030.[25] The main role of this document is to ensure the continuous, planned implementation of the administrative reform process aimed at establishing a modern public administration which will provide quality public services to its citizens and economic operators, and have an adequate level of unification with the EU Member States public administra-

24 OECD (2019). Recommendation on Public Service Leadership and Capability, 17. Jan. 2019:https://www.oecd.org/gov/pem/recommendation-public-service-leadership-and-capability-2019.pdf

25 The Public Administration Reform Strategy for the period 2021-2030, "*Official Gazette of RS*", no. 9/2014, 42/2014 – corr., 54/2018); See: Ministry of Public Administration and Local Self-government of the RS (2022); http://mduls.gov.rs/en/public-administration-reform/; http://mduls.gov.rs/wp-content/uploads/PAR-Strategy-in-the-Republic-of-Serbia-for-the-period-2021%E2%88%922030.pdf

tion systems, which is necessary for connecting administrative systems on the European soil (Lilić, Golubović, 2011:101).

The Strategy has set ambitious goals to be achieved over the next ten years. The proposed reform will be aimed at establishing well-managed, professional, motivated, and efficient public administration, which promotes innovation and merit-based employment and staff appointments, and is capable of implementing the government goals and meeting the citizens' expectations. One of the main goals set by the PAR Strategy is the further development of a functional and innovative public administration system. Given that the organization of a system is largely embodied in the people who make, this goal is intended to be achieved by improving the recruitment process in public administration: a) attracting and hiring staff with the necessary competencies; b) promoting and retaining competent and motivated employees who achieve their career goals in an enabling environment; c) updating the system of professional development and professional examinations in public administration based on an analysis of the needs for improving the competencies (knowledge, skills and abilities) of public administration employees. In view of improving the recruitment process in the public administration by the end of 2030, "it is expected that the state administration will be perceived as a desirable employer who applies transparent procedures, identifies better the necessary staff needed by state administration who have appropriate job competencies, and has more efficient recruitment and candidate selection procedures, including merit-based appointment of senior civil servants". In order to achieve this specific goal, the PAR Strategy envisages the following activities: a) improving personnel planning and promoting public administration as a desirable employer; b) improving the selection process and initial training of new employees, and c) improving the merit-based process of filling senior civil service positions and their induction. (PAR Strategy, 2021-2030: 13).

An effective career management system has also been set as a specific goal which will be applied in practice. Within this goal, emphasis is placed on "attracting and retaining competent civil servants by providing conditions for career development, innovation, stronger motivation and increased mobility. Efficient human resources management in the state administration will be further enhanced by ensuring adequate delegation of authority as well as professionalization of the senior civil servants' positions (PAR Strategy, 2021-2030: 13).

In terms of human resources orientation in the Serbian public administration, we may observe a notable progress. Namely, looking 20 years back, it may be said that the personnel policies were strictly bureaucratic, while nowadays the focus is more on individuals. However, personnel policies are still inconsistent,

many employees are still recruited and admitted without public competition; in many cases, public competitions are only formally announced because it is already known in advance which candidate will be admitted. It indicates that corruption is still present in the employment process, and that the candidates' actual professional competencies and values do not come to the fore. The professionalization of public administration will not be possible without selecting the best candidates exclusively through a public competition. Even after several years of application, the candidate assessment system has not produced the desired results. The lack of reliable objective criteria, subjectivity in candidate evaluation, and the absence of complaints have had negative effects in other parts of the civil service system (rewards, promotion, demotivation, interpersonal relations, etc.).

In Serbia, it may be said that the public administration reform and European integration are interconnected processes, the goal of which is to ensure compliance with the fundamental principles of "good governance". The COVID-19 pandemic has accelerated the digitization of public administration and the necessity of the digital inclusion of all actors in that process. We should not forget that in certain parts of the country, mainly in rural areas, there is a lack of IT infrastructure, which leads to digital exclusion and unequal treatment of citizens. Online training programs and professional development of civil servants are recognized as good experiences from the pandemic period, which can be very effective and efficient, while reducing costs. The most important lesson from that period is the need to simplify administrative proceedings.

4. Directions of public administration reforms in European countries

On 27 May 2020, the European Commission proposed the Recovery and Resilience Facility (RRF) as the centerpiece of NextGenerationEU, a temporary recovery instrument that allows the Commission to raise funds to help repair the immediate economic and social damage brought about by the Coronavirus pandemic and make European societies and economies more sustainable, resilient and better prepared to face the challenges and opportunities of the next generation policies. On 17 December 2020, the Council of the EU adopted the next long-term EU budget for the period 2021-2027(EC, 2022).[26] The European Institute of Public Administration (EIPA)emphasized that the directions of public administration reform after the COVID-19 pandemic must consider the

26 EC (2022). Recovery plan for Europe; https://ec.europa.eu/info/strategy/recovery-plan-europe_en; Recovery and Resilience Faculty (REF); https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en

weaknesses observed during the pandemic crisis,[27] considering that most EU Member States will support public administration reforms and digitalization projects in the period 2021-2027 (Lopriore, Vlachodimitropoulou, 2021: 11).

As pointed out by the GRECO,[28]the pandemic crisis has increased the risk of corruption in all EU member states, while preventive measures show weakness and inapplicability in practice. The GRECO "has consistently recommended specific anti-corruption and governance tools", which include greater transparency, oversight and accountability as a key to preventing corruption both at the central and the local level, particularly in extraordinary circumstances caused by the pandemic (GRECO, 2020:1). Therefore, it is necessary to introduce comprehensive new or revised anti-corruption strategies with clearly defined and measurable goals, to designate the budget, and to clearly define the competences and responsibilities of specialized institutions.

Furthermore, the Commission singles out the unused potential of digital services as one of the lessons from the pandemic, because the percentage of digitally provided services and the share of the population that uses them is low. There are significant transaction costs for analog services, which simultaneously create a significant administrative burden for businesses and citizens. , but also public administration (EC, 2020).[29]

In Belgium,[30] for example, some of the reforms planned by the Government of Flanders in the forthcoming period are: to simplify administrative proceedings; to ensure faster appeal procedures and eliminate backlogs by employing extra judges; to reduce the case files processing time to a maximum of 9 months; to strengthen trust in local authorities by slowing down structural decentralization; to invest in knowledge administration, quality education, digitization

27 Lopriore, M. Vlachodimitropoulou, M. (2021). Recovery and Resilience Plans for the Next Generation EU: a unique opportunity that must be taken quickly and carefully, EIPA Paper, European Institute of Public Administration, https://www.eipa.eu/wp-content/uploads/2021/10/EIPA_Paper_Recovery-and-Resilience-Plans-for-the-Next-Generation-EU_Digitaal.pdf (accessed 30 September 2022)

28 GRECO (2020)). Corruption Risks and Useful Legal References in the context of COVID-19, (2020)4 , Group of States against Corruption, Council of Europe, Strasbourg, 15 April 2020; https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context- of-covid-1/16809e33e1

29 European Commission (2020b). Recovery and Resilience Facility – State Aid, Guiding template: Digitalisation of public administration, including healthcare, 19 December 2020, Brussels https://ec.europa.eu/competition/state_aid/what_is_new/template_RFF_digitalisation_of_public_administration.pdf

30 Government of Flanders (2020). Flemish Resilience, Government of Flanders Recovery Plan, Department of Chancellery and Foreign Affairs, Brussels; https://publicaties.vlaanderen.be/view-file/40072; (10 Sept. 2022).

and digitalization, etc. (GF Recovery Plan, 2020:9). In view of accelerating and strengthening the digital transformation of public services, the Flanders Government envisaged the project "Municipality without a Town Hall", which entails launching an e-desk for citizens "to accelerate the roll-out of citizen profiles and an e-desk for businesses as a service plugged into the websites of local authorities, so that these become fully-fledged, unique digital gateways for the service delivery of local, Flemish and federal authorities alike" (GF Recovery Plan, 2020:19).

Similar to Belgium, the German government has envisaged the modernization of public administration as one of the six strategic recovery goals. In the German Recovery and Resilience Plan (GDRP) plan[31], the public administration modernization entails three main components: a) European identity ecosystem; b) Digitalization of administration, ensuring the implementation of the Online Access Act; and c) Modernizing the digitalization of administration, by ensuring the modernization of registers (GDRP, 2020: 39). In this context, "the Online Access Act promotes creating a digital administrative service at the national level in Germany by 2022. Its main goal is to digitize 575 administrative services in a user-friendly and legally correct way." The goal is to connect as many local governments as possible through online services, which have been developed and implemented in one place according to the "one for all" model (GDRP, 2020: 40). In Germany, the registers are managed on a decentralized basis, i.e. on-site by individual local authorities. They are often not interconnected to allow for the use of existing data in other administrative procedures. In order to make it possible in the future, "the quality of German registers will be improved and they will be linked to each other across the country through a cross-register identification management system and a system for the communication of competent authorities and data relevant to the implementation of the Online Access Act and the European "once-only" principle" (GDRP, 2020: 40).

In Croatia, legal scholars point to a number of problems in the employee assessment system (e.g., officials do not know what their specific tasks are; the officials' tasks are not related to organizational goals; there are no work plans for officials; etc.). In addition, the Croatian legal theory highlights a number of weaknesses of the public administration system, including huge regional and local differences in the availability of public services, neglected community and citizen-oriented approach, poor citizens' influence on the formulation of public

31 See: Federal Ministry of Finance (2021). German Recovery and Resilience Plan (Draft GRRP), Dec.2021;
https:// www.bundesfinanzministerium.de/Content/EN/Standardartikel/Press_Room/Publications/Brochures/2021-01-13-german-recovery-and-resilience-plan.pdf?blob=publicationFile&v=8 (accessed 10 September 2022)

policies at the state and local levels, etc. (Koprić, Džinić, Škarica, Manojlović, Lopižić, 2020:15).

5. Concluding remarks

The importance of the public administration system was evident during the COVID-19 pandemic, which revealed the need for a high quality, transparent, reliable and efficient system which should be flexible enough to adapt to the changing reality and citizens' needs. In addition to the need to simplify administrative proceedings, this period also revealed the need to invest in the system in the best of times so that it can adapt to changes in the worst of times.

All countries agree that the digitalization of public services is inevitable, which has only been accelerated the COVID-19 pandemic. Furthermore, there is a consensus among states that reforms in the future must move towards simplification of administrative proceedings and removal of administrative barriers. Citizens need an administration which they can trust, which would hear their needs and take takes them seriously, which is transparent, responsible and responsive in performing their activities, and which provides opportunities for citizens to influence public policies. However, trust cannot be built "overnight"; it is a long-term process that takes a lot of effort and consideration of different factors. Citizens want a public administration that cares about the exercise of citizens' rights, while respecting the principle of legality, ensuring the rule of law, and protecting the public interest. On the basis of prior experience, almost all countries concluded that centralized systems did not do well during the pandemic and that decentralization is a necessary process. It indicates that local governments cannot only be seen as service providers but also as key actors in the decision-making processes.

However, many countries have to make a much greater effort in view of the professionalization of public administration, especially EU candidate countries. In Serbia, human resources policies are still inconsistent and public administration employees are still recruited and admitted without public competitions. In a large number of cases, public competitions for public administration positions are only formally announced because it is already known in advance which candidate will be employed. Such practices preclude the recruitment of the best candidates and indicate that corruption in is still present in the employment process and that candidates' professional competencies and values are not taken into account. The professionalization of public administration is not possible without the selection of the best candidates because the human substance is the most precious quality of public administration. Another huge problem is the politicization of public administration, where civil servants act in accordance with the interests of the political party to which they belong.

The overarching goal of the public administration reform in Serbia is to establish a "good administration" which "successfully" implements its goals in full observance of human rights and freedoms, provides high-quality services to end-users in a modern manner, acts in accordance with enacted legislation and legitimate professional practices, effectively counteracts the practice of "bad" administrative treatment, enjoys the trust of its citizens, and produces positive socio-economic effects both in the country and at the supranational level.

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JAVNA UPRAVA TOKOM PANDEMIJE I PRAVCI REFORME

Rezime

Svaka forma organizacije rada tokom COVID-19 pandemije izazvane virusomSARS-CoV-2 pretrpela je određene promene u načinu svog funkcionisanja. Kriza je istakla ulogu države i javnog sektora i testirala njihovu sprenost da na izazove koje je urokovala pandemija odgovore prilagodljivim i pragmatičnim rešenjima poštujući vladavinu prava. Javni službenici su se tokom pandemije suočavali sa velikim izazovima u kojima su često bili primorani da improvizuju, suočeni sa situacijom koja se brzo menja. U ovako izuzetno teškom kontekstu, bilo je od velike važnosti da se izbegnu administrativne barijere, koje su mogle rezultirati gubitkom dragocenog vremena tokom krize. Pandemija je otkrila mnoge slabosti u funkcionisanju javnih uprava širom Evrope, od organizacije, promene radnog mesta iz kancelarijskog u kućno okruženje, novog načina interakcije sa građanima, a u zemljama u razvoju i do sporih procedura zbog neadekvatnih zakonskih i tehničkih rešenja i nedovoljnog stepena digitalizacije. Cilj rada je da ukaže na probleme sa kojima su se suočavale javne uprave tokom pandemije, da istakne primere dobre prakse suočavanja sa krizom i da ukaže na pravce reforme nakon pandemije.

***Ključne reči**: službenici, ljudski resursi, organizacija, transparetnost, decentralizacija.*

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FREEDOM OF ASSOCIATION OF JUDGES IN BOSNIA AND HERZEGOVINA

Abstract: *Freedom of association is one of the fundamental freedoms and is considered one of the necessary elements of a free society. Isolated from other members of the community, an individual would have little chance of successfully resisting the arbitrariness of the ruler, or fighting for social changes that he deems justified. Although judges are also entitled to this right, the very nature of the judicial office may call for establishing certain restrictions on the exercise of this right in order to protect the dignity of the judicial office and public confidence in the independence and impartiality of the judiciary. The first part of the paper focuses on the importance of exercising the freedom of association of judicial office holders. Special attention will be drawn to the role that professional associations of judges play in preserving the independence of the judiciary and improving its position, as well as protecting the rule of law and a democratic order. After referring to relevant provisions of international documents and the case law of the European Court of Human Rights, the author analyzes the restrictions on the freedom of association of judges adopted in various national legislations. Special attention will be given to the justifiability of prohibiting judges from joining political parties, and the dilemmas arising from the membership of judges in secret societies, i.e. other organizations operating on similar grounds. The second part of the paper focuses on the legal framework of the freedom of association of judges in Bosnia and Herzegovina and the justifiability of restrictions imposed on the exercise of this right.*

Keywords: *freedom of association, judges, professional associations, political parties, secret societies.*

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1. Introduction: the democratic relevance of freedom of association

Freedom of association is one of the fundamental freedoms, whose relevance for the establishment and functioning of a democratic system and the rule of law has been strongly emphasized by political and legal thinkers.

According to John Stuart Mill, one of the preconditions of a free society is the liberty of "combination among individuals", provided that the persons who associate are of full age, and not forced or deceived (Mill, 2009: 23). Alexis de Tocqueville, the famous French 19th-century liberal, viewed freedom of association as one of the fundamental human rights. As he influentially stated in *Democracy in America*: "The most natural privilege of man, next to the right of acting on his own, is that of combining his exertions with those of his fellow-creatures, and of acting together ... The right of association is almost as inalienable as the right of personal liberty" (Tocqueville, 2015: 209). The stability and vitality of a democratic system depend on the existence of democratic habits of its citizens, which must be cultivated and developed. According to Tocqueville, "the qualities of representative democracy depend on the qualities of the society within which it is embedded, especially upon the cultivation of civic virtues via associational ties" (Warren, 2001: 30). Following in Tocqueville's footsteps, Robert Putnam emphasized the interdependence between successful democratic government and associational life. As Putnam pointed out in his book *Making Democracy Work* (1993), associations "instil in their members habits of cooperation, solidarity, and public-spiritedness" (Putnam, 1993, cited in Warren, 2001: 18). The American political philosopher Michael Walzer described the freedom of association as "a central value, a fundamental requirement of liberal society and democratic politics" (Walzer, 1998: 64). According to Walzer, "only a democratic civil society can sustain a democratic state. The civility that makes democratic politics possible can only be learned in the associational networks ..." (Walzer, 1995: 104). George Kateb claims that being a free person necessarily "includes associating on one's own terms, which means engaging in voluntary relationships of all sorts" (Kateb, 1998: 37-38). Such an approach to freedom of association indicates the strong link between the existence of this freedom and the value of human dignity, considering that associational freedom is vital to personal self-realization (as an essential element of human dignity). According to Kateb: "Inseparable and indistinguishable from being a self – having a unique identity – is having the relationships that one wants" (Kateb, 1998: 48). The philosopher Michael Oakeshott thought that a free society was integrated by a wide variety of "enterprise associations" formed for the more satisfactory pursuit of individual ends, and he considered freedom of association to be perhaps the single most important of liberal freedoms (Oakeshott, 1991, cited in Boyd, 2008: 235). In *Political Liberalism*, John Rawls considered freedom of association

as one of the indispensable institutional conditions for giving effect to liberty of conscience and political liberties (Rawls, 2005: 309). In a detailed study on the relationship between democracy and freedom of association, Mark Warren identified three general ways in which associations might produce potentially "democratic" effects: 1) they may contribute to the capacities of citizens to participate in collective judgement and decision-making and to develop autonomous judgements that reflect their wants and beliefs (developmental effects of associational life); 2) they may contribute to the formation of public opinion by developing agendas, testing ideas, and providing a voice for various interests; 3) they may contribute to institutional conditions that support, express, and actualize individual and political autonomy as well as transform autonomous judgements into collective decisions (enabling individuals to affect the political system) (Warren, 2001: 61).

However, freedom of association is not absolute, which means that it can be legitimately restricted if certain conditions are met. Many influential political thinkers warned of the possible harmful effects and abuses of associations. Both Jean-Jacques Rousseau and James Madison were highly suspicious of associations as the social basis of political factions (Warren, 2001: 30). Although Madison defended freedom of association, he regarded groups and factions as a perpetual danger to the constitutional order (Boyd, 2008: 249). Tocqueville's awareness of the possibility of perversions of associational life is visible from his description of "small" parties (as compared to European "great" parties), whose way of functioning he had the opportunity to observe during his stay in America, and which he called factions or parties "without political faith". According to Tocqueville: "I cannot conceive of a sorrier spectacle in the world than that of different coteries (they don't deserve the name of parties) which today decide the Union. You see operating in broad daylight in their bosoms all the small and shameful passions which are usually hidden with care at the bottom of the human heart" (Tocqueville, cited in Bonneto, 1981: 64). According to John Stuart Mill, freedom of association belongs to the area of application of the "harm principle". If adults voluntarily associate, freedom of association will be tolerated as long as its exercise does not result in harm to another, regardless of the purposes that associations are trying to achieve (Mill, 2009: 23).

Freedom of association is one of the key protective mechanisms against a tyrannical government. Isolated from other community members, an individual would have little chance of successfully opposing the arbitrariness of a tyrannical ruler (an individual tyrant or a tyrannical majority) or fighting for the social changes he considers justified. Freedom of association is a precondition for the adequate exercise of citizens' rights, whose violation can most easily be prevented or their exercise ensured by the joint action of individuals.

Considering the importance of this freedom, it is not surprising that relevant human rights instruments give a prominent place to the right to free association. According to Article 20 of the Universal Declaration of Human Rights (UDHR): "Everyone has the right to freedom of peaceful assembly and association." The right of a person not to be coerced to join an association (the negative aspect of the freedom of association)[1] is prescribed in Article 20 para. 2 of the UDHR: "No one may be compelled to belong to an association". The UDHR also protects the right to form and join unions, as a relevant aspect of the freedom of association (Article 23, para. 4). The right to freedom of association (or certain elements of this right) is also protected in other UN human rights instruments. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) states: "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Article 22 para. 2 of the ICCPR stipulates that no restrictions may be placed on the exercise of freedom of association "other than those which are prescribed by law and which are necessary in a democratic society", and allows "lawful restrictions on members of the armed forces and of the police in their exercise of this right". According to Article 8(1a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right of everyone to form a trade union of his choice, subject only to the rules of organisation, has to be ensured.

Freedom of association is also protected by regional human rights instruments. The European Convention of Human Rights (ECHR) guarantees the right to freedom of association in Article 11, which states: "Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests." Freedom of association belongs to the group of the so-called "qualified rights", for which the ECHR envisages legitimate restrictions. The scope of permissible restrictions on freedom of association is defined in Article 11 para. 2 of the ECHR. Such limitations are only acceptable to the extent that they are prescribed by law, are deemed necessary in a democratic society, and pursue a legitimate aim listed in Article 11(2). The list of legitimate aims that can serve as a basis for legitimate restriction on freedom of association includes: the protection of the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals, and the protection of the rights and freedoms. This enumeration is exhaustive and is to be interpreted narrowly (see: *Sidiropoulos and Others v. Greece*, *Stankov and the United Macedonian Or-*

1 The negative (passive) side of freedom of association "includes whatever general freedom we have not to associate at all as well as whatever particular freedoms we have not to associate with particular people ... Both the positive freedom and the negative freedom are necessary for us to have a complete freedom of association (which is not a same thing as having an *unlimited* freedom of association)" (Brownlee, 2016: 360).

ganisation Ilinden v. Bulgaria, *Galstyan v. Armenia*) (Schabas, 2015: 511-512). The last sentence of Article 11(2) states that the imposition of lawful restrictions on the exercise of the freedom of association by members of the armed forces, the police, or the administration of the State is not prohibited. The European Court of Human Rights (ECtHR) acknowledged the special position of judges as civil servants whose duties typify the specific activities of the public service, although "the judiciary is not part of the ordinary civil service" (*Pitkevich v. Russia*) (Dijkstra, 2017: 5). Such status of judges provides a basis for legitimate restrictions on their rights under Articles 9-11 of the ECHR.

The American Convention on Human Rights (ACHR) guarantees the right to freedom of association in Article 16. The African Charter on Human and People's Rights (1981) provides for freedom of association in Article 10, which states that everyone has the "right to free association provided that he abides by the law" (Swepston, 1998: 174).

The relevance of the right to freedom of association has also been acknowledged in the case-law of regional human rights courts. The ECtHR expressed the view that "the way in which national legislation enshrines [freedom of association] and its practical application by the authorities reveal the state of democracy in the country concerned" (*Sidiropoulos and Others v. Greece*, cited in Schabas, 2015: 499). The right to freedom of association imposes positive as well as negative obligations on the contracting states. The primary duty of the contracting states with respect to freedom of association is a negative one: the duty not to interfere with the exercise of this right. According to the ECtHR case-law, one of the most important objectives of Article 11 of the ECHR is to protect people from arbitrary interference by public authorities in the exercise of their right to freedom of association (see, for example, *Manole and Romanian Farmers Direct v. Romania*, *Sindicatul Pastoral cel Bun v. Romania*, etc.) (Sakharuk, 2021: 172). In some instances, however, the contracting states also have positive obligations to secure the effective exercise of freedom of association. This primarily includes a duty of a state to allow an association to obtain the status of a legal entity and to provide necessary legal protection during its existence (*Ramazanova and Others v. Azerbaijan*). A state must also ensure that members of an association which pursues legitimate aims are not exposed to any legal sanctions because of their membership (see, for example, *Vogt v. Germany*, *İzmir Savaş Karşıtlari Derneği and Others v. Turkey*, etc.). In addition, a state must protect an association and its members from the illegal actions of third parties (*Ouranio Toxo and others v. Greece*[2], *97 Members of the Gldani Congregation of Jehovah's Witnesses & 4 Others*

2 According to the ECtHR:"[A] genuine and effective respect for freedom of association cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the

v. Georgia), or from discriminatory and arbitrary decisions of the association's governing bodies (*Johansson v. Sweden*), which is considered particularly justified in those cases where national legislations do not provide for sufficient legal remedies in that regard (Golubović, 2013: 760).

The ECtHR has also emphasized the negative aspect of freedom of association. In its decision in *Sorensen and Rasmunssen v. Denmark*[3], the Court stated that the notion of personal autonomy, as one of the principles underlying the interpretation of the ECHR guarantees, must "be seen as an essential corollary of the individual's freedom of choice implicit in Article 11 and confirmation of the importance of the negative aspect of that provision". In the ECtHR's opinion, Article 11 "must ... be viewed as encompassing a negative right of association or, put in other words, a right not to be forced to join an association". This dimension of the right to freedom of association has also been stressed by other regional human rights courts. The African Court on Human and Peoples' Rights found, in its decision in *Mtikila & Others v. Tanzania*, that the right to freedom of association incorporates not only the right to associate with others but also the right not to be forced to associate with others as occurs when one is required to join a political party to run for public office (Windridge, 2015: 312). Some of the regional courts' decisions related to the freedom of association of judges will be discussed in more detail below.

The right to freedom of association is also protected in many national constitutions. For example, Article 29 of the Constitution of the Slovak Republic states that: "The right to freely associate is guaranteed. Everyone has the right to associate freely with others in unions, societies, or other associations." According to Article 18.1 of the Constitution of Italy: "Citizens shall have the right to form associations freely without authorization for aims not forbidden to individuals by the criminal law." The existence of explicit constitutional provisions guaranteeing the right to freedom of association confirms the importance attributed to this right in modern societies and legal orders. Although the freedom of association is not explicitly mentioned in the Constitution of the United States (US), the US Supreme Court has long recognized this right as a "penumbral" or "implicit" constitutional right (Stephens, Scheb, 2007: 157).

Convention in general. There may thus be positive obligations to secure the effective enjoyment of the right to freedom of association … even in the sphere of relations between individuals… Accordingly, it is incumbent upon public authorities to guarantee the proper functioning of an association or political party, even when they annoy or give offence to persons opposed to the lawful ideas or claims that they are seeking to promote. Their members must be able to hold meetings without having to fear that they will be subjected to physical violence by their opponents." (*Ouranio Toxo and others v. Greece*, App. 74989/01, ECtHR [2005])

3 *Sorensen and Rasmunssen v. Denmark*, Apps. 52562/99 and 52620/99, ECtHR [2006]

2. Freedom of association of judges: international and national standards

International documents on judicial ethics stipulate that judges also have the right to freedom of association. According to Article 41 of the IBA Minimum Standards of Judicial Independence (1982), adopted by the International Bar Association (IBA): "Judges may be organized in associations designed for judges, for furthering their rights and interests as judges". Principle 8 of the UN Basic Principles on the Independence of the Judiciary (1985) states: "In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly, provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary." According to Principle 9 of the UN Basic Principles: "Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence." The right of judges to freedom of association is also stressed in the Bangalore Principles of Judicial Conduct (elaborated by the Judicial Integrity Group in 2001 and revised at the 2002 Round Table Meeting of Chief Justices held at the Hague on 25-26 November 2002), a document described as "the Magna Charta of the judicial ethics on the global stage" (Terhechte, 2009: 512). Principle 4 ("Propriety") of the Bangalore Principles states that a judge, like any other citizen, is entitled to freedom of association. Like the UN Basic Principles, the Bangalore Principles point to a higher standard of conduct that is required of judges when exercising this right. In exercising the right to freedom of association, "a judge shall always conduct himself or herself in such manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary" (Principle 4.6).

The right of judges to form professional associations has also been recognized in several other documents regulating the status of judges and standards of their professional conduct: the Universal Charter of the Judge (Article 12), the European Charter on the Statute of Judges (Article 1.7), the Magna Carta of Judges (Article 12), etc. According to Article 25 of the Recommendation Rec (2010)12: Judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010: "Judges should be free to form and join professional organization whose objectives are to safeguard their independence, protect their interests and promote the rule of law."

The relevance of exercising the aforementioned right is also recognized in Opinion no. 23 of the Consultative Council of European Judges (CCJE): On the role of associations of judges in supporting judicial independence (2020). As stressed

in the CCJE Opinion, the establishment of professional associations of judges contributes to the protection of judicial independence, i.e. fostering the rule of law within a legal order. The right to associate is not only in the personal interest of a judge, but also in the interest of the judiciary as a whole. According to Opinion no. 23, the following are the objectives of establishing the associations of judges: 1) establishing and defending the independence of the judiciary, and 2) fostering and improving the rule of law. The establishment of professional associations of judges enables judicial office holders to assert themselves as a relevant interlocutor in the process of creating and implementing judicial reforms, or to decide on issues related to their status, and to more effectively oppose attempts to undermine judicial independence, regardless of whether these attempts originate from the representatives of other government branches or from the judiciary itself. Professional associations of judges can also play a relevant role in securing the material status of judicial office holders, conducting their professional training and education, and developing and promoting the ethical standards of judicial conduct (CCJE, 2020).

Freedom of association of judges is not limited exclusively to the founding of professional associations. As emphasized in the provisions of the UN Basic Principles and the Bangalore Principles quoted above, judges enjoy the right to freedom of association like all other citizens, provided that in exercising this right they behave in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary. The question arises at what point a judge's affiliation with a certain organization becomes a threat to his/her ability to make impartial decisions. In performing his/her judicial duties, the judge must be impartial and must be seen by all to be impartial (see, e.g., Art. 5 of the Universal Charter of the Judge; Art. 3 of the Judges' Charter in Europe, etc.). Membership in a certain club or association can question such an impression or create the impression of impropriety. Therefore, it is necessary that judicial office holders show special caution when joining various associations and organizations. If a judge is not aware of the real character of the association at the time of joining, he must leave such association immediately upon learning the facts about its discriminatory actions or goals. As stated in the B&H Act on the High Judicial and Prosecutorial Council (HJPC Act B&H): "A judge ... may not be a member of any organization that discriminates on the basis of race, color, sex, sexual orientation, religious affiliation or ethnic origin or national affiliation, nor may he contract the use of facilities belonging to such organizations, and must withdraw from such organizations immediately after becoming aware of their conduct"(Article 82, para.3 HJPC Act).[4]

4 Article 82, paragraph 3, Act on High Judicial and Prosecutorial Council of the Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovin*a, 25/2004, 93/2005 and 48/2007

The issue that raises particular controversies is whether judges should be allowed to become members of political organizations (parties). The connection between the right to political party membership and the freedom of association was stressed in certain decisions of national constitutional courts, which evaluated the justifiability of banning party membership for some categories of public servants. In its 1993 decision, the Belgian Court of Arbitration found that the legal provisions prohibiting police officers from becoming political party members, justified by the desire to ensure the political neutrality and open-mindedness of the police, violated the very essence of freedom of association; in the Belgian Court's opinion, the general nature of the ban was clearly disproportional to the goal pursued (CoE, 1994: 49). However, as noted above, the ECHR allows such restrictions under certain conditions.

A comparative analysis shows that the permissibility of political activity/party membership of judges is regulated differently in different national legislations. In many countries, it is expressly prescribed by law that judicial office holders cannot be members of political parties. For example, Article 94(1) of the Courts Act of the Republic of Croatia states: "A judge shall not be a member of a political party, nor engage in political activity." According to Article 195(6) of the Bulgarian Judiciary System Act, a judge may not be a member of political parties, coalitions or organizations with a political goal, nor shall he/she be involved in political activity. In some countries, the ban on membership of judges in political parties is expressly prescribed in the constitution (e.g., Article 100 of the Constitution of North Macedonia). On the other hand, judges in some countries have the right to engage in political activities, including the possibility of becoming a political party member. In the US, judges can be members of political parties; moreover, in some states, where judges are elected by citizens, information about party affiliation is indicated on ballots, along with the names of judicial candidates (Bado, 2013: 39-40).[5] In Germany, it is also not forbidden for judges to be members of political parties (Bado, 2013: 45). In Switzerland, where judges are elected by legislative bodies, the selection and election of judges is based on an informal agreement between the political parties, depending on the party strength. As a result, party membership or (at least) ideological closeness to the party endorsing the candidate play an important role in the judicial selection process. Only in the smallest Swiss cantons, where judges are elected by plebiscite, do the political parties seem to have little or no influence on the election process (Kiener, 2012: 414-415). Is the ban on the political activity of judges justified? And should this ban be absolute?

5 For more on controversies surrounding partisan elections of judges in the US, see: Bado, 2013: 39-42; Larkin, 2020; Kauffman, 1982.

Some authors differentiate between two kinds of political participation of judges: passive and active. Passive political engagement is reduced to the membership of judges in political parties or professional associations connected to them (e.g., trade unions). The second form of participation implies the active (working) participation of judges in the activities of such organizations (Gilles, 1985: 96). In Germany, the leading political parties are linked to professional associations that bring together members of the legal profession. The oldest among them is the Social Democratic working group of lawyers (*Arbeitsgemeinschaft sozialdemocratischer Juristen*-ASJ), founded in 1947, which gathers members of the Social Democratic Party (SPD) coming from all sectors of the legal professions, including judges (Gilles, 1985: 97). It is not uncommon for political parties to form bodies (committees) that deal with matters in the field of justice, whose members may also be non-party figures. The association of judges with political parties can take different forms, which do not necessarily require party membership. Are all the mentioned forms of the political participation of judges unacceptable?

The HJPC Act of B&H explicitly prohibits both active and passive party engagement of judges. Article 82 (para.2) of the HJPC Act stipulates that judges shall not be members of political parties and their bodies, foundations and associations connected to political parties. The legislator went a step further, demanding that judges should refrain from participating in public events that are connected to political parties (thus establishing restrictions on the freedom of expression of the judicial office holders). This means that judges should not participate in public forums organized by political parties, or speak at political party rallies, even if it is emphasized that the judge appears as a non-partisan person.

There are several reasons for prohibiting the party membership (activities) of judges. If political parties can influence the election of judges, the risk of electing politically suitable judges increases and calls into question the impression of the impartiality of the election process (and, consequently, the impression of impartiality of elected judges). Even when judges are elected by high judicial councils, if part of the members of these bodies is chosen by authorities of other branches of government, the impression of favoring (or obstructing) candidates based on their party affiliation may be created. Such a risk is especially present in the so-called "new" democracies, where there is a gap between the formally guaranteed independence of the judiciary and how judicial bodies function in practice (or, at least, how the functioning of judicial bodies is perceived by the public). Party membership of a judge could be a basis for filing a motion for his recusal, whether he is charged with favoritism to a party colleague or animosity toward a party member from an opposing political bloc. Considering the importance of preserving the impression of independence and impartiality of judicial proceedings, the ban on membership in political parties for judicial of-

fice holders can be considered justified. The question remains whether and to what extent the formal prohibition of party membership ensures the political neutrality of the judicial office holders, i.e. prevents the influence of judges' political preferences on decisions they make.

There are also dilemmas regarding the admissibility of the membership of judges in secret societies (or organizations operating on similar grounds). The UN ODC *Commentary on the Bangalore Principles* states that it is not advisable for a judge to join a secret society whose membership includes lawyers representing parties in proceedings heard by the judge because it may entail extending favours to those lawyers "as part of the brotherhood code" (UN ODC, 2007: 91). This comment refers to the provision of the Bangalore Principles that regulates personal relationships of judges and members of the legal profession. The risk of possible favoritism, or giving the impression of favoritism, exists in relation to political parties as well. Although this issue seems to be distant from the daily judicial practice and professional conduct, it raises numerous dilemmas, and was the issue of an ECtHR ruling.

The question of admissibility of judges' membership in Masonic lodges (and whether data on membership in this organization should be made available to the public) has attracted most attention. This dilemma is not new. At the beginning of the 20th century, there were attempts to use the Masonic lodge membership as a means of influencing the Masonic judge. In the well-known *Seddon* case, the defendant, after being sentenced, showed a Masonic sign to the judge. Judge Bucknill (a Freemason himself), expressing regret about passing a sentence on a member of "the same fraternity", sentenced Seddon to death (Samuels, 2005: 2003). Should a judge be put in a position to prove his impartiality in this way?

In court practice, there were cases where parties to proceedings submitted requests for the recusal of a judge because of his membership in a Masonic lodge. There were also reported cases where the accused demanded from the judge to declare his affiliation with a Masonic organization, thus challenging the ability of a Freemason judge to pass an impartial judgement.[6] The concern that

6 In Scotland, in 2000, the accused demanded from the judge to declare whether he was a member of a Masonic lodge, arguing that the judge's affiliation with a Masonic organization would undermine the impartiality of the proceedings (BBC News, 2000). The request was probably inspired by the rule that was in force in England and Wales at the time. In England, in 1998, the legislator introduced an obligation that a candidate applying for a judicial post should declare whether he is a member of a Masonic organization; the obligation was abolished in 2009. The abolition of this obligation was followed by the successful challenge of similar Italian rules before the ECtHR. In its judgment in *Grande Oriente d'Italia de Palazzo Guistiniani v. Italy*, the ECtHR found that the obligation to declare membership of a non-secret society breached the applicants' right to free association (Shetreet, Turenne, 2013: 218). The controversial 2019 Polish Disciplinary Act (so-called "muzzle law") contains a provision that

the membership of a judge in a Masonic lodge could lead to a conflict of loyalty (loyalty toward the legal order and loyalty toward the Masonic organization) resulted in the introduction of restrictive measures in some European countries.

In Italy, the High Council of Magistracy adopted acts that warned against the problematic membership of judges in a Masonic organization; eventually, the High Council's guidelines of July 1993 explicitly prohibited the membership of judges in Masonic lodges. The imposition of disciplinary measures on judges due to their association with a Masonic organization sparked controversy and led to appeals to the European Court of Human Rights.

In the case of *N.F. v. Italy* (2001)[7], a judge (appellant) was given a disciplinary sanction for being member of a Masonic lodge that operated under the Grand Orient of Italy; the disciplinary sanction had negative consequences for his professional advancement. The basis for imposing the sanction was Article 18 of Royal Decree no. 511, adopted in 1946, which stipulates that a judge who "fails to fulfil his obligations or behaves, in the performance of his duties or otherwise, in a manner which makes him unworthy of the trust and consideration which he must enjoy or which undermines the prestige of the judiciary" will be subject to disciplinary measures. In March 1990, the Superior Council of the Magistracy of Italy adopted guidelines that determined that judges' membership in "associations imposing a particularly strong hierarchical and mutual bond through the establishment, by solemn oaths, of bonds such as those required by Masonic lodges raises delicate problems as regards the observance of the values enshrined in the Italian Constitution", but the 1990 guidelines did not expressly prohibit judges from being members of a Masonic lodge. The appellant subsequently took steps to distance himself from the Masonic organization. In November 1992, his membership in the lodge became "inactive". In July 1993, the Council adopted additional guidelines, which contained the provision: "Performing the function of a judge is incompatible with membership in a Masonic lodge." After the disciplinary sanction was imposed on him, the judge filed an appeal with the Court of Cassation, which rejected the appeal. In his application to the ECtHR, the judge (applicant) stated that the imposition of the disciplinary sanction violated his right to freedom of association envisaged in Article 11 of the ECHR. The Court found a violation of his right to freedom of association under Article 11 because the regulations in force in the period until July 1993 did not meet the requirements in terms of foreseeability; the judge/applicant could

judges must disclose their membership in associations, functions performed in non-profit foundations and political party membership before they became judges. This provision applies to memberships in all kinds of associations, including associations of judges; thus, it is contrary to the ECHR (Sanders, 2020).

7 *N.F. v. Italy*, App. 37119/97, ECtHR [2001]

not have foreseen the possibility of being subjected to disciplinary proceedings for his membership in a Masonic lodge. In the case *Maestri v. Italy (2004)*[8], the circumstances were similar and the Court made the same decision as in the case *N.F. v. Italy*.

In these judgments, the ECtHR did not deal with the issue of incompatibility of the judicial function with membership in a Masonic lodge. However, in decisions made in some other cases, the ECtHR took a position regarding the question of whether a judge's affiliation with a Masonic organization necessarily calls into question his impartiality and creates grounds for his recusal (in case one of the parties is a Freemason). In *Salaman v. The United Kingdom* (2000)[9], the ECtHR found that the membership of a judge in a Masonic lodge of the United Kingdom does not *per se* create doubt as to his impartiality in a case where the witness or a litigant is a Mason as well. Therefore, the judge's membership in the Masonic lodge would withstand the scrutiny of the so-called objective test of judicial impartiality. The mere fact of a judge's membership in a Masonic organization will not mean that his impartiality is necessarily compromised, but it still does not mean that membership in a Masonic lodge cannot be problematic based on the application of the subjective test of impartiality. If the judge's actions give the impression that he favors the members of the Masonic organization, this could constitute a basis for submitting a request for recusal, or challenging the judgment he would pass in the aforesaid case. For example, if a judge greets one of the parties to proceedings in a manner typical of members of a Masonic organization, it would be a reason to doubt his impartiality.

3. Legal framework of Freedom of Association of judges in B&H

In Bosnia and Herzegovina (B&H), freedom of association is protected by the Constitution of Bosnia and Herzegovina, as well as by entity[10] constitutions. According to Article II(3i) of the Constitution of B&H, all persons within the B&H territory shall enjoy the freedom of peaceful assembly and freedom of association with others. Article II, paragraph 2 of the B&H Constitution stipulates that the ECHR and its Protocols shall directly apply in Bosnia and Herzegovina and they shall have priority over all other law. Although the Constitution of Republika Srpska (RepS) does not explicitly mention freedom of association, it provides for the protection of the freedom of political organization (Article 31, para.1) and

8 *Maestri v. Italy*, App. 39748/98, ECtHR [2004]

9 *Salaman v. The United Kingdom*, App. 43505/98, ECtHR [2000]

10 Bosnia and Herzegovina is a state of complex constitutional structure. It comprises two entities: the Republic of Srpska and the Federation of Bosnia and Herzegovina, and the Brcko District as a third territorial unit that enjoys broad legislative autonomy.

the freedom to establish and join trade unions (Article 41). Article 2(1i) of the Constitution of the Federation of Bosnia and Herzegovina (FB&H) safeguards the freedom of association, including the freedom to form and join trade unions and the freedom not to associate. Under Article 14 of the Statute of the Brčko District (BD), everyone has the right to freedom of association, including the right to form political, social and other organizations.

The legislative framework pertaining to the exercise of the right to free association is primarily defined by laws on associations and foundations (adopted at different government levels) which regulate issues relevant to the establishment and functioning of associations (establishment, registration, internal organization, and termination of their work). According to Article 9 of the Associations and Foundations Act of RepS, an association can be founded by at least three natural persons or legal entities. Similar provisions are contained in the Associations and Foundations Act of B&H (Article 9), the Associations and Foundations Act of the FB&H (Article 11), and the Associations and Foundations Act of the BD (Article 12).

The HJCP Act of B&H does not mention the right of judges to freedom of association, or the right to form professional associations. As cited above, the HJCP Act provides for the prohibition of judges' membership in associations of a discriminatory character, as well as their membership in political parties. Some of the laws regulating the organization and operation of courts also provide for this right. Article 41 (para.1) of the Courts Act of the BD stipulates that judges may form professional associations. Article 4.10 of the Code of Judicial Ethics (adopted by the HJCP B&H) states: "A judge can form or be a member of an association of judges, or other organizations that represent the interests of judges." Considering the importance of this right, it should be expressly stipulated by law.

Several professional associations of judges have been established in B&H: the Association of Judges of RepS, the Association of Judges in FB&H, the Association of Judges in B&H, the Association of Women Judges in B&H; the establishment of several associations of judges is partly a consequence of the complex state structure and the organization of the judiciary in B&H. The existence of several professional associations of judges in one country is not unusual; for example, they are present in France and Germany (Bočer, 2018: 16), as well as in Spain (Morn, Toro, 2011: 220) and Poland (Matthes, 2022).

According to Article 1 of the Statute of the Association of Judges of RepS, it is a professional organization gathering judges from the territory of RepS, for the purpose of exercising their common interests and promoting the legal profession and science. Article 7 of the Statute lists some of the Association objectives: establishing the rule of law; respecting legality and justice through different

activities; preserving and strengthening an independent judiciary; improving regulations on the organization and operation of the judiciary; developing and improving legal conscience, judicial ethics and legal culture; developing and improving the professional education and training of judges; developing and strengthening the professional ethics and responsibility of judges; advocating for the improvement of the financial status of judges, etc.

As there are no trade unions of judges in B&H, the last mentioned objective of professional associations of judges is particularly important. In some cases, the Association of Judges of RepS had an active role in protecting the judges' financial status. In 2014, the Association submitted a proposal to the Constitutional Court of RepS to review the constitutionality of certain provisions of the Act on Salaries and Remuneration of Judges and Prosecutors (RepS) which did not guarantee the protection of their acquired rights. In its Decision no. U-86/14[11], the Constitutional Court of RepS found that one of the challenged provisions were not in accordance with the RepS Constitution.

4. Conclusion

Judges, like all other citizens, enjoy the right to freedom of association. The right of judges to establish professional associations is a relevant element of this right, highly important for establishing and strengthening the rule of law. On the other hand, in order to protect the independence and impartiality of the judiciary, it is justified to impose certain restrictions on the right to freedom of association of judges; for example, the prohibition of party membership of judges or other forms of their political engagement should be considered justified.

Because of its importance, the right of judges to form professional associations should be expressly protected by law (and, if possible, by the constitution). For that reason, it would be necessary to make changes to the legislation in B&H and emphasize the importance and the role of the judges' associations. As there are no trade unions of judges, the role of the associations of judges in protecting/improving the working conditions and material status of judges is even more important. It is all the more significant that the associations of judges act not only post factum, after a certain rule has been adopted, but also as interlocutors of the responsible authorities when defining legal provisions related to the status of judges.

11 Decision of the Constitutional Court of Republika Srpska no.U-86/14 (Odluka br.U-86/14 Ustavnog suda Republike Srpske, 27.5.2015);
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SLOBODA SUDIJSKOG UDRUŽIVANjA U BOSNI I HERCEGOVINI

Rezime

Sloboda udruživanja spada u red fundamentalnih sloboda i smatra se jednim od nužnih elemenata slobodnog društva. Izolovan u odnosu na druge članove zajednice, pojedinac bi imao slabe izglede da se uspješno suprotstavi samovolji vlastodršca, ili da se izbori za društvene promjene koje smatra opravdanim. Iako navedeno pravo posjeduju i sudije, priroda funkcije koju obavljaju može zahtijevati uspostavljanje izvjesnih ograničenja u pogledu njegovog ostvarivanja, kako bi se zaštitili dignitet sudijske funkcije i povjerenje javnosti u nezavisnost i nepristrasnost sudijskog djelovanja.

U prvom dijelu rada biće ukazano na značaj ostvarivanja prava na slobodno udruživanje nosilaca sudijske funkcije. Upozoriće se na ulogu koju profesionalne asocijacije sudija vrše u očuvanju nezavisnosti sudstva i unapređivanju njegovog položaja, kao i zaštiti vladavine prava i demokratskog uređenja. Nakon što bude ukazano na odgovarajuće odredbe međunarodnih dokumenata i praksu Evropskog suda za ljudska prava, analizi će biti podvrgnuta ograničenja slobode sudijskog udruživanja usvojena u različitim nacionalnim zakonodavstvima (posebna pažnja biće posvećena opravdanosti zabrane članstva sudija u političkim partijama, kao i dilemama koje proističu iz članstva sudija u tajnim društvima, odn. drugim organizacijama koje djeluju na sličnim osnovama). U drugom dijelu rada, analizi će biti podvrgnut pravni okvir sudijskog udruživanja u Bosni i Hercegovini.

Ključne reči: *sloboda udruživanja, sudije, profesionalna udruženja, političke partije, tajna društva.*

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FUTURE THINGS AS AN OBJECT OF REAL RIGHTS

Abstract: *The paper aims to answer the question whether the concept of " future things" is compatible with property relations by addressing the issues such as: future things as an object of real rights, future things as real securities, transfer of real rights on future things, and future things as an object of enforcement proceedings. The analysis provided in this paper shows the COVID-19 crisis has brought many repercussions, not only to the public health systems in Europe but also to the European economy that has sustained losses during the pandemic. In such dire conditions, certain Macedonian financial institutions (such as banks) have offered financial support to the government and have lobbied for some benefits in return. Unfortunately, the benefits that banks have lobbied for threaten the stability and consistency of the civil law system. The situation raises concern among scholars who have urged for the preservation of the civil law institutes so that the short-term legal solutions implemented in haste for the benefit of some entities (banks) will not cause irreparable long-term damage to the overall civil law system. The authors analyze the provisions of several Macedonian legislative acts that implement the concept of future things in some areas of property law, such as: the exercise of real rights on future things, future things as real securities, transfer of right on future things, and forced sale in enforcement proceedings. The main objective of the analysis is to demonstrate that regulating " future things" as an object of real rights is not sustainable due to the nature of these rights.*

Keywords: *civil law, property law, future things.*

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1. Introduction

The most common and widely accepted definition of real rights is that they represent the exercise of a direct power over the object of real rights (Živkovska, 2005: 20-21; Grupče, 1983:114-115; Atias, 1999: 34; Gavella, Gliha, Josipović, Stipković,1992 :41). As we can conclude from the basic definition on real rights, the power granted by those rights extends over the object and enables the holder of the real right to use and to dispose with that object in a manner consistent with the type of real right acquired. The holder of the real right is also entitled to exercise the granted power directly, meaning independently and without requiring assistance from a third party. The extent of the power granted by real rights varies, depending on the type of real right. Ownership is a type of real right that grants full power over the object of ownership: the power to possess, to fully use, to dispose or even to destroy the object of ownership. All other types of real rights (servitudes, pledge, real burdens, etc.) grant only partial power over the object. For example, servitudes grant the power to its holder to use the object owned by another in a certain way; pledge grants the power to the pledge creditor to demand sale of the pledged object belonging to his/her pledge debtor; real burdens (encumbrances) grant the power to the holder to demand certain actions from the owner of the burdened object; etc. The direct power that the owner, or the holder of another real right, exercises over the object of his/her real right has also an *erga omnes* effect against all third parties. It means is that all third parties must recognize and respect that power by remaining passive and not interfering with the exercise of the real right.

Considering the nature of real rights and how the power they grant is exercised over the object of real rights, we pose the question: What can be an object of real rights? A short answer is that only things of material nature can be an object of real rights. Why? In order for someone to exercise a right that by nature grants power to use and to dispose with the object of that right independently and without requiring the assistance of a third party, the object has to be tangible (real). It is no coincidence that such rights are called *real*. The existence of a real object over which a real right can be exercised is the main thing that distinguishes real rights from the rights arising from obligations. The owner, or the holder of another real right, is not dependent on the actions of a third party in order to be able to exercise his/her real right, unlike the creditor who depends on the actions of the debtor in order to fulfill his/her rights arising from the obligation. Unlike the rights arising from obligations, real rights bring on a level of certainty to its holders, ensuring that they will be able to exercise the real right they have acquired. The certainty stems from the fact that real rights exist over a real object; thus, the real right can be exercised as long as that object exists.

Contemporary property law continues to base its regulation on real rights respecting the notion of real rights as *rights in rem.* Regulating real rights as rights over material things contributes to the stability of the property law system where real rights continue to represent the solid and static bedrock which all other civil law relations stand on. However, some concessions have been made for the sake of economic development. For example, usufruct is granted over rights that give dividends or other benefits; rights with monetary value can be pledged; the right to build (or the right of long-term lease as it is called in the Macedonian law) falls under the legal regime governing immovable things because it is considered as a *fictitious real-estate* upon which a building or another structure can be erected, and we also have the concept of *future things* as an object of real rights.

In this paper we will discuss the concept of *future things* as an object of real rights and the extent to which it has been implemented in the Macedonian property law system.

2. The meaning of the term *future thing* in the Macedonian property law system

In the Macedonian property law, there is no comprehensive definition of the term *future thing*. The basic Act on Ownership and other Real Rights (hereinafter: the ORR Act)[1] does not recognize the concept of *future things* as an object of real rights. According to this basic Act, there are four legal requirements that make a thing eligible to be an object of real rights: 1) the thing must be part of the material word (it must be real); 2) the thing should be suitable to be dominated by men; 3) the thing should be individualized; and 4) the law should allow for real rights to exist over it (Article 12 of the ORR Act). Considering these four requirements imposed by the ORR Act, it is obvious that *future things* fail to meet the first legal requirement – to be part of the material word. As suggested by the term itself, *future things* are assets that are yet to be created some time in the future. For this reason, the ORR Act does not recognize them as eligible to be an object of real rights.

The term *future thing*, or more precisely *future object,* is explicitly mentioned in the Macedonian Civil Obligations Act[2]. According to the Civil Obligations Act (COA), the sales contract can be concluded for a *future object* (Art. 446(3) COA). However, the Act does not go on to explain what *future object* is in the legal sense, nor does it specify at what moment the right of ownership will be acquired.

1 Zakon za sopstvenost i drugi stvarni prava, *Sl. vesnik na RM*, br. 18/01 (2001).

2 Zakon za obligacionite odnosi, *Sl. vesnik na RM*, br. 18/01 (2001).

The Contractual Pledge Act (CPA)[3] also contains provisions declaring that *future objects* can be an object of the right of pledge (Art. 7 (1) CPA). This Act also does not contain any provisions defining *future objects* or even providing guidance to what they are, and under what rules and conditions they can be pledged. In theory, pledging *future objects* or *future things* means pledging natural fruits that are yet to be born from the fruitful thing or buildings and other structures under construction.

The Act on Obligations and Real Property Relations in Air Traffic[4] prescribes that aircrafts under construction can be owned and mortgaged (Art. 144 and 157 of the Act). Regarding the right of ownership over aircrafts under construction, the Act states that it entails ownership over the parts already incorporated in the aircraft under construction, as well as ownership over the parts that are especially designed to be incorporated in the particular aircraft under construction even if they are still in factories or workshops that produced them. We can conclude from these provisions that the Act views the right of ownership over the aircraft under construction as ownership over its existing components. As for mortgaging the aircraft under construction, the Act states that same rules apply as if mortgaging an operational aircraft.

The Inland Navigation Act[5] contains provisions similar to the provisions of the Act on Obligations and Real Property Relations in Air Traffic. The Inland Navigation Act (INA) also states that boats under construction can be owned and pledged (Art. 111 INA). Ownership of boats under construction actually implies ownership over its exiting components incorporated or intended to be incorporated in the particular boat under construction (Art. 114 INA). As for pledging the boat under construction, the Act states that it is done under the same provision as pledging an operational boat (Art. 30 INA).

The Construction Act[6] uses the term *future structure* when referring to structures that are planned to be constructed in accordance to the construction project and the adjoining documentation (Art. 62-b CA).

The term *future structure* is also used in the Real Estate Cadastre Act.[7] The REC Act regulates the pre-registration of the right of ownership over the *future structure* in a pre-registration sheet in the Real-Estate Cadastre. The REC Act

3 Zakon za dogovoren zalog, *Sl. vesnik na RM,* br. 5/03 (2003).

4 Zakon za obligacionite i stvarnopravnite odnosi vo vozdušniot soobraќaj, *Sl. vesnik na RM,* br. 85/08 (2008).

5 Zakon za vnatrešna plovidba, *Sl. vesnik na RM,* br. 55/07 (2007).

6 Zakon za gradenje, *Sl. vesnik na RM,* br. 130/09 (2009).

7 Zakon za katastar na nedvižnosti, *Sl. vesnik na RM,* br. 55/13 (2013).

does not actually define what *future structure* is, but it is obvious from its provisions that the term refers to buildings or other structures under construction.

The Enforcement Act[8] regulates the enforcement proceedings over *future structures.* It prescribes that the real estate that is described in a pre-registration sheet (i.e., the buildings and other structures under construction) can be subject to enforcement proceedings. According to the Enforcement Act, the enforcement proceedings should be conducted as if real estate is being sold (Art. 205-a EA).

3. Acquiring real rights on *future things* in the Macedonian property law system

When discussing the issue of acquiring real rights on *future things,* we have to underline that the lack of a comprehensive definition on what *future things* are in a legal sense, as well as the lack of detailed provisions on their legal regime, have given a free reign to all kinds of legal practices by notary publics, lawyers, public enforcers and investors, which mostly resulted in disputes for violation of real property right. In other words, when there is no regulation on what one should do, participants do whatever they want.

From the theoretical point of view, the fact that *future things* do not actually exist (i.e., they are not yet tangible/corporeal), makes the concept of acquiring real rights over *future things* rather problematic. Can we actually say that we have a right of ownership, or any other real right, over a thing that does not actually exist, and it is uncertain if it will come to exist one day? The simple answer to this question is negative: we cannot actually have ownership, or other real rights, over things that are not yet real (tangible) simply because we have no way of exercising real rights over things that are not real. That being said, we may look into the laws that embrace, to a certain degree, the concept of real rights over *future things*.

3.1. Right of ownership on future things

Prima facie, the Macedonian legal system seems to include legislative acts that support the concept of ownership over *future things,* such as the Civil Obligations Act, the Act on Obligations and Real Property Relations in Air Traffic, the Inland Navigation Act, the Construction Act, and the Real Estate Cadastre Act. However, a closer look into the provisions of these acts reveals a different picture. In some of these acts, the provisions are inconclusive on whether the right of ownership is actually acquired over the *future thing*, or it is in the process of being acquired as the *future thing* is being created. In our opinion, the latter is more likely. There

8 Zakon za izvršuvanje, *Sl. vesnik na RM,* br. 72/16 (2016).

are also laws that consider the right of ownership on *future things* as ownership on its existing components that will eventually be incorporated in it, which will ultimately lead to its creation as a real thing. In our opinion, this is not the same as having ownership over *future things*.

Looking into the Civil Obligations Act, we can note that it recognizes the possibility for a sales contract to be concluded by transferring the right of ownership over *future object.* Yet, the Civil Obligations Act (COA) does not address two key issues: 1) How will the seller enable the buyer to take possession over the *future object* which is the key element in completing the sale; and 2) How will the seller and the buyer meet the legal objective of the sales contract – the transfer of the right of ownership? As the COA provides no answers to these questions, we turn to legal logic in order to address these issues. The transfer of possession over a *future object,* as a key element in completing the sale, is not possible. The buyer is not able to take possession over the thing he/she is buying because the thing is not tangible yet. This means that the sales contract will not be actually completed until the *future object* becomes a real (tangible) thing. Once the *future object* becomes a real thing, the buyer can take possession over what he/she bought from the seller and, at that point, the sale will be completed. Reflecting on the issue of meeting the legal objective which is the transfer of the right of ownership over the *future object,* we conclude that the transfer of the right of ownership will also occur after the *future object* becomes a real thing. This is because, at the time of conclusion of the sales contract, the seller does not yet own the *future object (thing)* that he/she is selling. The seller will actually acquire ownership over the *future object (thing)* once it becomes real (tangible). From that moment on, the seller will be able to transfer the right of ownership onto the buyer, which will lead to fulfillment of the legal objective of the sales contract. In conclusion, sales contracts on *future objects* are in essence contracts concluded under a postponing condition. The condition that needs to be fulfilled is for the *future object* to become a real thing so that the sales contract can also be fulfilled.

Acquiring ownership over *future things,* such as aircrafts under construction and boats under construction, is recognized by respective laws regulating the legal regime governing such assets (the Act on Obligations and Real Property Relations in Air Traffic for aircrafts, and the Inland Navigation Act for boats). Even though these laws recognize that a person can have ownership over an aircraft or a boat under construction, the reality is that these laws actually recognize the right of ownership over the components that are incorporated or will be incorporated into the aircraft or boat under construction. We can all agree that having the right of ownership over the components of the aircraft or boat under construction is not the same thing as owning an aircraft or a boat. The difference is not of minor relevance since the nature and the quality of the

thing one owns determines the possibilities in exercising one's ownership right. This goes to show just how unsustainable the concept of owning *future things* actually is.

There is also a misconception promoted by the legal practice that the Construction Act and the Real Estate Cadastre Act recognize the right of ownership on buildings and other structures under construction as a type of *future things*. This is not actually true. The Construction Act considers buildings or other structures under construction as *future things*. However, it does not treat such things as someone's ownership. Quite the opposite, the Act actually states that the building or other structure under construction becomes eligible to be an object of ownership only after construction is completed in accordance to the building permit and the rules and regulation governing the construction process (Art. 95 CA). Once the respective authorities determine that the construction has been performed and completed legally, then and only then, the building or other structure can be registered in the Real Estate Cadastre as ownership of the investor that built it (Art. 96 CA). The Real Estate Cadastre Act is completely in-lined with the Construction Act. It allows for registration of the right of ownership over the building or other structure in a property sheet only after the construction process is completed legally and the documentation in support of that has been issued by the competent authorities. In legal practice, there is a certain level of confusion caused by the pre-registration sheet issued by the Real Estate Cadastre Agency. The pre-registration sheet is a document that contains information about the building or other structure under construction, such as: information about the investor, the building project, the building permit, etc. The pre-registration sheet also includes the pre-registered ownership rights of people that concluded pre-sales contracts with the investor for the building or some other structure under construction. However, it needs to be noted that the pre-registration sheet does not have the same legal value as the property sheet. The property sheet is a conclusive proof that the right of ownership on real-estate has been acquired, while the pre-registration sheet only provides publicity and priority for the people who have pre-registered ownership rights. According to the Real Estate Cadastre Act, people with pre-registered ownership rights have priority, before all others, to register their right of ownership in a property sheet once the building or some other structure has been completely constructed (Art. 172(5) REC Act). Having priority in acquiring the ownership right is not the same as actually having acquired the ownership right. The pre-registration sheet holds no guarantee that the people who pre-registered their ownership rights will acquire those rights eventually. Whether the pre-registered ownership rights will actually be acquired depends on the *future thing* (the building or other structure under construction) becoming a real thing (fully and

legally constructed building or some other structure). In addition, we wish to underline that the Real Estate Cadastre Act does not even consider *future things* as real estate (future or otherwise). According to the Real Estate Cadastre Act, only land and fully constructed buildings, infrastructure and other structures of permanent nature are considered as real estate (Art. 3(1) REC Act).

The analysis of relevant provisions of the Civil Obligations Act, the Act on Obligations and Real Property Relations in Air Traffic, the Inland Navigation Act, the Construction Act, and the Real Estate Cadastre Act reflects the ambiguous position of the Macedonian legislator on the issue of the legal regime of *future things* as an object of the ownership right. It is clear that the legislator cannot circumvent the obvious problem concerning *future things*, which entails the fact that they are not real and are therefore unsuitable to be an object of ownership, or another real right for that matter. So, why is there an inclination to treat them as such? The reason lies in the economic interests of investors and creditors in the real estate market. All the provisions that are put in place are intended to provide investors and creditors with the opportunity to develop the real estate market by trading not only with the existing real estate but also with buildings and other structures under construction that will eventually become real estate. The Real Estate Cadastre Act has also put in place the mechanism (the pre-registrations sheet) aimed at protecting the buyer of *future things* from being defrauded by investors. The pre-registration sheet made the trade with buildings and other structures under construction public. By envisaging the pre-registration sheet, the Real Estate Cadastre Act put an end to the fraudulent sales practices of investors that involved multiple sale of the same apartment or office space onto several different persons, causing disputes over the right of ownership. However, no regulation can be put in place to protect buyers from the uncertainty that accompanies all those that aspire to acquire ownership over buildings and other structures under construction. In the trade with buildings and other structures under construction, it is uncertain whether they will ever be finished and turned into real estate. There have been more than a few cases where the investors halted construction for lack of funds and then proceeded to go into bankruptcy, leaving the building or other structure under construction unfinished and leaving the buyers without the pre-paid apartments and offices. Another set of problems for buyers of buildings or other structures under construction were brought on by investors who conducted construction contrary to the issued building permit. According to the Construction Act, if construction is conducted contrary to the issued building permit, the permit is annulled and the building or other structure is deemed to be illegal, which prevents buyers from ever acquiring ownership over the pre-paid apartments and offices. These are the problems that neither the laws nor the courts could resolve to everyone's

satisfaction. We simply must accept that any buyer participating in the trade with buildings and other structures under construction assumes the risk linked with this type of trade which boils down to never acquiring the right of ownership.

3.2. Right of pledge on future things

The Contractual Pledge Act recognizes the possibility for a *future object (thing)* to be pledged (Art. 7(1) CPA). Pledging *future things* is also possible according to the Act on Obligations and Real Property Relations in Air Traffic, which states that aircrafts under construction can be mortgaged (Art. 157). The same is prescribed in the Inland Navigation Act, which states that boats under construction may be pledged (Art. 111 INA).

The Contractual Pledge Act does not specify what type of *future things* may be pledged, nor does it specify the legal requirement for pledging *future things*. On the other hand, the Act on Obligations and Real Property Relations in Air Traffic specifies that aircrafts under construction are to be considered as immovables and, thus, they are to be mortgaged under the same conditions as operational aircrafts. Under the Inland Navigation Act, boats under construction are considered to be movable things. Pledging boats under construction is done under the same conditions as pledging operational boats.

Since the Act on Obligations and Real Property Relations in Air Traffic and the Inland Navigation Act are special law regulating the legal regime governing aircrafts and boats, the Contractual Pledge Act remains applicable to all other *future things* that are being pledged. Considering that the Contractual Pledge Act does not specify the type of *future things* that can be pledged, it is left to open interpretation. It also remains unclear whether the Contractual Pledge Act intends for *future things* to be pawned, mortgaged, or both. In order to answer how *future things* can be pledged under the Contractual Pledge Act, we should first know what legal regime *future things* generally fall under. As we have shown, there is no law actually defining what the term *future thing* entails. From the various provision we have analyzed, we can conclude that buildings and other structures, aircrafts and boats under construction are considered as *future things*. Pledging of aircrafts and boats is regulated by special law, so that the Contractual Pledge Act has only subsidiary application. However, the Contractual Pledge Act is applicable in pledging buildings and other structures under construction. But, how should they be pledged? Should they be pawned or mortgaged? Based on what we know about the legal regime of buildings and other structures under construction, we can conclude that they are considered as *future things*, but not real estate under the Real Estate Cadastre Act and Construction Act. If they do not fall under the legal regime of real estate, then they

must fall under the legal regime of movable things, which consequently means that they can be pawned, but not mortgaged. In legal practice, this does not make much sense because buildings and other structures under construction could eventually be turned into real estate. For this reason, in legal practice, buildings and other structures under construction are being mortgaged, while the fact that they are not considered as real estate *per se* is being ignored. But that is not the only fact that the legal practice ignores when mortgaging buildings and other structures under construction. It also ignores the two basic legal requirements for the right of pledge to be valid under the Contractual Pledge Act: 1) the pledged object must be owned by the pledge debtor; and 2) it must be tradable (Art. 10 CPA). Buildings or other structures under construction are not yet owned by anyone, nor are they freely tradable. The other issue that is being ignored is more of a theoretical nature: we wonder how *future things* that are not yet real could serve as real securities for securing claims.

In spite of all legal obstacles, the lawyers draft mortgage contracts for buildings or other structures under construction, notary public notarize such contracts, and the Real Estate Cadastre Agency registers those mortgages in the Real Estate Cadastre pre-registration sheets. All this is done in line with the understanding that all mortgages on buildings and other structures under construction could not be enforced until construction is completed. This was made clear by the courts which ruled in several cases on delaying the enforcement of mortgages on buildings under construction until construction is completed.

4. Forced sale of *future things* in enforcement proceedings

For a period of time, there was a consensus that real rights like the right of ownership and the right of pledge on *future things* are to be considered as actually acquired once the *future thing* becomes a real thing. Consequently, the exercise of these real rights was possible only after the *future thing* had become a real thing. However, this consensus was not in line with the interest of the banking sector. Banks, as major creditors on the real estate market, began lobbying for legislative changes that would enable them to enforce mortgages on buildings and other structures under construction without delay, i.e., without having to wait for the construction process to be completed. The intense lobbying resulted in passing an amendment to the Enforcement Act (EA) in 2018, when Article 205-a was introduced. According to Article 205a of the EA, buildings and other structures under construction described in the pre-registration sheet can be subjected to forced sale in enforcement proceedings under the rules for forced sale of real estate. If the entire building or structure under construction is being sold, the sale also includes the investor's right to build. If a portion of the buil-

ding or structure is being sold, the sale does not include the right to build. This is the general intent of Article 205-a of the EA; but, as the Article was drafted so incomprehensibly, public enforcers have refused to apply it in enforcement proceedings. They usually refuse to conduct an enforcement proceeding under Article 205-a of the EA claiming that it is practically inapplicable. They also state that Article 205-a is contrary to a basic requirement of the Enforcement Act, according to which enforcement proceedings can be conducted over property belonging to the debtor, and the buildings or structures under construction are not the debtor's property yet. We completely agree with those arguments. The ones that did not agree were the representatives of the banking sector; they stand firm on the position that Article 205-a of the EA must be enforced in favor of banks as creditors. Their position is absurd, primarily because, if Article 205-a is to be enforced, it should be enforced in favor or all creditor and not just banks. Any other interpretation or application of these provisions would be unconstitutional because it will cause inequality of rights.

Upon analyzing the provisions of Article 205-a of the Enforcement Act (EA), we notice problems in its application. One of the problems in Article 205-a is the treatment of buildings or other structures under construction as real estate when there are no legal provisions in substantive laws to support such treatment. This directly affects how the building or other structure will be appraised in the enforcement proceedings when it is sold as a whole. In Article 205-a EA, it is stated that the value of the building or structure under construction will be appraised as real estate taking into account the phase of construction it is found in. In practice, authorized appraisers calculate the value of what they find on the construction ground. We do not consider such appraisals to be accurate if costs for finishing the building or other structure are not calculated, and if it is not taken into account that in some cases the construction may be funded (to some degree) by the buyers that pre-paid for the apartments and offices in the building under construction. If the entire building or other structure is being sold, the investor's right to build is sold along as well, but appraisers are not directed to appraise the value of the right to build. What is more peculiar is that the right to build is treated as part of the real estate, which is completely inaccurate since the right to build in Macedonian law is not a real right, nor does it fall under the regime of real estate. In our opinion, the approach of Article 205-a of the EA with respect to the enforcement on buildings or other structures under construction is flawed. What can actually be enforced is the right to build, since the building or other structure under construction is not yet eligible for trade. The reason why the legislator avoids taking this approach is because the right to build cannot be treated as real estate, and can only be transferred as an obligation onto the interested party. Transferring an obligation in enforcement proceedings is very

difficult since it requires consent of all concerned parties, some of whom are not even directly linked to the enforcement proceedings. The authority given to enforcers under the Enforcement Act does not allow for their interference in *inter partes* relations. By law, enforcers are only authorized to transfer claims, but not an entire obligation. So, if the right to build is to be enforced, the authority afforded to enforces need to be amplified as well. Instead of doing things the right way, the legislator has opted, under the pressure of the banks' lobby group, to open the doors to free trade with *future things* as if they were real.

A different problem arises when part of the building or structure under construction is to be sold in enforcement proceedings under Article 205-a of the EA. This type of enforcement is conducted against the indebted buyer who has entered a pre-sales contract with the investor for an apartment or office in the building under construction. Article 205-a does not provide guidance to how the apartment or office should be appraised in the enforcement proceedings, which could lead to unfair treatment of the indebted buyer. The EA calls it sale, but what actually happens is that the person who wins the public bidding steps in place of the indebted buyer in the pre-sales contract with the investor. All this is enforced without informing the investor or asking for the consent of the investor as the other party in the pre–sales contract. Both types of "sale" regulated by Article 205-a are conducted contrary to the substantive laws and without just consideration of the rights of all parties concerned. Article 205-a of the EA does not provide the basis for fair treatment of the debtor in the enforcement proceedings, and it completely ignores the rights of other concerned parties that are not directly involved in the enforcement proceedings. The so called "sale" pushes enforcers to interfere in *inter partes* relations, which exceeds the boundaries of the authority they are afforded under the Enforcement Act.

Taking all things into consideration, we find that application of Article 205-a of the EA in enforcement proceedings will violate the rights of debtors because they will not get a fair appraisement of the value of the rights, they will be deprived of in the enforcement proceedings. As Article 205-a does not consider the rights of other concerned parties outside the enforcement proceedings, it is very likely that their rights will be violated as well.

The provisions in Article 205-a of the EA will also have a wider effect on the Macedonian property law system because they call for free trade with *future things* as if they were real. If this trend takes on in other legislative acts, it will gradually erode the nature of real rights. *Future things* would be freely traded and real right on future things would be transferred from one person onto another without any certainty that those rights will ever be actually exercised.

Ultimately, this will blur the difference between real rights and rights arising from obligations.

Both legal practitioners and legal scholars have voiced their opinion against the enforcement of Article 205-a of the Enforcement Proceedings Act. However, these opinions have fallen on deaf ears. So far, the pressures of the banks' lobby group have prevailed before the authorities, supported by argument that the banking system will crush if Article 205-a is not enforced, or the argument that banks financially supported the Government during the COVID crisis and that the compensation is now due. In our opinion, neither of the arguments presented by the banks' lobby group is valid to support implementing a legal regime on *future things* that could potentially disrupt the entire property law system. By pursuing this path and enforcing Article 205-a of the EA, the legislator is "taking a jump from a high cliff into shallow waters", which will not end well. Instead of giving in to the pressure coming from lobby groups, the legislator should focus on amending Article 205-a of the EA and offering a more viable solution that will not be contrary to the material/substantive laws and will not disrupt the property law relations already put in place.

5. Conclusion

The existing legal provisions in the Macedonian legal system envisage that *future things* are an object of real rights. In our opinion, *future things* (objects) cannot be treated as such. They are neither movable nor immovable things; in fact, they are not even things in the strict legal sense of the word. There are no real rights that can exist on *future things* as anything more than a mere aspiration. The concept of *future things* is a legal construct created to enable economic activity primarily in the real estate market. The construct has its benefits but it should be made clear, both in applicable legislation and in practice, that no one can actually acquire real rights on *future things*. What can be obtained is a priority in acquiring real rights if and when the *future thing* becomes real. Economic activity in the real estate market should not include free trade of *future things* as if they were real estate. Instead, it should reflect the true nature of these relations which does not go beyond being an obligation.

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BUDUĆA STVAR KAO PREDMET STVARNIH PRAVA

Rezime

Ovaj rad daje odgovor na pitanje da li treba prihvatiti koncept da buduća stvar može biti stvar u stvarnopravnom smislu reči, tj. da li može biti objekt stvarnih prava, da li može biti predmet realnog obezbeđenja, da li se može s njom raspolagati (pustiti je u promet), i na kraju da li buduća stvar može biti predmet izvršenja u izvršnom postupku. Analizapokazuje da je kriza prouzrokovana korona-virusom imala štetne posledice po zdravstvene sisteme evropskih zemalja koji su se našli u kolapsu, kao i po evropsku ekonomiju koja je pretrpela gubitke tokom pandemije.U tim uslovima, određene institucije u RS Makedoniji, kao što su banke, s jedne strane pružaju finansijsku pomoć državnim institucijama, a s druge strane traže pogodnosti koje, na žalost, dovode do urušavanja pravne prirode građansko-pravnih instituta. Ovakva dvoličnost zabrinjava teoretičare građanskopravne nauke koji u ovim vanrednim okolnostima apeluje na očuvanje stabilnosti građanskopravnih instituta, kako ne bi došlo do još većih problema u održanju stvarnopravnih sistema i njihovog urušavanja radi zadovoljenja pojedinačnih potreba.

Autorke ovog rada analiziraju određene građanskopravne odredbe u makedon- skom pravu koje se odnose na buduće stvari u svim sferama stvarno-pravnog sistema (vršenje stvarnih prava na budućoj stvari, realno obezbeđenje na budućoj stvari, promet buduće stvari, i prinudno izvršenje na budućoj stvari). Izvršena kritička analiza ima za cilj da pokaže da se koncept normativnog uređenja buduće stvari ne uklapa u njenu pravnu prirodu kao objekata stvarnih prava.

Ključne reči: *građansko pravo, stvarno pravo, buduća stvar.*

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THE LEGAL REGIME OF ELECTRONIC MEDIA IN THE LEGAL ORDER OF THE REPUBLIC OF SERBIA[**]

Abstract: *Different legal regimes of public information in the Republic of Serbia and the differences between the existing media have not been sufficiently analyzed in legal literature. From the positive law perspective, media differ by the legal regime of their structural organisation, activities and control, as well as by public information activities they perform. The media are subjects of a territorial community which have a duty to communicate their program content in an objective, impartial and truthful manner. Consequently, all media (both commercial and non-commercial ones) primarily serve general and public interests. The only difference is the content of public interest in individual media. In the order of a legal state (Rechtsstaat), the greatest impact is attributed to electronic media, especially television stations with state-wide (national) coverage as media aimed at accomplishing special goals in the field of public information. TV stations with national coverage primarily aim to accomplish general interests. They are bound by the special content of the public interest and, thus, they have a significantly wider scope of duties than other televisions. Unfortunately, the current circumstances in the field of public information in the Republic of Serbia prove otherwise.*

Keywords**:** *electronic media, televisions with national coverage, public service broadcasters, democratic society, culture promotion.*

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1. Introduction

The legal order of the Republic of Serbia comprises systemic and special laws. Systemic laws are basic (generic, organic) laws which regulate an area of the legal order in a teleologically comprehensive (integral) manner, while special laws cannot do the same. In the Serbian legal order, the Public Information and Media Act[1] is a systemic (basic) media law which regulates the area of public information in a teleologically comprehensive manner. In addition to this basic legislative act, the Serbian legal order encompasses several special legislative acts regulating the legal regime of specific types of media, such as the Electronic Media Act[2] and the Public Media Services Act,[3] They are special media laws, while the Public Information and Media Act is a general media law.

The Public Information and Media Act (the PIM Act) is a systemic (basic) law in the field of public information which regulates: (1) the positive law concept of the media; (2) the basic legal principles of public information; ands (3) the general legal regime (basic legal institutes) of public information as an area of the legal order. Special media laws must comply with the basic media law in terms of the fundamental legal principles and basic public information institutes, which is in compliance with the constitutional principle of the unitary legal order.[4] Legal principles, as teleological legal positions, express the basic legal ideas and guide legal awareness in the field of public information, defining the legal ground of legal norms as regulatory legal positions and the legal grounds for the activities of the media as subjects of the legal order. The legal norms contained in media

1 The Public Information and Media Act, *Official Gazette of the RS,* no. 83/2014, 58/2015 and 12/2016

2 The Electronic Media Act, *Official Gazette of RS*, no. 83/2014 and 6/2016.

3 The Public Media Services Act,*Official Gazette of RS,* no. 83/2014, 103/2015 and 108/2016.

4 From the positive law perspective, the doctrine on differentiation between systemic (generic, basic) and subject-specific laws derives from the Constitutional Court of the Republic of Serbia (hereinafter: the Constitutional Court) which specified its legal position on the unitary legal order as a constitutional principle in its Decision IU-z-231/2009 dated 22 July 2010 (*Official Gazette of RS*, no. 89/10) as follows: "Starting from the provisions of Article 4 (para. 1) of the Constitution which defines the principle of unitary legal order as one of the basic principles that the constitutional law system of the Republic of Serbia rests upon, the Constitutional Court points out that, even though the existing legal system does not differentiate between the so-called organic, general or basic laws that have stronger legal power that other "ordinary" subject-specific laws, which ultimately implies that the Constitutional Court is not authorized (under the provision of Article 167 of the Constitution) to assess the mutual compatibility of laws, the constitutional principle of the unitary legal order dictates that the basic principles and legal institutes envisaged in legislative acts which systemically regulate an area of social relations should be observed in subject-specific legislative acts as well, except if the systemic law explicitly prescribes the possibility of regulating such issues in a different manner." (Prica, 2018a: 103-126).

laws regulate the course, scope and reach of the legal regulation and activities of specific types of media, as well as the authorizations and legal obligations of the media as subjects of the legal order (Prica, 2018b: 135-180).

The PIM Act is the basic media law which guarantees the freedom of information and the existence of the public sphere as preconditions for a democratic society in the order of a legal state (*Rechtsstaat*, state of law). It protects media pluralism, the public nature of information on the media, the freedom of public criticism of public servants and political appointees, and prescribes the journalists' duty of care for the purpose of establishing unconditional validity of objective, impartial and truthful public information. Moreover, in terms of public information activities, this basic media law takes into account the interests and needs of specific vulnerable subjects in the territorial community, such as minors, people with disabilities and national minorities. The basic principles of public information should be supplemented by special legal guarantees within the scope of public information system, which are envisaged in the PIM Act, such as: the presumption of innocence, ban on hate speech, ban on public display of pornography, respect for personal dignity, privacy and private domain in general. Furthermore, the PIM Act defines the primary objectives in the field of public information which, along with the aforesaid principles of public information, represent the basic content of public interest, the starting point and foundation for building the edifice of public information.

As a systemic law, the Public Information and Media Act defines the concept of the media by enumerating the features that are included in or excluded from the positive law concept of the media. In the positive law sense, one of the essential features of the media is a set of media content conceptualized by the editorial staff, as a result of which the internal organizational structure of the media implies relations between media publishers/broadcasters, editors-in-chief, and journalists. Nevertheless, one should bear in mind that internal organizational structure is not identical for all media. Unlike the printed media and a vast majority of electronic media (where the internal organizational structure implies relations between media publishers, editors-in-chief and journalists), the republic and provincial media services (as electronic media) have their own managing bodies (the board of directors, the general manager, and the program council), which entails their special status. Additionally, the legal regime of supervision is not identical for all media. For instance, the Regulatory Authority for Electronic Media (RAEM) supervises the work of electronic media. However, in case of public media services, the RAEM supervision activities have been reduced to a minimum, and they have been completely excluded in case of printed media. From the perspective of the positive law, it means that the media are differentiated on the basis of the legal regime of their organizational

structure, activities and supervision, which ultimately define the type of media. Thus, the Public Information and Media Act is not only the basic but also the only legislative act applicable to printed media, which regulates all aspects of their operation. On the other hand, the legal regime pertaining to electronic media has been regulated by the Electronic Media Act, while the legal regime governing public media services (as electronic media) has been regulated by the Public Media Services Act. It has generated the need to establish several legal regimes governing the media and insist on the mutual legal correlation between the enacted media laws (the systemic and special legislative acts). In that context, it would be of crucial importance to determine the criteria for establishing the media legislation system by defining the relations between the systemic (basic) media law and special media laws.

In addition to defining the concept of the media and legal principles, the Public Information and Media Act regulates the general legal regime which applies to all media, including as follows: (1) the relationship between publishers, editors-in-chief, and journalists; (2) media register; (3) basic information about the media (imprint, short imprint, etc.); (4) distribution and storage of media content; (5) information retraction and information correction; (6) liability for damage, and (7) co-financing the projects in the field of public information.

All provisions of the Public Information and Media Act are directly applied to all media, while special laws may prescribe specific legal regimes for a particular type of media, provided that the specific legal regimes are in compliance with the provisions of the PIM Act. In the Republic of Serbia, the two special media legal regimes have been established for electronic media and public media services as a type of electronic media. The purpose of these special media legal regimes is to strengthen and expand the implementation of the general legal regime of public information. Consequently, it would be ideal to establish circular connection between the special legal regimes and the general legal regime by ensuring full compliance of all media laws in the media legislation system.

The Electronic Media Act regulates the establishment of electronic media, their status, scope of activities and supervision. The primary feature of the legal regime governing electronic media are extensive authorizations of the Regulatory Authority for Electronic Media (RAEM), which performs regulatory, supervisory and quasi-judicial tasks. The special legal regime envisaged in the Electronic Media Act should fully comply, in all aspects, with the general legal regime envisaged in the Public Information and Media Act. Depending on the scope of broadcasted media content, the electronic media can be classified into: a) media with national (state-wide) coverage, and b) regional (local, non-central) media. Television stations that broadcast TV programs on the entire territory of the country have a special legal status.

In a legal state, the greatest impact is attributed to electronic media, especially television stations with state-wide (national) coverage and the so-called public media services, as media which should accomplish special goals in the field of public information. In the Serbian legal system, the status and activities of public media services are regulated by the Public Media Services Act, which has the status of a special legislative act in relation to the Public Information and Media Act as the general legislative act. Moreover, considering that public media services are a type of electronic media, the Electronic Media Act is regarded as a hierarchically higher (general) legislative act in relation to the Public Media Services Act.

Television stations with state-wide (national) coverage primarily aim to accomplish general interests; they are bounded by the special content of the public interest and, thus, they have a significantly wider scope of duties than other televisions. Unfortunately, the current circumstances in the field of public information in the Republic of Serbia prove otherwise.

2. Legal Regime of Electronic Media

The media are subjects of territorial community which have a duty to inform the public in an objective, impartial and truthful manner. Given that public information is regarded as a common good, all media (both commercial and non-commercial ones) primarily serve general and public interests. All media are subject to public interest, but the content of public interest differs in some media. Therefore, the term "public media service" is quite meaningless, having in mind that all media are public services which are subject to the public law regime and public interest. No media can be excluded from the scope of public interest; only the content of public interest as a regulatory determinant can be different, depending on the type of media. Moreover, all media are public services because they perform activities which are crucial for the public interest. With this in mind, instead of using the phrase "public media service" which is obviously a result of uncritical borrowing of foreign terms, it would be more appropriate to use the terms "republic broadcasting service" and "provincial broadcasting service" (Prica, 2021a: 388-393).

In the organic sense, electronic media are providers of audio and audio-visual content. The entities that have the properties of providers of electronic media content (in the organic sense) are: 1) public service broadcasting institutions which act in compliance with the Public Media Services Act; 2) commercial providers of electronic media content; and 3) providers of electronic media content in the civil sector. In terms of their function, program content broadcasted via electronic media may be characterized as follows: (1) general media content

encompassing informational, educational, scientific, sports, entertainment (etc.) program content; (2) specialized media services which include program content of the same type (sports, cultural, music, educational, children, entertainment, etc.); and (3) commercial content, completely aimed at selling products via TV or self-promotion.

The legal regime governing electronic media is different from the legal regime governing printed media. It primarily refers to the fact that the status and activities of electronic media are regulated and supervised by the Regulatory Authority for Electronic Media (REAM), as an independent subject in institutional order of the Republic of Serbia. This body is also authorized to make decisions on issuing licenses and permissions for establishing electronic media, except for the electronic media which may be established without obtaining a license or permission. Here, we may observe the difference between the legal regime governing the registration of printed media and the legal regime governing the establishment of electronic media, which confirms the distinctiveness of the legal regime pertaining to electronic media.

The Regulatory Authority for Electronic Media (RAEM) is an independent organization. As such, it is not supervised by the Government or any state administration authority but the activities of such independent bodies may be controlled by the National Assembly and the courts. On the other hand, autonomous institutions and bodies are subject to the Government supervision. This shows the difference between independence and autonomy as two distinctive features of the legal status of the institutions and bodies in the legal order. Having in mind that these concepts are mutually exclusive and that a body cannot be both independent and autonomous at the same time, it is rather baffling that the Electronic Media Act defines the Regulatory Authority for Electronic Media as "an independent and autonomous organization". Therefore, the legal definition is contradictory (like oxymorons "cold fire" or "wooden iron"). This RAEM authorities are so extensive that we can freely say that that the Regulatory Authority for Electronic Media performs regulatory, supervisory and quasi-judicial tasks, which is a legal curiosity. This Regulatory Authority (RAEM) performs continuous supervision over the electronic media by controlling the operations of electronic media content providers in terms of consistent application and development of the principles governing the relations in the field of electronic media, as well as in terms of meeting the requirements for providing media content, fulfilling the obligations of media content providers envisaged in the Electronic Media Act and by-laws, and taking the prescribed measures without delay. In particular, the Regulatory Authority (RAEM) is obliged to ensure that media content providers comply with the obligations referring to program contents envisaged in the Electronic Media Act and conditions under which the license

for their operation has been issued, especially in terms of type and nature of the program. Moreover, the Regulatory Authority for Electronic Media has the authority to initiate action and exercise meritory control.

In a legal state, different legal goods and legal interests are dynamic expressions of legal goods (Prica, 2019: 597-639). In a legal order, individual goods (freedom, private property, human dignity, etc.) which belong to humans/citizens as subjects of the legal order are the properties of legal goods. Moreover, the common goods (of the state as a territorial community) are also the properties of legal goods. Legal interests are dynamical expressions of legal goods in the legal order. For example, public health is a common good clause, and preventing the spread of the COVID-19 pandemic is an example of a common interest as a expression of a dynamic interest of common goods. On the other hand, an individual's health is an example of an individual legal good, while the individual's need to protect personal health information and prevent the disclosure of such data to third parties is an example of a private interest as a dynamic expression of an individual legal good in the legal order of a state of law. Therefore, the order of a legal state encompasses common interests as dynamic expressions of common goods and private interests as dynamic expressions of legal goods of an individual as the subject of the legal order. Common and private interests are substantial categories in the order of a legal state.

Unlike common and private interest as substantial categories, public interest is a relational category. Public interest is a regulatory determinant in the order of a legal state, resulting from the need to legally regulate the relations between different legal goods and interests. In the order of a legal state, public interest encompasses both common and private interests. It is important to emphasize that a public interest is not equivalent to a common interest; thus, a public interest cannot be equaled with a common interest. In the above example referring to public health and individual's health condition, public interest in obtaining public information would imply establishing a balance between the right of all to be informed about COVID-19 and the right of an individual to prevent the disclosure of his/her personal health information to third parties.

Freedom of the media also has the character of a legal good in the order of legal state. It is anchored between general and private interests, common goods and individual legal goods, the interventionism of state authorities and the autonomy of civil society, and the institutional order of public authority and the institutional order of the territorial community. Media law is defined as a system which comprises teleological, systemic and regulatory legal positions. Public information is based on the public interest as a regulatory, ethical and democratic determinant; hence, it means that media activities are based on written law as

a regulatory determinant, the public as a democratic determinant, and virtues as an ethical determinant of public interest.[5]

The presence of various legal regimes governing specific media is the result of the fact that there are different goals which have to be achieved within the public information system as an area of the legal order. Consequently, legal regimes which have been regulated by special media laws reflect the specificity of the content of public interest in specific types of the media. The basic content of the public interest within public information has been determined in the systemic (basic) media law, on the basis of which the legislator may develop special legal regimes of public information regulating the activities of specific media. In this context, one of the most prominent examples refers to public broadcasting services and televisions with national (state-wide) coverage as electronic media with particular duties within the public information system. The core public interest in the area of public information is stipulated in Articles 15 and 16 of the Public Information and Media Act, which was the starting point for determining the content of public interest which would be applied to televisions with national coverage and public broadcasting services in line with the special legislation.

Televisions with state-wide (national) coverage are subject to the legal regime regulated by the Electronic Media Act on and the Rulebook on Minimum Requirements for providing media services and Decision-making Criteria in the process for issuing a license for providing media services based on public competition (2016).[6] In terms of program requirements, the Rulebook establishes the minimum requirements that should be met by a television aspiring to obtain the status of the media with national coverage. These requirements entail the obligation to broadcast the following contents: 1) information program; 2) scientific-educational program; 3) cultural-artistic program; 4) documentary program; 5) children and teenage programs (Article 11 of the Rulebook). Televisions with national coverage are bounded by the special content of the public interest; thus, they have broader obligations than other televisions, except for

5 Today, the primary issue is not how to safeguard the freedom of the media from state interference but how to ensure that the media serve to uphold and develop the state governed by the rule of law. "Nowadays, the traditional meaning of freedom of the press, which is limited to protecting the press from the state abuse of power, is no longer sufficient. According to the traditional conception, as noted by Maurice Duverger, freedom of the press resembles freedom in the jungle: all animals are protected from being hunted (by the state) but who will protect small and medium-size animals from tigers or elephants (financially powerful individuals)? The press is not free if it is protected only from the state but not from the impact of financial tycoons." (Marković, 2020: 480).

6 Rulebook on Minimum Requirements for providing media services and Decision-making Criteria in the process of issuing a license for providing media services based on public competition, *Official Gazette of the RS,* no. 46/2016.

public media services with the highest obligations in the field of public information. By performing their primary activities, televisions with national coverage should ensure the attainment of special interests in the area of public information and provide general and comprehensive media services including informative, educational, cultural and entertainment contents for all audiences.

In view of the foregoing, the essence of subject-specific legal regimes is to strengthen and enhance the implementation of general legal regime of public information, whereby it would be ideal to establish circular connection between the special legal regimes and the general legal regime by ensuring full mutual compliance of all media laws in the media legislation system.

The public media service is an independent legal entity which, by performing its primary business activity, enables the achievement of special interests in the field of public information and provides general and comprehensive media services which include informative, educational, cultural and entertainment content intended for all sections of society. In terms of their legal status, public media services differ from other electronic media because they have the status of a legal entity and the status of the holder of public authorities. Unlike public media services, other electronic media have neither the status of a legal entity nor the status of a public authority holder. Namely, the status of a public authority holder is granted to the subjects of the territorial community that perform the activities of substantial public interest, which is the primary reason for entrusting such subjects with specific prerogatives of public governance. Given the fact that these subjects are not public governance holders, they are called "public authority holders" (as the term "public authorities" seems to be more suitable for denoting public governance prerogatives). Thus, the legislator distinguished between the public governance authorities and territorial community subjects that are not public governance holders, which is absolutely correct if one takes into consideration that performing the activities of substantial public interest is not equivalent to performing public governance activities. In the domestic literature, it has not be acknowledged that public media services have the status of public authority holders, which is the result of a rather confusing standpoint on the difference between the state and non-state administration. Therefore, in area of public information, the status of public authority holders is granted to the Regulatory Authority for Electronic Media and public media services; other electronic media and printed media are not public authority holders. Moreover, the organizational structure of public media services is quite different from other electronic media, primarily due to the fact that public media services have internal bodies that other electronic media do not have. Above all, public media services differ from other electronic media in terms of the degree of public participation in constituting their organizational structure and implementation

of public media service activities. In this context, the Public Media Services Act envisages the accountability of the public media service broadcasters to the general public for the activities they perform. (Prica, 2021a: 388-408).

The primary activity of public media services aims to accomplish specific interests in the field of public information through the producing, purchasing, processing and broadcasting radio, television and multimedia content, including informative, scientific-educational, cultural-artistic, children, entertainment, sports, religious and other programs which are of public interest for the citizens and territorial community subjects. The objectives of the public media service activities go way beyond the scope of activities of other electronic media.[7] Thus, it may be said that that public media services are a comprehensive embodiment of the public interest in the area of public information. Televisions with national coverage and public media services perform commercial activities as well, but such activities should be a subsidiary element of the content of the public interest within the public information activity performed by these media.

Speaking of televisions with national coverage, the current situation in the Republic of Serbia is rather unfortunate, having in mind that none of the four commercial televisions with state-wide (national) coverage (Pink, O2, Happy, and Prva) broadcasts all five mandatory television genres (informative, scientific-educational, documentary, cultural-artistic and children's programs), which are stipulated in the Rulebook. Information on the increase of reality programs in the structure of media content of the televisions with national coverage can be the best indicator of unfortunate media circumstances in Serbia. For instance, during 2018 and 2019, the share of informative and reality programs broadcasted on Pink and Happy was 65.97% and 74.86% respectively. The increase of informative and reality programs has caused irreparable damage to culture and art. Moreover, in the period from 2012 to 2020, the presence of documentary, scientific-educational and children programs on televisions with national coverage was at the level of a statistical error (from 0,03 to 0,54%),

7 Some of the objectives envisaged in the Public Media Services Act are as follows: 1) developing media literacy of the population; 2) production of domestic documentary program and TV series; 3) providing timely information to the public about current worldwide events, as well as about scientific, cultural and other civilization achievements; 4) promoting general education, health education and environmental education; 5) developing culture and artistic creation; 6) nurturing humane, ethical, artistic and creative values; 7) satisfying citizens' entertainment, recreational, sports and other needs; 8) informing the citizens abroad and members of the Serbian diaspora living outside the territory of the Republic of Serbia; 9) presenting cultural heritage and artistic creation both at home and abroad, and 10) informing the foreign public about the events and circumstances in the Republic of Serbia (Article 7 of the Public Media services Act).

while cultural-artistic program on Pink TV has been covered by zero minutes since 2013 (Prica, 2021a : 381-384).

3. Institutional Imbalance between Electronic Media and Other Public Information Subjects

The Public Information and Media Act (PIM Act) does not regulate the relationship between the provisions of the PIM Act and the provisions of other media laws, which is a major drawback in terms of the media legislation system. As the basic legislative acts, the PIM Act should contain the legal grounds for adopting special media laws, but its provisions should also clearly define the limits and range of legal regimes which would be established by a special law.[8] Furthermore, in the part regulating the general media regime and legal institutes envisaged in this Act, the PIM Act should regulate the possibility of divergence from its own provisions (i.e. explicit referral to provisions of other media laws). The essence of the systemic law is to shape the possibility of developing the legal regimes within the legal order, not only to use it as a general legislative act which is applied to issues that have not been regulated in the special law.

The Electronic Media Act does not appropriately regulate the relation between its own provisions and the provisions of the basic media law (PIM Act),[9] nor does it regulate the relations between its own provisions and the provisions of the Public Media Services Act. In turn, the Public Media Services Act refers to the concurrent application of the PIM Act and the Electronic Media Act (!) when it comes to matters which have not been regulated this Act, but it provides no further clarification or explanation.[10] The concurrent application of the two media laws is neither correct nor possible. In terms of public media services, it

8 The only provision of the PIM Act that refers to relations with other laws is Article 67 of the PIM Act, which envisages the application of the Criminal Procedure Code, regarding the ban on distribution of media content.

9 Article 3 of the Electronic Media Act: "Provisions of this Act shall be interpreted in terms of promoting the values of a democratic society, in accordance with the principles of the Constitution of the Republic of Serbia, laws regulating the field of public information and applicable international standards in the field of human and minority rights, as well as practices of international institutions which supervise their implementation." Instead of this formulation, it would be appropriate to envisage the primacy and direct application of the Public Information and Media Act for all issues that have not been regulated by the Electronic Media Act, especially having in mind that the Electronic Media Act explicitly refers to some other laws (Article 2 of the Broadcasting Act, Article 41 of the General Administrative Procedure Act, and Article 42 of the Administrative Disputes Act).

10 Article 52 of the Public Media Services Act states: "The provisions of this Act that regulates the field of public information and electronic media shall apply to all issues pertaining to public media services which have not been regulated by the Public Media Services Act."

would be legally appropriate to envisage the subsidiary application of the basic media law (PIM Act) and the analogous application of the Electronic Media Act. In view of the aforesaid and considering that the PIM Act does not regulate the relations between its own provisions and provisions of other media laws, it cannot be said that the legal order of the Republic of Serbia has a comprehensive media legislation system. This conclusion may be supported by the fact that media laws do not clearly define the relations between various subjects in the area of public information, which particularly refers to the relations between the National Assembly, the Ministry in charge of public information, the Regulatory Authority for Electronic Media, and public media services.[11]

First of all, electronic media activities cannot be the subject matter of control of the competent Ministry and the Government, as they do not have jurisdiction in this area. However, electronic media are subject to substantial supervision and control by the Regulatory Authority for Electronic Media (hereinafter: the RAEM). Bearing in mind that the RAEM has the status of an independent subject (entity), the institutions that can supervise its work are the National Assembly and competent courts (in terms of legal acts and actions). Moreover, unlike other electronic media, public media services are not subject to extensive RAEM control.[12] The Regulatory Authority (RAEM) does not have the authority to participate in the decision-making process for obtaining the status of a public

11 The relationship between a general (basic) law and a subject-specific law may be regulated through the regime of legal subordination and the regime of legal referral, which is the cornerstone for the differentiation between the subsidiary and the analogous application of the general law. Considering that this issue has not been previously elaborated in great detail in legal literature, there in no common perception in Serbian legislation and among practitioners concerning the distinction between the subsidiary and the analogous application of the general law.
From the author's standpoint, the analogous application is not the same as the subsidiary application of the general law. The subsidiary application implies the application of the general law as a whole for all issues which have not been regulated by a subject-specific law. Analogous application implies the application of the general law in concordance with the nature of the relations between the legal regime and the subject matter (substance) of legal regulation (Prica, 2021b: 97-116). Having this in mind, the basic media law should epitomize the difference between the subsidiary and the analogous application of its provisions in relation to subject-specific media laws.

12 Regardless of the fact that it is quite natural that public media services are not controlled by the Regulatory Authority for Electronic Media (REAM), the REAM authorities over public media services are exercised in the area of constituting the managing boards of public media services, which results in instituting an inseparable link between public media services and the REAM. Accordingly, Article 28 of the Electronic Media Act envisages restricted control authorities of the REAM in terms of public media services. These authorities are considered to be unreasonable and inapplicable, considering the fact it is a relationship between two independent subjects.

media service . It is due to the fact that public media services are independent subjects (legal entities) which are subject to control of the National Assembly, just like the Regulatory Authority for Electronic Media. This means that both public media services and the REAM have the status of independent public authority holders. Ultimately, it means that independent entities are not controlled by other public governance bodies but are subject to control by the National Assembly and competent courts.[13] However, the control (supervision) authorities of the National Assembly have not been explicitly stipulated, which makes this form of control practically nonexistent, just like a footprint in the sand which may be washed away by a random wave, whereby the arbitrary actions of the Regulatory Authority do not make allowances for laying down the foundations of building the edifice of enlightened public information in the Republic of Serbia. Furthermore, it should be emphasized that the relations between the Ministry in charge of public information affairs, the Regulatory Authority (REAM) and public media service broadcasters have not been comprehensively regulated either, which may be observed in the supervision of the implementation of media laws. Namely, the Ministry in charge of public information affairs supervises the implementation of the provisions of the Public Information and Media Act and the Public Media Services Act, but it does not supervise the implementation of the Electronic Media Act.

The only appropriate solution would be to regulate the control authorities and mutual relations between the National Assembly, the Regulatory Authority (REAM), public media service broadcasters, and the competent Ministry by amending the provisions of the Public Information and Media Act, and to envisage that the (generic) provisions of the basic PIM Act shall be further specified in the special media laws. Additionally, the author considers that there is an institutional imbalance between independent public information subjects in the field of public information. Bearing in mind that the National Assembly's control over the actions of independent bodies has not obtained its clear legal form, appointing a commissioner for public information would be an adequate step towards establishing institutional balance in the field of public information. The National Assembly would elect the commissioner from the rank of reputable media professionals. The commissioner would be tasked to monitor the operations of all media and other public information subjects. The commissioner would not have the authority to directly interfere with media work but his/her monitoring activities of the media, the REAM and other public information

13 Article 6 of the Public Media Services Act envisages that RTV Serbia and RTV Vojvodina shall submit an annual Report on Activities and Business Operations for the previous year, and the report of an independent authorized auditor, to the National Assembly for consideration and decision-making, as well as to the Regulatory Authority (RAEM) for informative purposes.

subjects would enable the commissioner to inform the territorial community subjects about her/his observations, and to send proposals to the National Assembly for improving the work of public information subjects. The activities of the commissioner for public information would eliminate the arbitrariness of the Regulatory Authority for Electronic Media, establish institutional balance and significantly contribute to the development of the control function of the National Assembly, all of which are the necessary preconditions for establishing media law as a system of teleological, systemic and regulatory legal positions which are based on mutual compliance and consistency of media laws.

4. Conclusion

The presence of various legal regimes governing specific media stems from the different goals which are to be accomplished within the public information system as an area of the legal order. Consequently, legal regimes defined by special media laws reflect the specific content of public interest pertaining to specific types of media. The basic content of public interest within the framework of public information has been regulated by the Public Information and Media Act, as the basic media law in this area. Based on the essential content of the public interest envisaged in this Act, the legislator may enact subject-specific legal regimes of public information pertaining to the activities of specific types of media.

The media are territorial community subjects (legal entities) which are obliged to inform the public and communicate their program contents in an objective, impartial and truthful manner. Considering that public information is regarded as a common good, all media (including the commercial ones) are primarily aimed at accomplishing the common and public interests; the only difference may be the content of public interest differs in some media. In the legal order of a state of law (*Rechtsstaat)*, the greatest impact is attributed to electronic media, especially televisions with state-wide (national) coverage and the so-called public media services as media which have to accomplish special goals in the field of public information. Televisions with national coverage and public media services which are primarily aimed at accomplishing general interests are bounded by the special content of the public interest and, thus, have more substantial duties than other televisions. Unfortunately, the current circumstances in the field of public information in the Republic of Serbia provide quite a different picture.

The Electronic Media Act does not appropriately regulate the relations between its own provisions and provisions of the Public Information and Media Act as the basis legislative act in this area. Moreover, it does not regulate the relations between its own provisions and provisions of the Public Media Services Act . In

turn, the Public Media Services Act refers to concurrent application of the fundamental media law and the Electronic Media Act (!) in cases where the matter have not been regulated in its own provisions. After all, considering the fact that the Public Information and Media Act does not regulate the relations between its own provisions and provisions of other media laws, it may not be concluded that the legal order of the Republic of Serbia has a comprehensive media legislation system. This conclusion may be supported by the fact that media laws do not clearly define the relations between various subjects in the field of public information, particularly the relations between the National Assembly, Ministry in charge of public information, the Regulatory Authority for Electronic Media and public media services.

The only adequate solution would be to regulate the control authorities and mutual relations between the National Assembly, the competent Ministry, the Regulatory Authority for Electronic Media and public media service broadcasters by amending the provisions of the Public Information and Media Act, and to envisage that the (generic) provisions of the basic PIM Act shall be further specified in the special media laws. Additionally, the author of the paper considers that there is an institutional imbalance between independent public information subjects in the field of public information. Bearing in mind that the National Assembly's control over the actions of independent bodies has not obtained its clear legal form, appointing a commissioner for public information would be an adequate step towards establishing institutional balance in the field of public information. The National Assembly would elect the commissioner from the ranks of reputable media professionals. The commissioner would be tasked to monitor the operations of all media and other public information subjects. The commissioner would not have the authority to directly interfere with media work but his/her monitoring activities of the media, Regulatory Authority of Electronic Media and other public information subjects would enable the commissioner to inform the territorial community subjects about her/his observations, and to send proposals to the National Assembly for improving the work of public information subjects. The activities of the commissioner for public information would eliminate the arbitrariness of the Regulatory Authority of Electronic Media, establish institutional balance and significantly contribute to the development of control function of the National Assembly, all of which are the necessary preconditions for establishing media law as a system of teleological, systemic and regulatory legal positions which are based mutual compliance and consistency of media laws.

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PRAVNI REŽIM ELEKTRONSKIH MEDIJA UPRAVNOM PORETKU REPUBLIKE SRBIJE

Rezime

U literaturi nisu analizovani različiti pravni režimi javnog informi- sanja u Republici Srbiji, a nisu razmatrane ni razlike između postojećih medija. Mediji se u pozitivnopravnom značenju razlikuju prema pravnom režimu ustrojstva, delatnosti i kontrole, a razlikuju se i prema osnovu delatnosti javnog informisanja koju obavljaju. Mediji su subjekti teritorijalne zajednice sa dužnošću objektivnog, nepristrasnog i istinitog saopštavanja programskih sadržaja, sledstveno čemu svi mediji, uključujući i komercijalne, prevashodno služe ostvarivanju opštih i javnih interesa, samo se sadržina javnog interesa razlikuje kod pojedinih medija. Najveći uticaj u poretku pravne države imaju elektronski mediji, a među elektronskim medijima izdvajaju se televizije sa celodržavnom (nacionalnom) pokrivenošću, kao mediji koji bi trebalo da ostvarujuposebne ciljeve u oblasti javnog informisanja. Televizije sa celodržavnom pokrivenošću prevashodno služe ostvarivanju opštih interesa, vezane suposebnom sadržinom javnog interesa i stoga imaju znatno veće dužnosti od drugih televizija, što nažalost ne odgovara postojećim prilikama u oblasti javnog informisanja u Republici Srbiji.

Ključne reči: *elektronski mediji, televizije sa celodržavnom pokrive- nošću, medijski servisi, demokratsko društvo, unapređivanje kulture.*

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PRAVNA SREDSTVA PRODAVCA ZA SLUČAJ KUPČEVE POVREDE UGOVORA O MEĐUNARODNOJ PRODAJI ROBE[**]

Apstrakt**:** *Rad se bavi analizom pravnih sredstava koja stoje na raspolaganju prodavcu usled povrede ugovora o međunarodnoj prodaji robe od strane kupca. Predmet istraživanja su odgovarajuće odredbe Konvencije Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe iz 1980. godine. Cilj istraživanja je da se obezbedi sistematičan icelovit prikaz navedene teme, u okvirima koje zadaje obim jednog rada. Ova tema, inače, pripada široj oblasti u okviru prava međunarodne prodaje, a koja uređuje pravna sredstva ugovornih strana usled povrede ugovora o međunarodnoj prodaji robe. Metod istraživanja se sastoji u analizi odredaba pomenute Konvencije, odgovarajuće i dostupne sudske i arbitražne prakse, kao i stavova domaćih i inostranih autora. U pravna sredstva kojima raspolaže prodavac usled povrede ugovora o međunarodnoj prodaji robe od strane kupca spadaju: a) pravo prodavca da traži izvršenje obaveze od kupca; b) pravo prodavca da kupcu dodeli dodatni rok za izvršenje obaveze; v) pravo prodavca da raskine ugovor i g) pravo prodavca da izvrši specifikaciju robeumesto kupca.*

Ključne reči*: pravo međunarodne prodaje robe, Bečka konvencija, povreda ugovora, pravna sredstva prodavca.*

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[**] Rad je izložen na naučnoj konferenciji „Tikveški pravnički denovi – pravoto i pravnata sigurnost“ koja je održana u organizaciji Instituta za pravno-ekonomsko istraživanje i edukaciju Iuridica prima, od 14. do 16. oktobra 2022. godine u Negotinu (Severna Makedonija).

1. Uvodne napomene

Pravna sredstva kojima prodavac raspolaže u slučaju povrede ugovora o međunarodnoj prodaji robe od strane kupca pretežno su razvrstana u članovima 61–65 Konvencije Ujedinjenih nacija o ugovorima o međunarodnoj prodaji robe[1] (dalje i: Bečka konvencija, Konvencija). Član61 ima uvodni karakter i daje opšti katalog pravnih sredstava kojima se prodavac može služiti usled kupčeve povrede ugovora. Tekst ove odredbe glasi:

„(1) Ako kupac ne izvrši bilo koju od svojih obaveza koju ima na osnovu ugovora ili ove konvencije, prodavac može:

(a) koristiti prava predviđena u članovima 62 do 65;

(b) zahtevati naknadu štete predviđenu u članovima 74 do 77.

(2) Prodavac ne gubi pravo da zahteva naknadu štete time što koristi svoja prava u pogledu drugih sredstava.

(3) Kad se prodavac koristi sredstvom koje je predviđeno za povredu ugovora, sud ili arbitraža ne može odobriti kupcu produženje roka."

Članovi 62–65 Konvencije razrađuju ponaosob pravna sredstva prodavca usled kupčeve povrede ugovora. Tu spadaju: a) pravo prodavca da traži izvršenje obaveze od kupca (razrađeno u članu 62); b) pravo prodavca da kupcu dodeli dodatni rok za izvršenje obaveze (razrađeno u članu 63); v) pravo prodavca da raskine ugovor (razrađeno u članu 64) i g) pravo prodavca da izvrši specifikaciju robe umesto kupca (razrađeno u članu 65).

Većina odredbi koje uređuju pravna sredstva prodavaca za slučaj kupčeve povrede ugovora se po svojoj sadržini poklapaju sa korespodentnim odredbama Konvencije koje uređuju pravna sredstva kupca usled prodavčeve povrede ugovora. Naime, uvodni član 61 je pretežno paralelan sa članom 45, koji predstavlja uvodnu odredbu za pravna sredstva kupca. Pravna sredstva prodavca koja su predviđena članom 62 korespondiraju sa sredstvima kupca iz člana 46 (pravo da se traži izvršenje obaveze). Član 63 analogan je sa članom 47 (pravo na dodeljivanje dodatnog roka za izvršenje obaveze). Na kraju, „prodavčev" član 64 odgovara „kupčevom" članu 49 (pravo da se raskine ugovor).

1 Konvencija je doneta 11. aprila 1980. godine u Beču, a stupila je na snagu 1. januara 1988. godine. Konvenciju su do sada ratifikovale 94 države. Socjalistička Federativna Republika Jugoslavija ratifikovala je Konvenciju 1984. godine („Službeni list SFRJ – Međunarodni ugovori", br. 10-1/84). Rebulika Srbija primenjuje Konvenciju, kao jedan od pravnih sledbenika SFRJ.

Član 61 Konvencije, koji, kao što je navedeno, predstavlja uvodnu i opštu odredbu, izričito (u stavu 2) priznaje pravo prodavcu na nadoknadu štete, bez obzira na pravna sredstva koja su mu omogućena članovima 62–65 Konvencije. Naime, odredba (1)(a) člana 61 koja upućuje prodavca na pravna sredstva koja su predviđena članovima 62–65 Konvencije, i odredba (1)(b), koja priznaje prodavcu pravo na nadonadu štete, nisu postavljene kao odredbe koje se međusobno isključuju. Prodavac će uvek moći da traži nadoknadu štete, ukoliko je ona nastala, i to u skladu sa članovima 74–77 Konvencije, bez obzira da li se istovremeno koristi nekim sredstvom koje je predviđeno u članovima 62–65.[2] Odredba koja priznaje pravo prodavcu na nadoknadu štete je naročito od značaja kada se prodavac koristi pravom na raskid ugovora.[3]

Iako je pitanje nadoknade štete neraskidivo vezano za temu pravnih sredstava usled povrede ugovora, ono predstavlja kompleksnu i zasebnu oblast. U prilog takvoj tvrdnji govori i okolnost da su redaktori Bečke konvencije pitanje nadoknade štete razradili u posebnom odeljku Konvencije (članovima 74–77), a ne zajedno sa ostalim pravnim sredstvima (u slučaju prodavca to su pomenuti članovi 62–65). Zbog toga se ovaj rad ne bavi temom nadoknade štete, koja zbog svoje kompleksnosti zaslužuje samostalnu obradu u okviru zasebnog rada.

Na osnovu člana 61(1) Konvencije, prodavac može koristiti pravna sredstva predviđena članovima 62–65 Konvencije, i/ili zahtevati nadoknadu štete ako kupac ne izvrši bilo koju od svojih obaveza koje ima na osnovu ugovora ili same Konvencije (uključujući i relevantne običaje i uspostavljenu praksu između ugovornih strana[4]). S tim u vezi, ukoliko kupac povredi neku obavezu koja nije predviđena Konvencijom, već su je ugovorne strane uspostavile na osnovu autonomije volje, prodavac će moći da se koristi odredbama na koje upućuje član 61 Konvencije.

2 Presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Transport of spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261).

3 Videti, na primer, odluku Kineske međunarodne ekonomske i trgovinske arbitražne komisije u predmetu *Styrene monomer*, br. CISG/2002/03 od 4. februara 2002. godine (CLOUT case No. 986) i presudu Okružnog suda u Sanu (Švajcarska) u predmetu *Transport of spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261).

4 Na osnovu člana 9 Konvencije koji glasi:
„(1) Strane su vezane običajima sa kojima su se složile, kao i praksom uspostavljenom među njima.
(2) Ako nije drukčije dogovoreno, smatra se da su strane prećutno podvrgle svoj ugovor ili njegovo zaključenje običaju koji im je bio poznat ili morao biti poznat i koji je široko poznat u međunarodnoj trgovini i redovno ga poštuju ugovorne strane u ugovorima iste vrste u odnosnoj struci."

Eventualna rešenja nacionalnog prava kojima se uređuje pravo prodavca usled povrede tako uspostavljenih obaveza neće se primeniti.[5]

Prodavac će moći da se koristi sredstvima koja su navedena u članu 61 Konvencije ukoliko *smatra* da je kupac povredio svoju obavezu. Nije neophodno da prodavac, u odgovarajućem sudskom ili arbitražnom postupku, dokaže da kupac nije izvršio svoju obavezu.[6] Ukoliko pak kupac smatra da se prodavac neosnovano koristi sredstvima iz člana 61, može protiv njega upotrebiti sredstva iz člana 45 (koja mu stoje na raspolaganju usled prodavčeve povrede ugovora), ili pokrenuti protiv prodavca postupak pred sudom ili abitražom.

Odredbe predviđene u članovima 62–65 nisu jedine u tekstu Konvencije koje uređuju sredstva kojima raspolaže prodavac u slučaju kupčeve povrede ugovora. Kao i kod kupca (slučaj sa članovima 46–52), ove odredbe razrađuju principijalna sredstva kojima se prodavac može koristiti. Konvencija u i svojim ostalim normama takođe uređuje sredstva kojima prodavac i kupac raspolažu u slučaju povrede ugovora (već su pomenuti članovi 74–77 koji uređuju pravo na nadoknadu štete). Tu spadaju i članovi 71–73 (pravna sredstva usled anticipativne povrede ugovora i povrede ugovora sa uzastopnim isporukama), član 78 (koji uređuje pravo ugovornih strana na kamatu), kao i član 88 (pravo na prodaju robe iz samopomoći). U širem smislu, katalogu odredbi koje uređuju pravo prodavaca usled kupčeve povrede ugovora bi se mogle pridodati i stavovi (1) i (2) člana 58 koje omogućavaju prodavcu da uslovi predaju robe ili dokumenata plaćanjem cene.

Na osnovu člana 61(3) Konvencije, kad se prodavac koristi sredstvom koje je predviđeno za povredu ugovora, sud ili arbitraža ne može odobriti kupcu produženje roka za izvršenje obaveze, uključujući i rok za plaćanje cene. Razlog za ovakvo rešenje (isto je predviđeno i članom 45 u odnosu na kupca), leži u prevenciji nacionalnih sudova da, primenjujući domaće

5 Presuda Apelacionog suda u Grenoblu u predmetu *S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export* od 22. februara 1995. godine (CLOUT case No. 154); presuda Privrednog suda Kantona Argau u Švajcarskoj u predmetu *Cutlery* br. OR.96.00013 od 26. septembra 1997. godine (CLOUT case No. 217); presuda Višeg regionalnog suda u Kelnu u predmetu *Tannery machines*, br. 27 U 58/96 od 08. januara 1997. godine (CLOUT case No. 311); presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Transport of spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261); presuda Vrhovnog suda u Kvinslednu (Australija) u predmetu *Downs Investments in liq. v. Perwaja Steel* od 17. novembra 2000. godine (CLOUT case No. 631).

6 Presuda Višeg regionalnog suda u Koblencu u predmetu *Computer equipment*, br. 2 U 1230/91 od 17. septembra 1993. godine (CLOUT case No. 281).

pravo, produžavaju rok za izvršenje obaveze i na taj način deluju u suprotnosti sa potrebama međunarodne trgovine (Uncitral Digest, 2016: 284). U redovnim okolnostima, jedino je prodavac taj koji je ovlašćen da kupcu dodeljuje dodatni rok za izvršenje obaveze.

U nastavku rada sledi detaljnija analiza pravnih sredstava koja prodavcu stoje na raspolaganju usled kupčeve povrede ugovora, a koja su razvrstana u članovima 62–65 Konvencije, putem istraživanja dostupne i relevantne sudske i arbitražne prakse, kao i stavova u domaćoj i stranoj literaturi.

2. Pravo prodavca da od kupca traži izvršenje obaveze

Prodavac, najpre, ukoliko kupac ne izvrši svoju obavezu, može od njega zahtevati izvršenje te obaveze. Ovo sredstvo je predviđeno članom 62 Konvencije koji glasi:

„*Prodavac može zahtevati od kupca da plati cenu, preuzme isporuku ili da izvrši druge svoje obaveze, ako se prodavac ne opredeli za sredstvo koje je suprotno takvim zahtevima*."

Član 62 Konvencije podudara se članom 46, koji isto pravo omogućava kupcu, usled prodavčeve povrede ugovora. Pravo poverioca da od dužnika zahteva izvršenje obaveze je opštepriznato u civilnim pravnim sistemima, dok anglosaksonsko pravo dopušta ovo sredstvo u izuzetnim situacijama (Uncitral Digest, 2016: 287). Bečka konvencija po ovom pitanju sledi načelo civilnih pravnih sistema i ostavlja široku mogućnost ugovornim stranama da od druge ugovorne strane zahtevaju izvršenje obaveze: naime, odredbe Konvencije ne postavljaju bilo kakve specifične uslove pod kojima se ovakav zahtev može upotrebiti. Nije neophodno ni da predmet ugovora bude specifična ili unikatna roba, niti da je u ugovoru izričito predviđeno da dužnik lično mora izvršiti neku svoju obavezu (Jianming, 1996: 262).

Prodavac, dakle, može od kupca zahtevati izvršenje njegovih obaveza ukoliko kupac sam to ne učini. Uslov je da kupac izvrši povredu ugovora, i to neizvršenjem bilo koje obaveze koja proizlazi iz ugovora ili Konvencije (uključujući i relevantne običaje i praksu u skladu sa članom 9 Konvencije[7]). Pritom, nije od značaja o kakvom se stepenu povrede radi, odnosno, da li je povreda bitna ili nije.

Na osnovu Konvencije, osnovne obaveze kupca su da: a) isplati cenu i b) preuzme isporuku robe onako kako je predviđeno ugovorom i Konvencijom

7 Videti fusnotu 6.

(član 53). Na ove obaveze izričito ukazuje član 62 Konvencije, s tim da istovremeno predviđa da prodavac može od kupca tražiti izvršenje drugih obaveza. U praksi prodavac najčešće zahteva od kupca isplatu cene za isporučenu robu, i kod takvih slučajeva nema naročitih problema prilikom usvajanja zahteva od strane suda (Bortolotti, 2006: 337; Unci- tral Digest, 2016: 287). Prodavac od kupca može zahtevati i izvršenje ostalih obaveza, poput preuzimanja isporuke. Sudska i arbitražna praksa, međutim, svedoči da su veoma retki slučajevi da prodavac od kupca zahteva izvršenje obaveze preuzimanje isporuke robe.[8] Za razliku od situacije kada prodavac zahteva od kupca isplatu cene, realizacija zahteva za preuzimanje isporuke pred sudovima može naići na probleme (Chengwei, 2003: 46). Pitanje je da li bi sudovi nastojali da obavezuju tuženog kupca da preuzme isporuku robe kada on to ne želi. U situaciji kada kupac čini povredu ugovora tako što ne preuzima isporuku robe, prodavac se najčešće odlučuje za druga sredstva, poput raskida ugovora i nadoknade štete (Bortolotti, 2006: 337; Uncitral Digest, 2016: 287).

Pravo prodavca da od kupca zahteva izvršenje obaveze podložno je ograničenjima. Prvo ograničenje je predviđeno samim članom 62. Prodavac ne može tražiti od kupca izvršenje obaveze ukoliko se opredeli za sredstvo koje je suprotno takvom zahtevu. Na primer, prodavac ne može istovremeno da raskine ugovor i da traži od kupca izvršenje obaveze. Takođe, ukoliko prodavac dodeli kupcu dodatni rok za izvršenje obaveze (na osnovu člana 63 Konvencije), ne može istovremeno tražiti od kupca da odmah izvrši svoju obavezu.

Drugo organičenje proizlazi iz člana 28 Konvencije. Do primene ograničenja iz ove norme može doći ukoliko prodavac zahteva od kupca preuzimanje isporuke, ili izvršenje neke druge obaveze u naturi (e. *specific performance*). Ukoliko prodavac ovaj zahtev istakne pred sudom, sud takav zahtev može odbiti, jer na osnovu člana 28 nije dužan da donese presudu o izvršenju u naturi osim ako bi to učinio prema pravilima sopstvenog prava za slične ugovore o prodaji na koji Konvencija ne odnosi . Dakle, uspeh prodavčevog zahteva za izvršenje obaveze će često zavisiti od diskrecione odluke suda (Katz, 2006: 384). U slučaju odbijanja takvog zahteva od strane suda, prodavac će moći da se služi drugim sredstvima, poput nadonade štete, ili eventualnog raskida ugovora. Zbog toga, strane

8 Presuda Višeg regionalnog suda u Minhenu u predmetu br. 7 U 1720/94 od 8. februara 1995. godine (CLOUT case No. 133); presuda Privrednog suda Kantona Cirih u predmetu *Lambskin coats*, br. HG930634 od 30. novembra 1998. godine (CLOUT case No. 251); presuda Privrednog suda Kantona Argau u Švajcarskoj u predmetu *Cutlery* br. OR.96.00013 od 26. septembra 1997. godine (CLOUT case No. 217).

koje zaključuju ugovore na koje se primenjuje Bečka konvencija moraju uzeti u obzir *lex fori* budući da od toga zavisi da li će im ovo pravno sredstvo biti dopušteno ili ne (Jovičić, 2011: 395).

Konvencija ne predviđa rok tokom kojeg prodavac može uputiti kupcu zahtev za izvršenje obaveze. Bez obzira na to, ovo pravo je ipak podložno normama o zastarelosti koje se nalaze u merodavnom nacionalnom pravu, ili, ukoliko postoje uslovi za njenu primenu, u Konvenciji o zastarelosti potraživanja u međunarodnoj prodaji robe iz 1974. godine.

3. Dodeljivanje kupcu dodatnog roka za izvršenje obaveze

Član 63(1) Konvencije predviđa mogućnost za prodavca da dodeli kupcu dodatni rok razumne dužine za izvršenje njegovih obaveza. Po svojoj suštini, ova odredba Konvencije se podudara sa članom 47, koji kupcu omogućava isto pravo naspram prodavca.

Prodavac samo ima opciju da kupcu dodeli dodatni rok razumne dužine za izvršenje njegovih obaveza. On je ovlašćen na mogućnost da od kupca zahteva izvršenje obaveze, pa stoga, načelno, i nije dužan da sredstvo iz člana 63(1) upotrebi kao preduslov za naknadnu primenu drugih pravnih sredstava koja predviđa Konvencija.[9] Međutim, dodeljivanje dodatnog roka kupcu može prodavcu olakšati korišćenje prava na raskid ugovora, kada prodavac nije siguran da li je kupac načinio bitnu povredu (Babiak, 1992: 133; Jovičić, 2012: 186), ili će njegovo neizvršenje dovesti do bitne povrede. Naime, na osnovu člana 64(1)(b), prodavac može raskinuti ugovor ako kupac nije ni u dodatnom roku koji je odredio prodavac u skladu članom 63(1) izvršio svoju obavezu da plati cenu ili preuzme isporuku robe, ili je izjavio da to neće učiniti u tako određenom roku. Dodeljivanje dodatnog roka kupcu, stoga, olakšava prodavcu da potom raskine ugovor (bez neophodnog ustanovljavanja da li se radi o bitnoj povredi), ali samoukoliko kupac nije platio cenu ili preuzeo isporuku.[10]

Prodavac može dodeliti dodatni rok kupcu za izvršenje obaveze nakon što kupac padne u docnju. Dodeljivanje dodatnog roka pre dospelosti obaveze kupca ne može se smatrati relevantnim u smislu odredbi člana 63 Konvencije. Primena člana 63 pretpostavlja činjenicu da je kupac već

9 Presuda Apelacionog suda u Grenoblu u predmetu *SARL Ego Fruits v. La Verja*, br. RG 98/02700 od 4. februara 1999. godine (CLOUT case No. 243); presuda Višeg regionalnog suda u Koblencu u predmetu *Computer equipment*, br. 2 U 1230/91 od 17. septembra 1993. godine (CLOUT case No. 281).

10 Presuda Apelacionog suda u Grenoblu u predmetu *SARL Ego Fruits v. La Verja*, br. RG 98/02700 od 4. februara 1999. godine (CLOUT case No. 243).

u docnji sa izvršenjem obaveze pre nego što će mu prodavac dodeliti dodatni rok za izvršenje.

Prodavac mora kupcu poslati obaveštenje o dodeljivanju dodatnog roka za izvršenje obaveze, koje treba biti učinjeno na jasan način. Uopšteno obaveštenje kojim prodavac poziva kupca da svoju obavezu izvrši „odmah" ili „u kratkom roku", ne smatra se dodeljivanjem dodatnog roka u smislu člana 63(1) Konvencije (Uncitral Digest, 2016: 291). Prodavac u obaveštenju mora odrediti tačan dodatni rok i pozvati kupca da u okviru tog roka izvrši svoju obavezu. On to može učiniti tako što će označiti datum do kojeg kupac može izvršiti svoju obavezu, ili tako što će naznačiti određeni period (u roku od jedne sedmice ili mesec dana, na primer). U literaturi se ukazuje i na formulaciju da prodavac mora da izrazi „određeni stepen pritiska na kupca" da izvrši svoje obaveze (Vukadinović, 2012: 548).

Dodatni rok koji prodavac dodeljuje kupcu za izvršenje obaveze mora biti razumne dužine, što se ocenjuje uzimanjem u obzir okolnosti konkretnog slučaja, uključujući relevantne poslovne običaje i praksu. Sudovi su različito tumačili razumni rok u zavisnosti od toga da li se radi o obavezi kupca da plati cenu ili da preuzme isporuku. Logično je da se za preuzimanje isporuke kupcu treba ostaviti duži rok nego za plaćanje cene, s obzirom na to da je potrebno da kupac preduzme niz faktičkih radnji. U jednom slučaju sud je protumačio dodatni rok od dva i po meseca za preuzimanje štamparskih mašina kao razuman.[11] Kada je u pitanju obaveza plaćanja cene, prodavac može odrediti i kraći dodatni rok. Na primer, dodatni rok od 10 dana za izvršenje ove obaveze je protumačen kao razuman od strane suda.[12]

Član 63(2) suspenduje pravo prodavcu da se koristi drugim pravnim sredstvima ukoliko je prethodno kupcu dodelio dodatni rok razumne dužine za izvršenje obaveze. To znači da tokom trajanja dodatnog roka kupac ne može raskinuti ugovor niti zahtevati nadoknadu štete usled neizvršenja. Prodavac, međutim, na osnovu izričite dikcije člana člana 63(2), može, nakon kupčevog izvršenja obaveze, zahtevati nadoknadu štete usled zadocnjenja.

Suspenzija prodavčevog prava da se koristi drugim sredstvima usled kupčeve povrede ugovora traje onoliko kolika je dužina dodatnog

11 Presuda Apelacionog suda u Milanu u predmetu *Bielloni Castello v. EGO* od 11. decembra 1998. godine (CLOUT case No. 645).

12 Presuda Privrednog suda Kantona Argau (Švajcarska) u predmetu *Granular plastic*, br. OR.98.00010 od 11. juna 1999. godine (CLOUT case No. 333).

razumnog roka. Ukoliko kupac ne izvrši svoju obavezu u okviru dodatnogroka, prodavac se nakon toga može služiti i drugim sredstvima, kao što su pravo na naknadu štete zbog neizvršenja i pravo na raskid ugovora. Međutim, ukoliko prodavac primi obaveštenje od kupca da neće izvršiti svoje obaveze ni u naknadno dodeljenom roku, prodavac može odmah nakon prijema takvog obaveštenja da se koristi drugim sredstvima.

4. Pravo prodavca da raskine ugovor

4.1. Pravo na raskid zbog bitne povrede ugovora (član 64(1)(a) Konvencije)

Odredbe člana 64 Bečke konvencije uređuju pravo prodavca da raskine ugovor usled neizvršenja kupčeve obaveze. Prodavac, najpre, može raskinuti ugovor ukoliko kupac učini bitnu povredu ugovora – na osnovu člana 64(1)(a) koji glasi:

„(1) Prodavac može izjaviti da raskida ugovor:

(a) ako neizvršenje bilo koje obaveze koju kupac ima na osnovu ugovora ili ove konvencije predstavlja bitnu povredu ugovora;"

Citirana odredba korespondira sa članom 49(1)(a) Konvencije koji na identičan način formuliše isto pravo za kupca ukoliko prodavac načini bitnu povredu ugovora.

Raskid ugovora se u sudskoj i arbitražnoj praksi, ali i u literaturi definiše kao „sredstvo poslednje namene" (lat. *ultima ratio*; eng. *remedy of last resort*), kada se od ugovorne strane ne može opravdano očekivati da ugovor održi na snazi (Pauly, 2000: 225). Gotovo svi nacionalni pravni sistemi predviđaju uslov da povreda ugovora ima odgovarajući stepen težine da bi se steklo pravo na raskid ugovora (Jovičić, 2015: 144). Zbogtoga se odredbe koje uređuju pravo ugovornih strana na raskid moraju tumačiti restriktivno, odnosno, prednost se mora dati sredstvima slabijeg intenziteta ukoliko su podobna da „izleče" ugovorni odnos.

Dakle, da bi prodavac, na osnovu člana 64(1)(a) Konvencije, imao pravo na raskid, neophodno je da kupac svojim neizvršenjem obaveze dovede do bitne povrede ugovora. Da li je povreda ugovora bitna, ocenjuje se na osnovu člana 25 Konvencije koji glasi:

„Povreda ugovora koju učini jedna strana smatraće se bitnom ako se njome prouzrokuje takva šteta drugoj strani da je suštinski lišava onog što je opravdano očekivala od ugovora, izuzev ako takvu posledicu nije predvidela

strana koja čini povredu niti bi je predvidelo razumno lice istih svojstava u istim okolnostima."

Na osnovu prethodno citirane odredbe Konvencije, da bi se povreda, iz perspektive prodavca, smatrala bitnom potrebno je da:

a) kupac ne izvrši svoju obavezu;

b) da kupčevo neizvršenje obaveze dovodi do suštinskog lišavanja prodavca koristi koju je opravdano očekivao od ugovora;

v) da je kupac predvideo posledicu u smislu suštinskog lišavanja prodavca koristi koju je opravdano očekivao od ugovora, odnosno da je takvu posledicu moglo predvideti razumno lice istih svojstava u istim okolnostima.

Posledice kupčevog neizvršenja obaveze ocenjuju se u svetlu svih konkretnih okolnosti slučaja. Na primer, definitivno neizvršenje obaveze plaćanja cene, ili većeg dela cene, načelno konstituiše bitnu povredu ugovora u svetlu člana 25 Konvencije.[13] Kao potvrda definitivnog neizvršenja obaveze plaćanja cene može poslužiti izjava kupca da ne želi da plati cenu[14], ili okolnost da se kupac nalazi u stečaju.[15] Nasuprot tome, neznatno zakašnjenje u plaćanju cene ne može se tumačiti kao bitna povreda ugovora[16], osim ukoliko obaveza kupca da plati cenu bez zadocnjenja predstavlja bitan element ugovora (Jovičić, 2017: 60).

Kada je u pitanju obaveza kupca da preuzme isporuku, definitivno neizvršenje ove obaveze se generalno može tumačiti kao bitna povreda

13 Presuda Okružnog suda Zapadnog distrikta Mičigen u predmetu *Shuttle Packaging Systems, L.L.C. v. Tsonakis, Ina S.A. and Ina Plastics Corporation* od 17. decembra 2001. godine (CLOUT case No. 578) (prema mišljenju Suda, neplaćanje cene je najteži oblik bitne povrede ugovora od strane kupca); odluka Međunarodne trgovačke arbitraže pri trgovačko-industrijskoj komori Ruske Federacije u predmetu br. 53/1998, od 5. oktobra 1998. godine (CLOUT case No. 468); presuda Višeg regionalnog suda u Dizeldorfu u predmetu *Winter shoes*, br. 17 U 146/93, od 14. januara 1994. godine (CLOUT case No. 130).

14 Presuda Višeg regionalnog suda u Braunšvajgu (Nemačka) u predmetu *Deer meat*, br. 2 U 27/99 od 28. oktobra 1999. godine (CLOUT case No. 361).

15 Presuda Federalnog suda Australije u predmetu *Roder Zelt- und Hallenkonstruktionen GmbH v. Rosedown Park Pty. Ltd. and Reginald R. Eustace*, br. SG 3076 of 1993 FED No. 275/95 od 28. aprila 1995. godine (CLOUT case No. 308).

16 Presuda Arbitražnog suda pri Međunarodnoj trgovačkoj komori u predmetu *Machinery for a production line of foamed boards*, Arbitral award No. 7585 iz 1992. godine (CLOUT case No. 301).

ugovora.[17] Sa druge strane, kašnjenje kupca od nekoliko dana da preuzme isporuku načelno ne predstavlja bitnu povredu,[18] osim ukoliko prodavac nema poseban interes da se roba preuzme u ugovoreno vreme (Jovičić, 2017: 60). Zakašnjenje od nekoliko dana može prouzrokovati bitnu povredu ugovora za prodavca ukoliko su okolnosti ugovora takve da zahtevaju od kupca blagovremeno preuzimanje isporuke: na primer, ukoliko je predmet ugovora kvarljiva roba, ili ukoliko je prodavcu bitno da isprazni na vreme svoje skladište ili oslobodi transportna sredstva.

Kupac može učiniti bitnu povredu ugovora i ukoliko se neizvršenje odnosi na neku drugu obavezu, a ne na obavezu plaćanja cene i preuzimanja isporuke (koje Konvencija navodi kao osnovne obaveze prodavca). To zavisi od volje ugovornih strana, relevantnih običaja i uspostavljene prakse, kao i od okolnosti slučaja. Na primer, u jednom slučaju sud je protumačio da je kupac učinio bitnu povredu ugovora tako što je prekršio obavezu zabrane reeksporta koju mu je prodavac nametnuo odgovarajućim ugovornim klauzulama.[19]

Bečka konvencija posebno uređuje pravo ugovornih strana na raskid u slučaju ugovora sa uzastopnim isporukama. Naime, član 73(1) Konvencije

17 Odluka Kineske međunarodne ekonomske i trgovinske arbitražne komisije (CIETAC) u predmetu *Mung beans*, br. CISG/2001/02 od 22. marta 2001. godine (CLOUT case No. 987) (odbijanje kupca da ugovori prevoz robe brodom na osnovu FOB klauzule); presuda Privrednog suda Kantona Argau u Švajcarskoj u predmetu *Cutlery* br. OR.96.00013 od 26. septembra 1997. godine (CLOUT case No. 217); presuda Višeg regionalnog suda u Hamu u predmetu *Wrapped bacon*, br. 19U 97/91 od 22. septembra 1992. godine (CLOUT case No. 227) (odbijanje kupca da primi isporuku više od jedne polovine ugovorene količine robe).

18 Presuda Apelacionog suda u Grenoblu u predmetu *SARL Ego Fruits v. La Verja*, br. RG 98/02700 od 4. februara 1999. godine (CLOUT case No. 243) (kupac je obavestio prodavca da će kasniti nekoliko dana sa preuzimanjem jedne uzastopne isporuke); sa druge strane, jedan sud je ustanovio da docnja kupca od nekoliko dana u izvršenju obaveze preuzimanja isporuke predstavlja bitnu povredu ugovora – obrazloženje za ovakav stav Sud je pronašao u činjenici da je prodavac prethodno dodelio kupcu dodatni rok za preuzimanje isporuke: videti presudu Kantonalnog suda u Cugu (Švajcarska) u predmetu *MTBE,* br. A3 2001 34 od 12. decembra 2002. godine (CLOUT case No. 629).

19 Presuda Apelacionog suda u Grenoblu u predmetu *S.A.R.L. Bri Production "Bonaventure" v. Société Pan Africa Export* od 22. februara 1995. godine (CLOUT case No. 154) – prodavac je želeo da obezbedi da se roba (farmerice) ne reeksportuje u Evropu, već da konačna destinacija budu tržišta Afrike i Južne Amerike. Kupac se složio sa zahtevom prodavca i ugovorom se obavezao da prodavcu pruži dokaze o konačnoj destinaciji robe na tržište Afrike i Južne Amerike. Kako kupac nije pružio prodavcu dokaze o konačnoj destinaciji robe (i nakon što mu je prodavac ostavio dodatni rok za to), sud je ustanovio da je time učinjena bitna povreda ugovora.

predviđa da ako u slučaju ugovora sa uzastopnim isporukama, neizvršenje bilo koje obaveze jedne strane koja se odnosi na jednu isporuku predstavlja bitnu povredu ugovora u vezi sa tom isporukom, druga strana može izjaviti da ugovor raskida u odnosu na tu isporuku. Ova odredba Konvencije se zajednički primenjuje kako na prodavca, tako i na kupca.

Dakle, stav 1 člana 73 Konvencije predviđa pravo za ugovornu stranu da izjavi raskid ugovora u odnosu na pojedinačnu isporuku ukoliko druga strana, takođe u odnosu na tu pojedinačnu isporuku, učini bitnu povredu ugovora. Svi kriterijumi iz člana 25 Konvencije koji važe za postojanje bitne povrede ugovora primenjuju se i u odnosu na pojedinačnu isporuku. Posmatrano iz ugla prodavca, ta povreda može da se sastoji u neizvršenju obaveze kupca da plati cenu za pojedinačnu isporuku, ili ukoliko kupac ne preuzme pojedinačnu isporuku robe, itd. U takvoj situaciji, prodavac može raskinuti ugovor u odnosu na pojedinačnu isporuku, dok će ugovor ostati na snazi u odnosu na prethodne pojedinačne isporuke. Sa druge strane, samo kašnjenje kupca u isplati cene za pojedinačnu isporuku ne mora biti osnov za raskid ugovora u odnosu na tu isporuku.[20]

4.2. Pravo na raskid usled neizvršenja obaveze u dodatnomroku koji je odredio prodavac (član 64(1)(b) Konvencije)

Član 64(1)(b) Konvencije predviđa da prodavac može raskinuti ugovor ako kupac nije u dodatnom roku koji je odredio prodavac u skladu sa članom 63(1) izvršio svoju obavezu da plati cenu ili preuzme isporuku robe, ili je izjavio da to neće učiniti u tako određenom roku.

Da bi prodavac mogao da raskine ugovor na podlozi člana 64(1)(b) Konven- cije, potrebno je da budu ispunjeni određeni uslovi.

Najpre, prodavac mora kupcu da ostavi dodatni rok razumne dužine za izvršenje obaveze, u skladu sa članom 63(1) Konvencije (videti izlaganje u podnaslovu 3). Član 64(1)(b) Konvencije uspostavlja vezu sa članom 63(1) – po ovoj odredbi prodavac *može* odrediti kupcu dodatni rok razumne dužine za izvršenje njegovih obaveza. Međutim, da bi mogao da raskine ugovor na podlozi člana 64(1)(b), prodavac prethodno *mora* dodeliti dodatni rok na koji ukazuje član 63(1) Konvencije. Veza između ove dve odredbe je uspostavljena zbog toga što se član 64(1)(b) primenjuje u situaciji kada nije jasno da li se radi o bitnoj povredi ugovora, na način kako je to opisano u članu 25 Konvencije. Ukoliko je

20 Presuda Arbitražnog suda Privredne komore Ciriha br. 273/95 od 31. maja 1996. godine.

jasno da se radi o bitnoj povredi, onda ne postoji potreba da se aktivira član 64(1)(b) – u tom slučaju primenjuje se član 64(1)(a) – prodavac može raskinuti ugovor ukoliko neizvršenje bilo koje obaveze koju kupac ima na osnovu ugovora ili Konvencije predstavlja bitnu povredu ugovora.[21] Međutim, ukoliko nije jasno da li se radi o bitnoj povredi, prodavac može otkloniti prepreku za raskid ugovora tako što će primeniti član 64(1) (b) – ostaviće kupcu dodatni rok razumne dužine za izvršenje njegovih obaveza; nakon isteka tog roka, ili nakon što primi obaveštenje od kupca da svoju obavezu neće izvršiti u okviru takvog roka, prodavac može raskinuti ugovor.

Drugi uslov za raskid je da se neizvršenje obaveze kupca sastoji u neplaćanju cene ili nepreuzimanju isporuke. Mehanizam za raskid ugovora predviđen članom 64(1)(b) Konvencije nije primenljiv ukoliko se povreda ugovora od strane kupca sastoji u neizvršenju neke druge obaveze, osim obaveze plaćanja cene ili nepreuzimanja isporuke.[22] Kada je u pitanju povreda obaveza plaćanja cene, pod tim se podrazumeva ne samo neizvršenje plaćanja u užem smislu, nego i neizvršenje formalnosti koje su neophodne za realizaciju plaćanja.[23] Na primer, propust kupca da otvori akreditiv tumači se kao neizvršenje obaveze plaćanja cene i dolazi pod okvir člana 64(1)(b) Konvencije.[24]

Ukoliko prodavac dodeli kupcu dodatni rok za izvršenje neke druge obaveze, a ne obaveze plaćanja cene ili preuzimanja isporuke, pa kupac u dodatnom roku ne izvrši svoju obavezu, to ne daje automatski pravo prodavcu da raskine ugovor. U tom slučaju, neće se primeniti član 64(1)(b), već član 64(1)(a) Konvencije, koji predviđa da prodavac može raskinuti ugovor ukoliko kupac učini bitnu povredu ugovora. Ipak, dodatni rok

21 U sudskoj praksi postoji i slučaj kada je zauzet stav da prodavac ni u kom slučaju (čak i kad je jasno da se radi o bitnoj povredi ugovora) ne može ugovor raskinuti, ako prethodno ne dodeli kupcu dodatni rok razumne dužine za izvršenje obaveza, na osnovu člana 63(1) Konvencije. Videti presudu Vrhovnog suda Austrije u predmetu *Carpets*, br. 6 Ob 187/97m od 11. septembra 1997. godine (CLOUT case No. 307). Ipak, ovakav stav se može posmatrati kao izuzetak.

22 Odluka Arbitražnog suda Međunarodne trgovačke komore br. 8574 iz septembra 1996. godine; presuda Privrednog suda Kantona Sent Galen (Švajcarska) u predmetu *Sizing machine case*, br. HG.1999.82-HGK od 3. decembra 2002. godine (CLOUT case No. 886).

23 Član 54 Konvencije izričito predviđa obavezu za kupca da obavi formalnosti u vezi sa izvršenjem plaćanja cene: „Kupčeva obaveza da isplati cenu podrazumeva preduzimanje mera i ispunjavanje formalnosti predviđenih ugovorom ili odgovarajućim zakonima i propisima da bi se omogućilo izvršenje plaćanja."

24 Presuda Okružnog suda u Sanu (Švajcarska) u predmetu *Transport of spirits*, br. T 171/95 od 20. februara 1997. godine (CLOUT case No. 261).

koji prodavac ostavlja kupcu za izvršenje neke druge obaveze (a ne obaveze da plati cenu ili preuzme isporuku) nije sasvim bez dejstva. Naime, do isteka tog roka, ili dok ne primi obaveštenje od kupca da neće izvršiti svoje obaveze u tom roku, prodavac se ne može služiti drugim sredstvima, pa ni pravom na raskid ugovora (primenjuje se član 63(2) Konvencije[25]). Sa druge strane, odbijanje kupca da izvrši takvu obavezu u dodatnom roku može otežati kvalifikaciju povrede ugovora i ići u prilog tvrdnji da se radi o bitnoj povredi ugovora.[26]

Treći uslov za raskid postoji ukoliko kupac ne izvrši obavezu plaćanja cene ili preuzimanja isporuke u dodatno ostavljenom roku, ili izjavi dato neće učiniti u tako određenom roku.

4.3. Pravo prodavca da raskine ugovor u slučaju kadje kupac platio cenu (član 64(2) Konvencije)

Član 64(2) Konvencije vremenski ograničava pravo prodavca da raskine ugovor u situaciji kada je kupac platio cenu. Tekst ove odredbe glasi:

„*Međutim, u slučaju kad je kupac platio cenu, prodavac gubi pravo da raskine ugovor ukoliko to nije učinio:*

(a) u pogledu zadocnelog izvršenja od strane kupca pre nego što jesaznao za izvršenje; ili

(b) u pogledu bilo koje druge povrede, osim zadocnelog izvršenja, u razumnom roku:

(i) pošto je prodavac saznao ili morao saznati za povredu; ili

(ii) po isteku dodatnog roka koji je odredio prodavac u skladu sa stavom (1) člana 63 ili pošto je kupac izjavio da neće izvršiti svoje obaveze uovom dodatnom roku."

Napred citirana odredba Konvencije se primenjuje isključivo u situaciji kada je cena plaćena. Do njene primene ne dolazi ukoliko kupac nije platio cenu, odnosno, tada prodavcu načelno nije vremenski ograničeno pravo da raskine ugovor (Uncitral Digest, 2016: 296). Jedan sud je zauzeo stav da čak i ukoliko kupac plati deo cene, prodavac zadržava pravo da

25 Podsećanja radi, ova odredba glasi: „Ako prodavac ne primi obaveštenje od kupca da neće izvršiti svoje obaveze u roku koji je tako određen, prodavac ne može do isteka tog roka da se koristi bilo kojim sredstvom predviđenim za slučaj povrede ugovora. Prodavac, međutim, ne gubi zbog toga pravo da usled docnje kupca zahteva naknadu štete."

26 Videti fusnotu 21.

raskine ugovor u bilo kom trenutku.[27] Međutim, pravo prodavca da raskine ugovor u bilo kom trenutku, bez vremenskog ograničenja, za slučaj da cena, ili deo cene, nije plaćen, ne može se tumačiti apsolutno: prodavac ne može, suprotno načelu dobre vere, neopravdano odugovlačiti raskid ugovora.[28]

Član 64(2) Konvencije različito tretira povredu ugovora u vidu zadocnelog izvršenja kupca od ostalih povreda ugovora od strane kupca. U slučaju zadocnelog izvršenja, primenjuje se član 64(2)(a): prodavac gubi pravo da raskine ugovor ako to nije učinio *pre nego što je saznao* za zadocnelo izvršenje. Dakle, pretpostavka za primenu ove odredbe je da je kupac svoju obavezu već izvršio (doduše sa zadocnjenjem). Iakoto nije izričito predviđeno članom 64(2)(a), primenjuje se generalno načelo Konvencije da se mora raditi o povredi ugovora koja se može okarakterisati kao bitna. U suprotnom, ukoliko zadocnelo izvršenje ne predstavlja bitnu povredu, prodavac ne bi imao pravo na raskid, već bi mogao da upotrebi druga pravna sredstva. Zadocnelo izvršenje se može odnositi na bilo koju obavezu koju kupac ima na osnovu ugovora ili Konvencije. To ne mora biti samo slučaj sa zadocnjenjem obaveze plaćanja cene, već i sa zadocnjenjem u preuzimanju isporuke ili u izvršenju neke druge obaveze. Obaveštenje prodavca o raskidu neće moći da proizvede dejstvo ako je ono poslato kupcu nakon što je prodavac saznao da je kupac neblagovremeno izvršio obavezu plaćanja cene ili je učinio radnju kojase poistovećuje sa plaćanjem cene (na primer otvaranje dokumentarnog akreditiva); takođe, prodavac neće moći da raskine ugovor nakon što je saznao da je kupac preuzeo robu sa zadocnjenjem, dok je cena za robu plaćena.

Rešenje iz člana 64(2)(a) je strože u poređenju sa rešenjem korespondentne odredbe Konvencije (član 49(2)(a)) koja uređuje položaj kupca kao poverioca u situaciji kada je prodavac isporučio robu. Prema članu 49(2)(a), u slučaju zadocnele isporuke, kupac može raskinuti ugovor u razumnom roku nakon što je saznao za takvu isporuku. Sa druge strane, prodavac mora delovati veoma brzo ukoliko namerava da raskine ugovor sa kupcem koji je platio cenu (Babiak, 1992: 133). Smisao strožeg uređenja

27 Presuda Višeg regionalnog suda u Gracu u predmetu *Romanian wood*, br. 3R 68/02yod 31. maja 2002. godine (CLOUT case No. 539).

28 Jedan sud je, međutim, ustanovio da prodavac nije izgubio pravo na raskid iako je proteklo šest meseci između dodeljivanja kupcu dodatnog roka za plaćanje cene i izjave raskida. Sud je ovakav stav obrazložio tako što je naveo da kupac nije mogao razumno da očekuje da prodavac neće iskoristiti svoje pravo na raskid. Videti presudu Višeg regionalnog suda u Minhenu u predmetu *Cars*, br. 23 U 2421/05 od 19. oktobra 2006. godine (CLOUT case No. 826).

ovog prava u odnosu na prodavca sastoji se u činjenici da je prodavac već primio isplatu cene i da je njegova pozicija usled zakasnele isplate cene ili neblagovremenog preuzimanja isporuke od strane kupca daleko povoljnija nego pozicija kupca koji trpi posledice zadocnele isporuke robe.

U pogledu neke druge povrede ugovora, a ne zadocnelog izvršenja, primenjuje se član 64(2)(b) Konvencije. U praksi su takve povrede ugovora od strane kupca retke. Kao primer može poslužiti već pomenuti slučaj povrede obaveze zabrane reeksporta koju je prodavac nametnuo kupcu odgovarajućim ugovornim klauzulama (videti fusnotu 20). Ova odredba razlikuje situaciju kada je prodavac odredio dodatni rok kupcu za izvršenje obaveze u skladu sa članom 63(1), od situacije kada takav rok nije određen. U pogledu obaveze prodavca da ostavi dodatni rok kupcu za izvršenje obaveze primenjuju se ista načela koja važe i za slučaj povrede ugovora od strane kupca u smislu neplaćanja cene ili nepreuzimanja isporuke (videti izlaganje u okviru podnaslova 4.2.).

U slučaju da prodavac nije kupcu ostavio dodatni rok za izvršenje obaveze, prodavac gubi pravo na raskid ugovora ukoliko to nije učinio u razumnom roku pošto je saznao ili morao saznati za povredu (član 64(2)(b) (i)). U tom slučaju mora biti jasno da se radi o bitnoj povredi ugovora, jer bi u suprotnom prodavac morao da ostavi dodatni rok kupcu za ispunjenje obaveze. Ako je prodavac ostavio dodatni rok razumne dužine kupcu za izvršenje obaveze, prodavac gubi pravo da raskine ugovor ukoliko to nije učinio u razumnom roku nakon isteka dodatnog roka ili pošto je kupac izjavio da neće izvršiti svoje obaveze u ovom dodatnom roku (član 64(2) (b)(ii)). Smisao vremenskog ograničenja prava prodavca da ugovor može raskinuti u razumnom roku se sastoji u zaštiti interesa kupca, s obzirom na to da bi prodavac mogao, prateći razvoj na tržišu, da špekuliše i raskine ugovor onda kada to njemu najviše odgovara (Ćirić, 2018: 172–73; Draškić, Stanivuković, 2005: 400).

5. Pravo prodavca da umesto kupca izvrši specifikaciju robe

Član 65 je poslednja odredba u odeljku Konvencije koji uređuje pravna sredstva prodavca za slučaj povrede ugovora od strane kupca. Ova odredba uređuje situaciju kada je prema ugovoru kupac dužan da odredi oblik, mere ili druga obeležja robe (tzv. specifikaciju). Prema članu 65(1), ako kupac ne učini specifikaciju do ugovorenog datuma ili do isteka razumnog roka pošto je od prodavca primio zahtev da to učini, prodavac može, ne dirajući time u svoja druga prava koje može imati, učiniti sam

tu specifikaciju u skladu sa kupčevim potrebama koje su mu mogle biti poznate.

Prodavac, dakle, može, umesto kupca, sam odrediti specifikaciju robe pod određenim uslovima. Najpre, potrebno je da kupac propusti da odredi specifikaciju do ugovorenog datuma. Ukoliko takav datum nije ugovoren, prodavac mora, ukoliko želi da se koristi pravom iz člana 65, kupcu dodeliti razumni rok da to učini. Ukoliko kupac ne odredi specifikaciju do isteka ugovorenog datuma ili razumnog roka, prodavac može sam to učiniti.

Zahtev prodavaca prema kupcu da odredi specifikaciju u razumnom roku proizvodi dejstvo tek kada stigne kupcu. Ovde se nailazi na odstupanje od generalnog pravila Konvencije iz člana 27 u pogledu slanja obaveštenja, zahteva i drugih saopštenja.[29] Na kraju, prodavac mora učiniti specifikaciju u skladu sa kupčevim potrebama koje su mu mogle biti poznate.

Prodavac nije dužan da odredi specifikaciju robe ukoliko kupac propusti da to učini. On se može služiti i drugim pravnim sredstvima koja mu stoje na raspolaganju, a o kojima je bilo reči u prethodnim izlaga- njima. Pored toga, na osnovu izričite dikcije člana 65(1) Konvencije, i ukoliko učini specifikaciju, to prodavca ne sprečava da se koristi drugim pravima.

Prema članu 65(2) Konvencije, ako prodavac sam učini specifikaciju, on je dužan da obavesti kupca o njenim pojedinostima, kao i da mu odredi razuman rok u kome kupac može učiniti neku drugu specifikaciju. Ako kupac, pošto je primio takvo obaveštenje prodavca to ne učini u tako određenom roku, specifikacija koju je učinio prodavac je obavezna za kupca.

29 Član 27 Konvencije glasi: „Izuzev ako je izričito drukčije predviđeno u ovom delu Konvencije, kad je jedna strana neko obaveštenje, zahtev ili drugo saopštenje dala ili učinila u skladu sa ovim delom i na način koji se smatra odgovarajućim u datim okolnostima, zadocnjenje ili greška u prenosu saopštenja ili činjenica da saopštenje nije stiglo ne lišava tu stranu prava da se na to saopštenje poziva."

6. Zaključak

Pravna sredstva kojima prodavac raspolaže u slučaju povrede ugovora o međunarodnoj prodaji robe od strane kupca pretežno su razvrstana u članovima 61–65 Bečke konvencije.

Prodavac, najpre, na osnovu člana 62 Konvencije, može od kupca zahtevati izvršenje obaveze. Uslov je da kupac izvrši povredu ugovora, i to neizvršenjem bilo koje obaveze koja proizlazi iz ugovora ili Konvencije (uključujući i relevantne običaje i praksu).

Kupac može, na podlozi člana 63 Konvencije, da dodeli kupcu dodatni rok razumne dužine za izvršenje njegovih obaveza. Dodatni rok koji prodavac dodeljuje kupcu za izvršenje obaveze mora biti razumne dužine, što se ocenjuje uzimanjem u obzir okolnosti konkretnog slučaja, uključujući relevantne poslovne običaje i praksu. Dodeljivanje dodatnog roka kupcu može prodavcu olakšati korišćenje prava na raskid ugovora, kada prodavac nije siguran da li je kupac načinio bitnu povredu ugovora, ili će njegovo neizvršenje dovesti do bitne povrede.

Član 64 Konvencije uređuje pravo prodavca da raskine ugovor. Prodavac, najpre, može raskinuti ugovor ukoliko kupac učini bitnu povredu ugovora (član 64(1)(a)).

Član 64(1)(b) Konvencije predviđa da prodavac može raskinuti ugovor ako kupac nije, u dodatnom roku razumne dužine koji je odredio prodavac u skladu sa članom 63(1), izvršio svoju obavezu da plati cenu ili preuzme isporuku robe, ili je izjavio da to neće učiniti u tako određenom roku. Ovo sredstvo se primenjuje u situaciji kada nije jasno da li se radi o bitnoj povredi ugovora, na način kako je to opisano u članu 25 Konvencije.

Ukoliko je kupac platio cenu, a pritom čini povredu ugovora, pravo prodavca da raskine ugovor je vremenski ograničeno. Tu Konvencija uspostavlja razliku između povrede koja se sastoji u zadocnelom izvršenju i ostalih povreda. U slučaju zadocnelog izvršenja, primenjuje se član 64(2)(a): prodavac gubi pravo da raskine ugovor ako to nije učinio *pre nego što je saznao* za zadocnelo izvršenje. U pogledu neke druge povrede ugovora, a ne zadocnelog izvršenja, primenjuje se član 64(2)(b) Konvencije. U slučaju da prodavac nije kupcu ostavio dodatni rok za izvršenje obaveze, prodavac gubi pravo na raskid ugovora ukoliko to nije učinio u razumnom roku pošto je saznao ili morao saznati za povredu (član 64(2)(b)(i)). Ako je prodavac ostavio dodatni rok razumne dužine kupcu za izvršenje obaveze, prodavac gubi pravo da raskine ugovor ukoliko to nije učinio

u razumnom roku nakon isteka dodatnog roka ili pošto je kupac izjavio da neće izvršiti svoje obaveze u ovom dodatnom roku (član 64(2)(b)(ii)).

Na kraju, član 65 Konvencije predviđa da prodavac može sam učiniti specifikaciju robe ukoliko kupac to ne učini. Ako kupac ne učini specifikaciju do ugovorenog datuma ili do isteka razumnog roka pošto je od prodavca primio zahtev da to učini, prodavac može, ne dirajući time u svoja druga prava koje može imati, učiniti sam tu specifikaciju u skladu sa kupčevim potrebama koje su mu mogle biti poznate.

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REMEDIES AVAILABLE TO THE SELLER IN CASE OF THE BUYER'S BREACH OF CONTRACT ON INTERNATIONAL SALE OF GOODS

Summary

The legal remedies available to a seller in case of a buyer's breach of contract on international sale of goods are predominantly contained in Articles 61-65 of the UN Convention on Contracts for the International Sale of Goods (CISG). Article 62 of the CISG entitles the seller to require from the buyer to perform the obligations. Under Article 63 of the CISG, the seller may fix an additional period of time of reasonable length for the performance of the buyer's obligations. Article 64 defines the conditions under which the seller is entitled to declare the contract avoided. The first situation in which the seller can avoid the con¬tract is where the buyer has committed a fundamental breach of contract. Article 64 also provides that the seller can avoid the contract if the buyer has not paid the price or taken delivery of the goods within the additional period of time fixed by the seller under Article 63(1) of the CISG. In case the buyer has paid the price, the seller loses the right to avoid the contract if it does not declare avoidance within the periods stated in Article 64(2). In cases of late performance, the seller loses the right to declare the contract avoided unless it does so before becoming aware that performance has been rendered. In regard to any breach other than late performance, there is a distinction according to whether or not the seller has fixed an additional period for performance in accordance with Article 63 (1). In the absence of an additional period for performance, the seller loses the right to declare the contract avoided unless it declares avoidance within a reasonable time after the seller knew or ought to have known of the breach. In case the seller has fixed an additional period of time for performance by the buyer, the seller loses the right to declare the contract avoided unless it declares avoidance within a reasonable time after the expiry of the additional period fixed by the seller or after the buyer has declared that it will not perform his obligations within such an additional period. Finally, under Article 65 of the CSIG, if the buyer fails to make the specification of the goods, either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

***Keywords**: International sale of goods, CISG, breach of contract, seller's remedies.*

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DA LI LIBERALNI MODEL LIČNOG STEČAJA MOŽE PREDSTAVLJATI PUTOKAZ KA PRAVNOJ REGULATIVI ISTOG U REPUBLICI SRBIJI I REPUBLICI SRPSKOJ?[**]

Apstrakt: *Nezaposlenost, slaba potrošačka moć, nemogućnost redovnog servisiranja kreditnih obaveza (problematični krediti) i izmirivanja ostalih finansijskih obaveza, mogu predstavljati faktore koje fizičko lice – potrošača vode ka insolventnosti. Institut koji pruža mogućnost da se fizičko lice – potrošač oslobodi dugova bez zapadanja u insolventnost po cenu da njegova imovina bude predmet izvršenja je institut ličnog stečaja. Je- dan od modaliteta ličnog stečaja koje treba uzeti u razmatranje prilikom budućeg normiranja je liberalni mode ličnog stečaja. Liberalni model ličnog stečaja karakteriše otvoren pristup koji u krajnjem ishodu vodi ka potpunom oslobađanju – razrešenju od duga. Oslobađanje od duga esencijalno je obeležje ovog modela koji počiva na ideji o pružanju šanse za nov finansijski početak (fresh start), čime se u prvi plan postavlja interes dužnika – potrošača, a rizik se prebacuje na poverioca. Pravni sistemi Republike Srbije i Repu- blike Srpske ne poznaju institut ličnog stečaja. Pravno normiranje instituta ličnog stečaja predstavlja izazov za zakonodavstvo Republike Srbije i Republike Srpske, a to posebno iz razloga jer nije poznat sudskoj i pravnoj praksi, dok je na pravno teoretskom nivou nedovoljno razmatran. Iz navednih razloga autori će u radu ukazati*

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na prednosti i nedostatke liberalnog modela, odnosno zašto bi trebalo uzeti u razmatranje ovaj model prilikom potencijalne pravne regulative instituta ličnog stečaja. Autori na ovaj način pokušavaju da otvore vrata pravne disuksije o neophodnosti povodom zakonske regulative instituta ličnog stečaja u Republici Srbijii Republici Srpskoj.

Ključne reči: *fizičko lice, lični stečaj, liberalni model, insolventnost, oslobođanje od duga, nov finansijski početak.*

I Uvod

II Lični stečaj - pravni mehanizam rešavanja problema insolventnosti fizičkog lica

Preteče savremenog instituta ličnog stečaja u rudimentarnom obliku možemo naći u rimskoj pravnoj tradiciji i to kroz institute: a) *missio in bona* i b) *cessio bonorum* (Bridge, 2013:30). U slučaju instituta *missio in bona*, *pretor* dozvoljava poveriocima da uđu u imanje dužnika koji ne može da isplati dugove (gubitak časti i osuda na zatvor) i prodaje *bonorum emptoru* koji ima obavezu da isplati poverioce u skladu sa visinom njihovih potraživanja. Kod instituta *cessio bonorum*, dužnik voljno (ne gubi čast i ne može biti osuđen) ustupa svoje imanje poveriocima u cilju naplate njihovih potraživanja.

U pogledu pojmovnog, smatramo da je ispravno koristiti terminologiju stečaj nad imovinom fizičkog lica (Radović, 2006:18-19) s tim da ćemo u radu a u skladu sa savremenim tedencijama koristiti termin lični stečaj.[1] Za razliku od instituta stečaja u komapnijskom pravu, stečaj fizičkog lica ne može se poistovetiti sa stečajem privrednog društva, pa samim tim institucija bankrota i gašenje koje se odnosi na privredno društvo ne može se primeniti na fizičko lice. Fizičko lice ne može se ugasiti – izbrisati iz registra (matične knjige rođenih) i nemoguće mu je uskratiti ustavom zagarantovana prava samo zato što je neodgovoran u pogledu izmirivanja ugovornih i zakonskih obaveza.

Lični stečaj pruža nesolventnom pojedincu uredan postupak izmirivanje obaveza, a u cilju minimiziranja ometanje ostalih aspekata njegovog života, zaustavljajući na taj način negativne radnje poverioca (Albanesi, Nosal,

1 Naziv stečaj nad imovinom fizičkog lica je više opisne prirode i u uporednopravnoj teoriji i praksi se ne koristi, već se koriste neke jednostavnije sintagme, kao što su *individual bankruptcy, consumer bankruptcy* i *personal bankruptcy*.

2015:8). Primenom instituta ličnog stečaja fizičkom licu se pruža nova šansa da uz finansijsku disciplinovanost ponovo bude učesnik u pravnom prometu i time stvara vrednost.[2] Treba naznačiti da finansijska resocijalizacija (finansijska rehabilitacija) savesnog nesolventnog dužnika predstavlja još jednu ako ne i najznačajniju svrhu postojanja instituta ličnog stečaja. Finansijska resocalizacija pruža mogućnost novog finansijskog početka (*fresh start*), čiji se osnovni cilj ogleda u izbegavanju narušavanja budućih ekonomskih (kreditnih) performansi dužnika, pruža mu se mogućnost brzog povratka na kreditno tržište. Ipak, bez obzira na sve treba naglasiti da lični stečaj ostavlja posledice kao što su: a) štete za buduće sticanje kredita i b) stigma povezana sa bankrotom (Robe, Steiger, 2015:38).

III Pravni režimi regulative ličnog stečaja

Pravne režime ličnog stečaja možemo klasifikovati u dve kategorije: a) liberalni ili b) konzervativni (Radović, 2006:28). Stečajno zakonodavstvo SAD-ea je tipičan predstavnik liberalnog režima, a samim tim naklonjeniji je dužnicima (*consumer-friendly*). Usvajanjem Nelsonovog zakona (Bankruptcy Act of 1898 - Nelson Act, July 1, 1898), čak i nekomercijalni dužnici mogu podneti zahtev za lični bankrot, tražeći da se neki ili svi dugovi otpuste, da im se udovolji zahtevu i da nastave sa svojim životima (Robe, et al. 2015:37). U kontinentalnoj Evropi zakonodavne promene i reforme započinje Danska 1984. godine, trasirajući smerniceu izradi zakona o ličnom stečaju (Niemi-Kiesilainen,1999:488). Ipak, iako Danska započinje reforme u domenu instituta ličnog stečaja, dominantan je model Nemačkog ličnog stečaja koji odlikuje konzervativnost pa samim tim je restriktivniji i naklonjeniji poveriocima (*creditor-friendly*). U periodu od 2000-te godine, nove države članice EU (centralne i istočne Evrope) donose zakone o ličnom stečaju ili reformišu postojeće zakoneo stečaju sledeći manje više nemački model (Ramsay,2017:5).

3.1. Liberalni model ličnog stečaja

Osnovna karakteristika liberalnog modela je predviđanje manjeg broja preduslova za pokretanje postupka ličnog stečaja (tzv. otvoren pristup).

2 Disciplinovati se može na način: a) što će uz ostavljanje nužnih sredstava i određene imovine (izuzete imovine) neophodnih za život njega i njegove porodice, određena imovina (neizuzeta imovina) biti predmet kolektivnog i srazmernog namirenja poverilaca ili b) se predvideti dugoročni plan otplate dugova uz ostavljanje dovoljno sredstava za normalan život.

Otvoren pristup upućuje na ideju da savesni insolventni dužnik dobija pristup proceduri stečaja koja u krajnjem ishodu vodi ka potpunom os- lobađanju (razrešenju) od duga (U. S. Supreme Court, *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) No. 783).[3] Mogućnost razrešenja od duga je esencijalno obeležje liberalnog modela, u čijem temelju leži ideja novog početka (*fresh start*) (Hirsch, 1994:175-176), čime se u prvi plan stavlja interes dužnika, a rizik prebacuje na poverioce kao ekonomski jaču stranu (Bodul, 2014:340). Koncept novog početka upućuje na pravo dužnika da bude oslobođen duga nastalog pre otvaranja stečaja kroz relativno kratak i formalni postupak (Reifner, Kiesilainen, Huls, Springeneer, 2003:165-166).

3.1.1. SAD

Stečajno zakonodavstvo SAD-ea predstavlja rodonačelnika razvoja regulative o ličnom stečaju. Stečaj je prvenstveno regulisan *Bankruptcy Reform Act*-om iz 1978. godine,[4] sa izmenama i dopunama, poznatijim kao „*Bankruptcy Code*" (Goodson, 2021:2-3). Trenutna verzija Bankruptcy Code kodifikovana je u Naslovu 11 *United States Code*[5] kojim se reguliše i lični stečaj. U skladu sa odredbama Naslova 11 *United States Code* za fizička lica predviđa dve forme pokretanja ličnog stečaja i to u skladu sa: a) poglavljem 7 ili b) poglavljem 13.

3.1.1.1. Poglavlje 7.

Da bi se kvalifikovao za olakšice prema odredbama poglavlja 7 (*Title 11 United States Code – 11 U.S.S. Chapter 7 Liquidation*) kao stečajni dužnik se može pojaviti fizičko lice, ortačko društvo, korporacija ili drugi poslovni subjekt.[6] Postupak se može pokrenuti na predlog dužnika (dobrovoljno), pred nadležnom stečajnim sudom, ili od strane poverilaca (prinudno).[7] Podnošenje predloga za pokretanje postupka „automatski zadržava" većinu radnji prinudne naplate protiv dužnika ili njegove imovine.[8] Pored predloga za pokretanje postupka, dužnik sudu podnosi: (1) raspon imovine i obaveza; (2) raspored tekućih prihoda

3 U. S. Supreme Court, *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) No. 783. Preuzeto 22.07.2022. https://supreme.justia.com/cases/federal/us/292/234/

4 Bankruptcy Reform Act of 1978 (amendments to the Bankruptcy Code in 1984, 1986, 1994, and 2005) - Bankruptcy Code (*Pub. L. 95-598, 92 Stat. 2549,* November 6, 1978).

5 United States Code. Preuzeto 10.07.2022. https://uscode.house.gov/

6 Title 11 Ch. 1. § 101 (41), §109 (b). United States Code – U.S.C.

7 Title 11 Ch. 3. § 303. U.S.C.

8 Title 11 Ch. 3. § 362. U.S.C.

i rashoda; (3) izjavu o finansijskim poslovima i (4) raspored izvršnih ugovora i zakupa koji nisu istekli.[9] Dužnik dostalja i: a) spisak svih poverilaca i iznos i prirodu njihovih potraživanja; b) izvor, iznos i učestalost prihoda; v) spisak celokupne imovine; i g) detaljan spisak mesečnih životnih troškova dužnika, odnosno hrane, odeće, režije, poreza, prevoza, lekova, itd. Treba istaći da budući prihod (zarada) koju dužnik stekne nakon otvaranja stečaja ne postaje deo stečajne mase, te dužnik njime može slobodno upravljati i raspolagati (Levis, 2006:38).

Po ovoj proceduri dužnik ima mogućnost da podnose i spisak određene imovine (*exempt property*)[10] koju izuzima od potraživanja.[11] Jedina finan- sijska obaveza koja pogađa dužnika je da ustupi postavljenom supervizoru ili povereniku (*trustee*) neizuzetu imovinu (*not exempt property*)[12] koju poseduje u vreme otvaranja stečaja radi njene likvidacije i raspodele poveriocima (Levis, 2006:38). Neizuzeta imovina (ako uopšte postoji) se prodaje, a dobijeni iznos se raspodeljuje poveriocima srazmerno visini njihovih potraživanja. U okolnostima ako je sva imovina dužnika izuzeta ili podleže založnom pravu, stečajni upravnik podnosi izveštaj sudu „bez imovine", koje za posledicu ima nenamirenje neobezbeđenih poverilaca. Ipak, ako se učini da je slučaj na samom početku predmet „imovine" (postoji neizuzeta imovina), neobezbeđeni poverioci u prekluzivnom roku od 90 dana od datuma određenog za sastanak poverilaca moraju prijaviti potraživanja.[13]

Ključno obeležje ove procedure je da ona dopušta dužniku da okončanjem postupka dobije razrešenje od dugova nastalih pre podnošenja

9 Rule 1007(b). Federal Rules of Bankruptcy Procedure – F.R.B.P, (Effective August 1, 1983, as amended to Dec. 1, 2021). Preuzeto 10.07.2022. https://www.law.cornell.edu/rules/frbp

10 Izuzetu imovinu (*exempt property*)čine predmeti koji spadaju u posebne kategorije imovine koje dužnik može da zadrži a neophodni su mu za normalno funcionisanje, koja može uključivati: porodičnu kuću; motorna vozila, do određene vrednosti; razumno neophodnu odeću; razumno neophodne kućne potrepštine i nameštaj; kućni aparati; nakit, do određene vrednosti; penzije; deo kapitala; dužnikov alat dužnikovog zanata ili profesije, do određene vrednosti; deo neisplaćenih, ali zarađenih plata; javna davanja, uključujući javnu pomoć (socijalnu pomoć), socijalno osiguranje i naknadu za nezaposlene; štete dosuđene zbog ličnih povreda.

11 Title 11 Ch. 5. § 522 (b). U.S.C.

12 Imovina koja nije izuzeta (*not exempt property*), a koje se dužnik obično mora odreći uključuju: skupe muzičke instrumente, osim ako je dužnik profesionalni muzičar; zbirke markica, kovanica i drugih vrednih stvari; porodično nasleđe; gotovina, bankovni računi, akcije, obveznice i druga ulaganja; drugi automobil ili kamion; druga kuća ili kuća za odmor.

13 Rule 3002 (c). F.R.B.P.

predloga za otvaranje ličnog stečaja (bez izlaganja budućim obavezama povodom isplate duga) (Levis, 2006:38) s jedne strane, i da se poverioci uredno isplaćuju do te mere da dužnik ima sredstva na raspolaganju za plaćanje (Gerhard, 2009:2) s druge strane. Oslobađanje dužnika lične odgovornosti za većinu svojih dugova onemogućava poverioca da pokreće ili nastavlja bilo kakvu pravnu ili drugu radnju protiv dužnika radi naplate potraživanja. Treba istaći da dužnik ne snosi odgovornost za razrešene dugove. Ipak, u određenim okolnostima sud može uskratiti razrešenje dužniku ako utvrdi da dužnik: a) nije vodio odgovarajuće knjige ili finansijsku evidenciju; b) nije uspeo da objasni na zadovoljavajući način gubitak imovine; v) počinio krivično delo zbog bankrota (poput krivokletstva); g) nije poslušao naredbu stečajnog suda (prevara, prenošenje, skrivanje ili uništavanje imovine koja bi postala deo stečajne mase) ili d) nije uspeo da završi odobreni kurs nastave u vezi sa finansijskim upravljanjem.[14]

Na kraju treba istači da se dužniku pruža mogućnost dobrovoljne konverzije slučaja iz poglavlja 7 u poglavlja 11,[15] 12[16] ili 13[17], i to sve pod uslovom da može da bude dužnik prema novom poglavlju. Ipak, nije dozvoljena reverzibilnost dobrovoljne konverzije slučaja iz poglavlja 7 u neka od navedena poglavlja, a to pod uslovom da slučaj prethodno nije preveden u poglavlje 7 iz nekog od navedenih poglavlja.[18]

3.1.1.2. Poglavlje 13.

Za razliku od poglavlja 7 gde se kao dužnici mogu javiti fizičko lice, ortačko društvo, korporacija ili drugi poslovni subjekt, prema odredbama poglavlja 13 (*Title 11 U.S. Code Chapter 13 Adjustment of debts of an individual with regular income*) kao dužnik jedino se može javiti fizičko lice. Prednosti pokretanja ličnog stečaja po pravilima navedenog poglavlja su: a) da se dužniku sa redovnim prihodima (budući prihodi) omogućava da putem plana otplate reprogramira dugove u periodu od 3-5 godina[19] i

14 Title 11 Ch. 7. § 727. U.S.C.; Rule 4005. F.R.B.P.

15 Title 11 Ch. 11. - Reorganization (sections 1101 to 1195). U.S.C.

16 Title 11 Ch. 12. – Adjustment of debts of a family farmer or fisherman with regular annual income (sections 1201 to 1232). U.S.C.

17 Title 11 Ch. 13. - Adjustment of debts of an individual with regular income (sections 1301 to 1330).

18 Title 11 Ch. 7. § 706 (a). U.S.C.

19 Ako je trenutni mesečni prihod dužnika manji od primenjive državne medijane, plan će biti tri godine. Ako je trenutni mesečni prihod dužnika veći od primenjive

b) da se dužniku pruža priliku da sačuva svoju imovinu od zaplene (ne traži se da se odrekne imovine radi namirenja stečajnih poverilaca) (Dick, Lehnert, 2007:4).

Procedura pokrenuta u skladu sa poglavljem 13. ne uključuje neposredno razrešenje od duga, već podrazumeva reorganizaciju dugovanja putem plana otplate i to ustupanjem buduće zarade ili drugih budućih prihoda stečajnom povereniku (*trustee*) na upravljanje u cilju izvršenja plana otplate (*payment plan*).[20] Poverenik se javlja u ulozi procenitelja i isplatioca (prikuplja isplate od dužnika i vrši raspodelu poveriocima),[21] organizuje sastanak poverilaca i dužnika, na kome se odlučije predloženim uslovima plana otplate,[22] koji sadržai redovne isplate u vidu fiksnih iznosa (dvonedeljno ili mesečno).

Plan otplate se podnosi na odobrenje sudu[23] koji ako je potvrđen obavezuju dužnika i poverioce.[24] Plan otplate mora biti saobrazan projektovanom raspoloživom prihodu, što suštinski znači da obračunavanje projektovanog raspoloživog prihoda zahteva predviđanje koliko će dužnik zaraditi (steći) tokom perioda plana (3-5 godina) i koliko treba od ovog iznosa odbiti troškove koji su razumno potrebni za izdržavanje dužnika i njegove porodice. Ako je trenutni mesečni prihod dužnika manji od primenjivog državnog medijalnog prihoda (s obzirom u kojoj se državi pokreće postupak), plan otplate je na tri godine, a ako je mesečni prihod veći plan otplate je na pet godina. Poverenik raspoređuje sredstva u skladu sa uslovima plana otplate, s tim da se poveriocima može ponuditi manje od pune isplate njihovih potraživanja. Iako potvrda plana otplate daje pravo da zadrži imovinu sve dok se izvršavaju isplate, dužnik ne može stvarati nov dug bez konsultacija sa poverenikom (dodatni dug može ugroziti ispunjenje plana oplate).[25] Prilikom isplate mogu nasupiti okolnosti koje mogu ugroziti dinamiku izvršenja plaćanja

državne medijane, plan obično mora biti na pet godina. Planom ni u kom slučaju ne mogu biti predviđene isplate duže od pet godina. - Title 11 Ch. 13. § 1322 (d). U.S.C.

20 Pokretanjem postupka i dostavljanjem neophodnih dokumenata (isti kao i u poglavlju 7.) dolazi do: a) automatskog zaustavljanja radnji naplate nad prihodima dužnika ili njegove imovine – Title 11 Ch. 3. § 362 i b) imenovanja nepristrasnog poverenika (*trustee*) – Title 11 Ch. 13. § 1302. U.S.C.

21 Title 11 Ch. 13. § 1302 (b). U.S.C.

22 Title 11 Ch. 3. § 343. U.S.C.

23 U slučaju da plan otplate bude odbijen može se podneti nov izmenjen plan otplate. - Title 11 Ch. 13. § 1323. U.S.C.

24 Title 11 Ch. 13. § 1327. U.S.C.

25 Title 11 Ch. 13. §§ 1305 (c), 1322 (a) (1), 1327. U.S.C.

po planu (poverilac može da prigovori ili da preti da će prigovoriti planu, ili dužnik možda nehotice nije uspeo da navede sve poverioce) što dužniku ostavlja mogućnost da plan otplate izmeni posle potvrde.[26] Izuzetno, nakon potvrde plana otplate mogu nastati okolnosti koje sprečavaju njegovo ispunjenje, te u takvim situacijama dužnik može zatražiti od suda „otpust u slučaju poteškoća" i to ako: 1) je neuspeh da izvrši isplate nastao usled okolnosti van njegove kontrole i bez njegove krivice; 2) su poverioci dobili najmanje onoliko koliko bi dobili u slučaju likvidacije iz poglavlja 7; 3) izmena plana nije moguća i 4) povreda ili bolest sprečava zaposlenje dužnika koje je dovoljno za finansiranje čak i izmenjenog plana otplate.[27]

Po završetku svih isplata, a u skladu sa planom otplate, dužnik ima pravo na razrešenje ako**:** 1) potvrdi (ako je primenljivo) da su sve obaveze koje su dospele pre izdavanja potvrde o razrešenju izmirene; 2) nije dobio otkaz u prethodnom slučaju podnetom u određenom vremenskom okviru (dve godine za prethodne slučajeve iz poglavlja 13 i četiri godine za prethodne slučajeve iz poglavlja 7, 11 i 12) i 3) je završio kursiz finansijskog upravljanja.[28] Ipak, sud neće automatski pristupiti razrešenju sve dok ne utvrdi, a nakon obaveštenja i saslušanja, da nema razloga da veruje da je u toku bilo koji postupak koji bi mogao dovesti do ograničenja na izuzeću dužnikove imovine.[29]

3.2. Means test

Treba naznačiti da kao i većina oblika osiguranja, otplata duga ponuđena u stečaju može stvoriti moralni rizik (Albanesi et al. 2015:8). Sve do 2005. godine pretežan broj insolventnih fizičkih lica prilikom podno- šenja predloga za pokretanja ličnog stečaja preferirao je proceduru predviđenu poglavljem 7.[30] Naime, i ona lica koja su imala dovoljno prihoda opredeljivala su se za proceduru u skladu sa odredbama poglavlja 7, izbegavajući na taj način da pokrenu proceduru u skladu sa odredbama

26 Title 11 Ch. 13. §§ 1323, 1329. U.S.C.

27 Title 11 Ch. 5. § 523. U.S.C.

28 Title 11 Ch. 13. § 1328. U.S.C.

29 Title 11 Ch. 13. § 1328 (h). U.S.C.

30 Tokom 2020 godine od ukupnpg broja pokrenutih ličnih stečajeva 71,65% se rešavalo u skladu sa poglavljem 7. Preuzeto 15.07.2022. https://s3.amazonaws.com/ abi-org/Newsroom/Bankruptcy_Statistics/Quarterlynonbusinessfilingsbychapter1994-Present.pdf

poglavlja 13.[31] Reformom stečajnog zakonodavstva, usvajanjem *Abuse Prevention and Consumer Protection Act* (*BAPCPA*)[32] predvidelo se nekoliko novina,i to**:** a) test dohotka (*means test*) za poglavlje 7; b) fiksni petogodišnji plan otplate za poglavlje 13; i g) pohađanje obaveznih časova kreditnog savetovanja od strane dužnika (White, 2006:10-15). Najznačajna, a samim tim i ključna novina, a sve u cilju otklanjanja potencijalnog prevarnog ponašanja dužnika, je predviđanje složenog matematičkog (ekonometrijski) formulisanog testa podobnosti (*means test*) za poglavlje 7 (DeFalaise, 2006:2) (Gross, Kluender, Liu, Notowidigdo, Wang, 2020). Predviđanjem *means test*-a, učinjen je značajan iskorak ka pravednijem sistemu zaštite interesa poverioca odnosno onemogućeno je dužniku koji ima redovne prihode iz kojih može podmiriti potraživanja da optira za proceduru koja bi ga u smislu mogućnosti razrešenja dugova izjednačila sa dužnikom koji ne ostvaruje prihode ali ima imovinu koja može poslužiti za izmirenje obaveza.

Na osnovu navedenog sud može odbiti pokretanje postupka ličnog stečaja po pravilima poglavlja 7, kada je tekući mesečni prihod[33] dužnika (dugovi su prvenstveno potrošački, a ne poslovni) veći od državnog medijalnog prihoda i ako utvrdi da bi odobravanje olakšica (poglavlje 7) predstavljalo zloupotrebu.[34] Pretpostavlja se da zloupotreba postoji ako je ukupni tekući mesečni prihod dužnika tokom 5 godina, umanjen za određene troškove,[35] te se u takvim okolnostima zahteva se obavezna primena *means test*-a (test podobnosti). Samo onda kada *means test* pokaže da je mesečni prihod ispod medijalnog prihoda, omogućava se zainteresovanom licu pokretanje postupak ličnog stečaja u skladu sa poglavljem 7. (Gerhard, 2009:2). Dužnik ima mogućnost da opovrgne pretpostavku zloupotrebe dokazivanjem posebnih okolnosti koje opravdavaju dodatne troškove ili

31 Personal Bankruptcy Statistics for 2020. Preuzeto 15.07.2022. https://www.fool.com/the-ascent/research/personal-bankruptcy-statistics/

32 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), (*Pub. L. 109-8, 119 Stat. 23*, enacted April 20, 2005).

33 Tekući mesečni prihod koji dužnik prima označava prosečni mesečni prihod primljen tokom šest kalendarskih meseci pre početka stečajnog postupka, uključujući redovne doprinose za troškove domaćinstva, prihod od supružnika, ali ne i prihode od socijalnog osiguranja ili uplate kada je dužnik žrtva određenih krivičnih dela. **–** Title 11 Ch. 1. § 101 (10A). U.S.C.

34 Title 11 Ch. 7. § 707(b). U.S.C.

35 Troškovi veći od $12.850 ili 25% dužničkog neprioritetnog neosiguranog duga, sve dok je taj iznos najmanje $7.70011 - Title 11 Ch. 7. § 707 2 (A). U.S.C.

prilagođavanjem tekućeg mesečnog prihoda, s tim da ako u tome ne uspe postupak se pokreće po pravilima poglavlja 13.[36]

IV Implikacije za Republiku Srbiju i Republiku Srpsku

Jedna od mogućnosti, odnosno pravno-političkih opcija za rešenje pro- blema prezaduženosti građana koja neposredno koindicira potencijalnu insolventnost istih je predviđanje instituta ličnog stečaja putem re- gulative (zakon) kojim bi se na konzistentan način uredila ova materija u pravnim sistema Republike Srbije i Republike Srpske.

Ono što predstavlja dilemu, a samim tim i traži odgovor, je da li treba doneti zakonski akt samo da bi se doneo ne sagledavajući posledice i domete takvog zakonskog akta ili treba doneti akt na iskustvima zemalja koje su ga već donele i primenjuju ga, sagledavajući sve prednosti i ne- dostatke istog? Ovo je pravno-političko pitanje o kojem ima da odluči zakonodavac. Sa teorijsko pravnog gledišta uvek se treba voditi time da zakonski akt ne treba prepisati već ga treba doneti u skladu sa potrebama i okolnostima koje vladaju u određenom društvu (ekonomija, socijalna struktura, mentalitet). Vođeni ovim konsideracijama smatramo da je vreme da se otvori diskusija o potrebi donošenja stečajne regulative fizičkih lica, pri čemu od koristi može biti bar načelni osvrt na uporednopravna zakonodavstva, a u ovom slučaju rešenja predviđena od-redbama Naslova 11 United States Code.

Respektujući izložen model ličnog stečaja u ovom slučaju liberalni model, Zakonom bi se imali postići opšti i posebni ciljevi. Opšti cilj zbog kojeg je potrebno uvesti institut ličnog stečaja jeste sistem koji će rezultirati stvaranjem uslova da građani reprogramiraju obaveze ili da se oslobode od preostalih obvaveza i omogući im se novi fina- nasijski početak, a da se poveriocima pruži mogućnost da ravnomerno namire svoja potraživanja. U okviru ovog opšteg cilja, ostvarili bi se i posebni ciljevi: 1) stvaranje uslova da se kroz neformalne (neistitucionalne) i formalne (institucionalne – sud) okvire postigne dogovor između poverioca i dužnika oko restruktiriranja postojećih obaveza; stvaranje uslova za odgovorno i ekonomski racionalno ponašanje I rasterećenje sudskog sistema od vođenja bezuspešnih i višestrukih izvršnih postupaka.

Međutim, uvođenje instituta ličnog stečaja kao novog instituta predstavlja ozbiljan izazov koji podrazumeva ne samo ispunjenost određenih

36 Title 11 Ch. 7. § 707 (b) (1). U.S.C.

socijalo-ekonomskiih i pravnih pretpostavki u smislu operabilnosti jednog takvog sistema, nego i skrupulozan analitičko-zakonodavni rad. Osim toga, u kreiranom okviru bi se morala pronaći adekvatna zakonska rešenja za čitav niz specifičnih pitanja koja pokreće uvođenje instituta ličnog stečaja u pravne sisteme R. Srbije i R. Srpske, a zakonom bi trebalo regulisati: 1) lica na koja se zakon odnosi; 2) uslove pod kojima se može pokrenuti postupak za otvaranje ličnog stečaja, odnosno proglasiti lični stečaj (predviđanje stečajnog razloga); 3) neformalne i formalne faze i procedure, kao i nadležnost neformalnih (vansudskih) i formalnih (sudskih) organa i subjekata, 4) detaljna pravila sudskog postupka sprovođenja ličnog stečaja, (nadležnost, otvaranje postupka i pravne posledice otvaranja postupka ličnog stečaja, kao i zaaključenje postupka); 5) oslobođenje (razrešenje) dužnika ili uskraćivanje oslobođenja od preostalih obaveza, i sl.

V Zaključak

Ideja regulisanja ličnog stečaja je da se dužnicima ponudi perspektiva za budućnost, da im se pruži podsticaj da ostanu produktivni, umesto da kapituliraju pred zavisnošću od životnog blagostanja i suštinskom prinudnom služenju poveriocima. Iako ne postoji univerzalno usagla- šeni skup pravila ili standarda koji bi garantovao nekakav najbolji sistem ličnog stečaja, kroz dosadašnju praksu primene različitih modela iskristalisali su se izvesni stavovi o prednostima i nedostacima raznih modela (liberalni i konzvervativni). Danas možemo govoriti o visokom stepenu saglasnosti o ključnom skupu preferiranih karakteristika jednog dobrog sistema ličnog stečaja u vidu pravila koja odražavaju tzv. najbolju praksu nacionalnih stečajnih zakonodavstava u tretmanu prezaduženosti građana.

Zakon koji bi uveo lični stečaj u pravni sistem Republike Srbije i Repu- blike Srpske stvorio bi uslove za konsolidaciju prezaduženih građana i njihov nov i odgovorniji finansijski početak. Uvođenje u pravo (zakon) instituta ličnog stečaja kao novog instituta predstavlja ozbiljan izazov i zahteva da se pre pravno-političkih izbora, opredeljenja i odluka, ispravno sagledaju dometi, prednosti i nedostaci pojedinih rešenja u svetlu uporedno pravne regulative, a sve u cilju profilisanje rešenja koje će najbolje odgovarati specifičnim potrebama rešavanja problema prezaduženih građana Republike Srbije i Republike Srpske.

Otuda, u slučaju da se donese odluka o donošenju Zakona kojim bi se uveo i uredio lični stečaj u pravni sistem, prilikom koncipiranja Zakona

o ličnom stečaju, bi svakako osim analize uporednog zakonodavstva i prakse, trebalo uvažiti stavove koji su plod kritičkog promišljanja vodećih evropskih i svetskih eksperata u materiji ličnog stečaja, a koji se mogu identifikovati u različitim ekspertskim izveštajima i prepo- rukama, uključujući i Izveštaj Svetske banke o tretmanu insolventnosti fizičkih lica (*Report on the Treatment of the Insolvency of Natural Persons*).

Na kraju možemo zaključiti, da u koncipiranju novog Zakona kojim bi se regulisala materija ličnog stečaja posebno treba povesti računa da se njime afirmišu osnovna načela modernog postupka ličnog stečaja, a sve u skladu sa potrebama, zahtevima i mogućnostima (pravnim, ekonomskim i mentalnim) koji vladaju u Republici Srbiji i Republici Srpskoj.

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CAN THE LIBERAL CONCEPT OF PERSONAL BANKRUPTCY SERVE AS A GUIDE IN REGULATING THIS INSTITUTE IN THE REPUBLIC OF SERBIA AND REPUBLIKA SRPSKA?

Summary

Unemployment, weak consumer power, inability to regularly service credit obligations (problem loans), and inability to settle other financial obligations may be the factors that lead a natural person (consumer) to insolvency. The institute of personal bankruptcy is an institute which provides an opportunity for a natural person (consumer) to be relieved from debts without falling into insolvency, at the cost of having his/her property subject to enforcement. The liberal model of personal bankruptcy is one of the modalities of personal bankruptcy that should be taken into consideration during future regulation. The liberal model of personal bankruptcy is characterized by an open approach, which ultimately leads to a complete discharge of debt. Debt relief is an essential feature of this model, which is based on the idea of providing a chance for a new financial start (fresh start), which puts the interest of the debtor-consumer in the foreground, and the risk is transferred to the creditor. The legal systems of the Republic of Serbia and Republika Srpska do not recognize the institute of personal bankruptcy. Establishing the normative framework of the institute of personal bankruptcy may be a challenge for the legislations of Serbia and Republika Srpska, especially because it is insufficiently considered in domestic legal theory and fairly unknown in judicial and legal practice. For the stated reasons, the authors will point out to the advantages and disadvantages of the liberal model of personal bankruptcy, focusing on why this model should be taken into consideration during the potential legal regulation of the institute of personal bankruptcy. In this way, the authors attempt to initiate a legal discussion about the necessity of the legal regulation of the institute of personal bankruptcy in the Republic of Serbia and Republika Srpska.

Keywords**:** *natural person, personal bankruptcy, liberal model, insolvency, debt relief, financial fresh start.*

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POČETAK IZVRŠENJA KRIVIČNOG DJELA U EVROKONTINENTALNOM I ANGLOSAKSONSKOM KRIVIČNOM PRAVU

Apstrakt: *jasno i precizno određenje djelatnosti koja označava početak izvršenja krivičnog djela, kao granica između načelno nekažnjivog i kažnjivog stadijuma njegovog ostvarenja, od velikog je značaja za krivično pravo. Prilikom određivanja ove granice savremena krivična zakonodavstva i doktrina krivičnog prava se rukovode različitim kriterijumima. U evrokontinentalnom pravnom sistemu određenje pokušajne djelatnosti pronalazi se u teorijama, dok se krivična zakonodavstva u anglosaksonskom krivičnopravnom sistemu u svojoj kazuistici više oslanjaju na odgovarajuće testove. U članku se analiziraju teorijska i zakonodavna rješenja početka izvršenja krivičnog djela i njegovog razgraničenja od stadijuma pripremanja, koja su prisutna u ovim sistemima.*

Ključne riječi: *pokušaj, krivično djelo, pripremne radnje, evrokontinentalno krivično pravo, anglosaksonsko krivično pravo.*

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1. Uvod

Doktrinarno tematiziranje pokušaja krivičnog djela često se smatra zamršenijim i složenijim za razumijevanje od bilo kojeg drugog dijela krivičnog prava. Složenost problema se možda i ponajbolje ilustruje raznolikošću rješenja koja predlažu teoretičari, zakoni i sudije. Odrebe koje se odnose na ovu materiju redovno su sadržane u pravnim aktima (zakonima) u formi instituta ili posebnog (nepotpunog) krivičnog djela (Bohlander, 2009: 137). Isto tako, pokušajna djelatnost redovno je predmet i doktrinarnih rasprava. To je uveliko slučaj u evrokontinentalnom pravnom sistemu što je rezultiralo odgovarajućim teorijama. Za razliku od ovoga, u anglosaksonskom krivičnom pravu izdvajaju se testovi, uz naznaku da se i ovdje mogu pronaći određene teorije.

Valja istaći da bez obzira na to da li je riječ o teorijama ili testovima, one/oni, pod uslovom da nije riječ o ekstremnim, u savremenom krivičnom pravu nedopustivim shvatanjima, svoje postojanje utemeljuju na dva konstitutivn aelementa: subjektivnom I objektivnom. Subjektivni element pokušaja krivičnog djela je umišljaj (u anglosaksonskom krivičnom pravu označen terminom *intent* – namjera, a u evrokontinentalnom kao direktni i eventualni) (Milić, 2017: 408). Objektivni element, na kome ujedno i počiva demarkacija između načelno nekažnjivog i kažnjivog stadijuma ostvarenja krivičnog djela daleko je više sporan. Nedvosmislenim se čini jedino pokušaj koji se sastoji u preduzimanju djelatnosti koja je u biću krivičnog djela označena kao radnja. U ostalim slučajevima pokušajnom se određuje ona djelatnost koja je različito definisana; prema širokoj lepezi ponuđenih rješenja to je radnja koja je povezana i koja najčešće neposredno predstoji radnji izvršenja krivičnog djela, radnja kojom se započinje ostvarenje krivičnog djela, radnja koja bez daljnjih (bitnih) međuakata vodi ostvarenju krivičnog djela, radnja koja je više od pripremne, radnja kojom se bez daljnjih međuakata ostvaruje vremenski i prostorni zahvat u sferu bića ili žrtve krivičnog djela i sl. Konsekventno tome krivičnopravna intervencija kod nekih manje, a kod nekih više zadire u domen prethodnog stadijuma ostvarenja krivičnog djela.

2. Pokušaj krivičnog djela u evrokontinentalnom pravnom sistemu

Krivičnopravni instituti u evrokontinentalnom pravnom sistemu doktrinarno su pojašnjeni putem teorija. Izuzetak nije ni pokušaj krivičnog djela. Ovdje se, istina više kao istorijske kategorije, javljaju

tzv. čiste ili jednostrane teorije nudeći objašnjenje početka izvršenja krivičnog djela pomoću samo jedne njegove sastavnice, objektivne ili subjektivne (Gropp, 2015: 337–343). Prve za početak izvršenja krivičnog djela kao kriterijum uzimaju preduzetu djelatnost. Sa druge strane, subjektivna shvatanja početak izvršenja krivičnog djela vide u onoj djelatnosti putem koje se ispoljava zločinačka namjera. Pored ovih utemeljenja, prisutna su i shvatanja koja uvažavaju obe njegove sastavnice.

Govoreći o ovom pravnom sistemu redovno se susrećemo sa tekstovima o formalno-objektivnoj i materijalno-objektivnoj teoriji, tj. shvatanjima koja možemo kvalifikovati kao tradicionalna. Pored njih, svojim značajem se posebno izdvaja njemačka krivičnopravna doktrina koja je u okviru savremenih mješovitih shvatanja, između ostalog proizvela i sve prihvatljiviju Individualno-objektivnu teoriju početka izvršenja krivičnog djela, dopunjenu sa Terijom međuakta.

2.1. Objektivne teorije

Formalno-objektivna teorija. Ova teorija, ovaploćena u francuskom *Code Pénalu* iz 1810. godine i čuvenoj formulaciji *commencemnt d'exécution* (početak izvršenja), pokušaj krivičnog djela vidi u djelimičnom ostvarenju nekog od obilježja konkretnog krivičnog djela (najčešće radnje). Pomenuta formulacija, koja početak izvršenja određuje u *„strogom"* smislu (Schönke, Schröder, 2010: 411), na prvi pogled uvažava načela zakonitosti i pravne sigurnosti. Štaviše, moglo bi se učiniti i da predstavlja idealno rješenje i za nesporne slučajeve pokušaja krivičnog djela, one u kojima je ispoljena radnja izvršenja, međutim to nije slučaj. Navedeno iz razloga što za pokušaj krivičnog djela nije dovoljno započinjanje ostvarenja samo jednog njegovog obilježja ukoliko se ne započne sa ostvarenjem cjelokupnog bića krivičnog djela (u smislu višeaktnih i kvalifikovanih krivičnih djela kao i krivičnih djela koja se označavaju „pripremom za akciju"[1]) (Novoselec, 2008: 728–730). Isto tako, nije pogodna za konstelaciju krivičnih djela kod kojih u zakonskom opisu nije predviđena radnja izvršenja.[2] I na kraju, bez obzira

1 Na primjer izvršilac noću izvadi dvije daske da bi sledeći dan mogao da uđe u kuću i izvrši krađu, ostvario je kvalifikatorno obilježje ali neće postojati pokušaj krivičnog djela jer nije odmah namjeravao izvršiti krađu (kvalifikovana krivična djela), ili izvršilac krađe koji pri sebi ima oružje koje ima namjeru da upotrijebi da bi zadržao ukradenu stvar, ali to ne učini odgovaraće samo za tešku krađu jer nije upotrijebio prinudu (višeaktna krivična djela), (Novoselec, 2008: 729).

2 Bez obzira na nedostatke u smislu restriktivnosti, ova sintagma je danas prisutna u pojedinim evropskim krivičnim zakonodavstvima uz naznaku da se u doktrini sa

na postavljanje kao granice razgraničenja pripremnih radnji i pokušaja krivičnog djela sintagme *„početak izvršenja"* ona stadijum pokušaja krivičnog djela može, sa jedne strane, odložiti što je više moguće čineći da područje krivične odgovornosti „zaostaje" za područjem rizika po potencijalnu žrtvu (Gropp, 2015: 342), ili, sa druge strane, u određenim (već pomenutim) slučajevima, pokušaj odrediti prerano kvalifikujući radnje iz stadijuma pripremanja kao početak izvršenja.

Materijalno-objektivna teorija. Načelna rigidnost formalno-objektivne teorije nastojala se korigovati proširenjem granice kažnjivosti i na druge djelatnosti koje ne predstavljaju radnju izvršenja krivičnog djela. S tim u vezi, materijalno-objektivna teorija je označila kao pokušajne i one djelatnosti koje su tako naslonjene na radnju izvršenja da sa njom čine prirodno jedinstvo. Prema Frankovoj formuli, to su one radnje koje su, iako pripadaju stadijumu pripremanja krivičnog djela i nisu sastavni dio činjeničnog opisa krivičnog djela, zbog nužne povezanosti sa radnjom izvršenja njen sastavni dio (Roxin, 2003: 368), i koje kao takve predstavljaju opasnost po pravno zaštićeno dobro. Kritika bi se mogla uputiti obema sastavnicama ovoga učenja. Prije svega, postavlja se pitanje kako posmatrati sintagmu prirodnog jedinstva. Traganje za prirodnim jedinstvom može dovesti do opasnosti od proširenja zone kažnjivosti. Riječ je o prilično neodređenom pojmu koji nameće potrebu raščlanjivanja preduzetih djelatnosti na pojedinačne akte, a da pri tome ne postoje mjerila za određenje nekih od njih kao pokušajnih. Kvalifikovanje ovih akata na nužne i one koji to nisu ne daje zadovoljavajuće rezultate, kao ni Frankovo nastojanje da odredi liniju razgraničenja kvalifikujući

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tih područja pokušaj ipak tumači u širem smislu. Ovdje prije svega treba pomenuti francuski Krivični zakonik (čl. 121–5) prema kome pokušaj postoji kada je *„... započeto izvršenje..."* (Penal Code of the French Republic. Preuzeto 3. 1. 2022. *https://www.legislationline.org/download/id/3316/file/France_Criminal%20Code%20updated%20on%2012-10-2005.pdf).* Krivični zakonik Švajcarske u čl. 22, st. 1 takođe koristi ovu formulaciju prema kojoj pokušaj ostvaruje onaj ko *„započne izvršenje krivičnog djela ili prekršaja* (Criminal Code of Swiss Confederation, of 21. December 1937, Amended 2017. Preuzeto 1. 2. 2022. *https://www.fedlex.admin.ch/eli/cc/54/757_781_799/en*) *a interesantno zakonsko rješenje sadrži i finski Krivični zakon. Naime, pored formulacije prema kojoj lice treba da „ započne izvršenje krivičnog djela*", finski zakonodavac postavlja I zahtjev da je usljed ovih preduzetih djelatnosti „ *došlo do opasnosti da će krivično djelo biti izvršeno*", (Criminal Code of Finland, 39/1889, amendments up to 766/2015. Preuzeto 23. 12. 2021. *https://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf).* Isto tako, u kontekstu formalno-objektivne teorije značajno je pomenuti i zakonska rješenja krivičnih zakonodavstava sa prostora bivše Jugoslavije, koja su (sa izuzetkom hrvatskog) u određenju pokušajne djelatnosti zadržala formulaciju *„početak izvršenja".*

pripremne radnje kao djelatnosti koje nisu nužne. Uostalom, kod ovakvog stanja stvari umjesno je postaviti pitanje zašto i pripremne radnje ne bi mogle biti nužne za njegovo izvršenje (Vuković, 2021: 296)? Treba priznati da određivanje početka izvršenja krivičnog djela „naslonjeno" na kriterijume *prirodnog jedinstva* i *nužne povezanosti* jeste prigodno iz razloga što proširuje zonu kažnjivosti postavljenu u kontekstu formalno-objektivne teorije, ujedno je ograničavajući postavljanjem zahtjeva da su to samo one djelatnosti koje čine pomenuto *„prirodno jedinstvo"* u smislu blizine, i koje su nužne za izvršenje krivičnog djela u smislu njihovog značaja. Ono, štaviše, uz određene modifikacije ponovo i dolazi do izražaja, u smislu kombinovanja kriterijuma izvršiočevog *„plana"* i *„prirodnog zajedništva"*, a primjećuje se i uvođenje i dodatnog materijalnog kriterijuma neposredne opasnosti po pravno zaštićeno dobro u smislu da bude izloženo *„konkretnom riziku"* (Schönke, Schröder, 2010: 411).

2.2. Subjektivne teorije

Prema svome začetniku Fon Buriju, orijentisane isključivo ka izvršiocu krivičnog djela u smislu njegove zločinačke volje i poimanja početka izvršenja, kod ovih shvatanja je zanemaren/isključen objektivni element.[3] Početak izvršenja krivičnog djela u smislu sintagme *„Jetzt geht es los"* odijelio je pokušaj od bića krivičnog djela i učinio ga više ili manje širokim, sve u zavisnosti od shvatanja izvršioca. U konačnici, to je ona radnja kojom izvršilac prema svojoj zamisli ostvaruje krivično djelo bez obzira na to što ona (možda) pripada stadijumu pripremanja krivičnog djela.

Savremena subjektivna shvatanja se po prirodi stvari dovode u vezu sa svrhom kažnjavanja, pa je subjektivni element značajan u kontekstu specijalne prevencije.[4] Lang *(Lange)* pokušaj krivičnog djela vidi u radnji koja napadača učini opasnim za pravnozaštićena dobra, a Bokelman *(Bockelmann)* shodno svojoj teoriji „*vatrene probe*" za pokušaj uzima onaj momenat u kome je „*namjera izvršioca prošla vatrenu probu u kritičnoj situaciji*" (Roxin, 2003: 345). Subjektivnu teoriju pokušala je da dopuni Teorija utiska *(Eindruckstheorie)* u čijoj suštini se nalazi „*utisak djela na širu javnost*" tj. „*sociopsihološki efekat*" ostvarenog akta koji „*šokira*" javnost i njegovo „*povjerenje u valjanost pravnog sistema*" (Jakobs, 1991: 712).

3 Često se tvrdi da je ovo shvatanje u osnovi rješenja njemačkog zakonodavca iz 1975. godine (Roxin, 2003: 342).

4 S tim u vezi *„jednom dokazana i prema svemu sudeći trajna volja može da generiše hiljadu akcija"* (Roxin, 2003: 344–345).

Jedna od varijanti subjektivnih teorija je i shvatanje prema kome poče- tak krivičnog djela predstavlja ona radnja putem koje se nedvosmisleno manifestuje zločinačka namjera. Pretpostavka je da ona podrazumijeva umišljaj i da se ove djelatnosti ne mogu objasniti drugačije nego da je u pitanju pokušaj krivičnog djela. Slično shvatanje, kako će se i uvidjeti, egzistira i u pojedinim zakonodavstvima iz anglosaksonskog krivično-pravnog sistema. Samo za sebe, bez kombinovanja sa drugim kriterijumima, ono ipak ne može da ponudi ispravno određenje pokušaja krivičnog djela. Razlog je jednostavan; posmatra se isključivo spoljašnji element, u smislu opasnosti ili *„šoka... utiska..."* koji izvršilac krivičnog djela ostvaruje, i na osnovu njega izvodi pretpostavka o „podrazumijevanom" subjektivnom elementu.

2.3. Mješovite teorije

S obzirom na nedostatke „čistih" objektivnih i subjektivnih promišljanja i, s tim u vezi, nemogućnosti njihove primjene, za konstituisanje pokušajne djelatnosti nametnuli su se zahtjevi za kumulativnim ostvarenjem objektivnog i subjektivnog elementa. Mješovite objektivno-subjektivne teorije kombinuju subjektivne i objektivne kriterijume najčešće zasnovane na planu izvršioca i neposrednosti napada na pravno zaštićena dobra (Freund, Rostalski, 2019: 340)[5]. Najznačajnije varijante mješovitih teorija su shvatanja kojima je zajedničko da su okarakterisana kao individualna, sa razlikom koja počiva na objektivnoj sastavnici.

Individualno-objektivno shvatanje *(Tatplantheorie).* Ovo shvatanje kao kriterijum početka izvršenja krivičnog djela vidi plan izvršioca i njegovo poimanje početka izvršenja (Schönke, Schröder, 2010: 411).[6] Kao

5 Kao takve inkorporirane su i u pojedina zakonska rješenja. Predvodnik ove konstelacije je Krivični zakonik Njemačke koji u čl. 22 propisuje: *„pokušaj krivičnog djela postoji ukoliko lice preduzme korake koji će odmah voditi ka dovršenju krivičnog djela, onako kako je on to planirao*". U pitanju je njemački ekvivalent englesko-velškoj formulaciji pokušaja krivičnog djela *(Criminal Attempt Act)* koja za početak vidi akte koji su „*more than merely preparatory*" (Bohlander, 2009: 141). Roksin *(Roxin),* kako će se i vidjeti, govori o novim kriterijumima na kojima počiva njemačka sudska praksa: pokušaj predstavljaju radnje koje nesmetano vode ka ostvarenju činjenica predviđenih u biću krivičnog djela i imaju blizak ili neposredan prostorno – vremenski odnos sa njim. U kontekstu objektivnog kriterijuma od velikog je značaja i učenje o međuaktu ili posrednom aktu. Zatim je tu subjektivni kriterijum u smislu snage volje koji se sastoji u prelasku u stadijum pokušaja kroz formulaciju *„sada počinje"* (Roxin, 2003: 370; Gropp, 2015: 334–335). Početak krivičnog djela započinje početkom realizacije činjeničnog opisa iz bića krivičnog djela, zakonodavac u prvi plan stavlja neposrednost čime se eliminiše subjektivnost (Jakobs, 1991: 726–727).

6 Za razliku od Individualno-objektivne teorije, Teorija utiska *(Eindruckstheorie)* uzima plan izvršioca krivičnog djela kao polazište, ali ne i i kao kriterijum

mjerodavna se uzima činjenica da li izvršilac radnju koju preduzima smatra pripremnom radnjom ili radnjom izvršenja krivičnog djela. Kao što se primjećuje, objektivni element je marginilizovan jer iako izvršilac djeluje u spoljnjem svijetu, važnost tog uticaja potiče isključivo iz njegovog shvatanja, a ne onako kako to treća strana razumije (Safferling, 2006: 686). Navedeno shvatanje je dovelo do toga da se nagrađuje *„zločinačka energija"* izvršioca koji na početku možda i nije mario kako može izvršiti krivično djelo (Beulke, 2018: 131). Pored ovoga, možda je i najveći problem koji se javlja kod ove teorije potencijalna nestalnost *„zločinačkog plana"* zato što se gubi odlučujući kriterijum za razgraničenje (Maurach, Gössel, Zipf, Dölling, Laue, Renzikowski: 2014: 136). Tako, u jednom trenutku izvršilac može svoje radnje smatrati pripremnim radnjama, a u drugom radnjama kojima ostvaruje obilježja krivičnog djela. Da bi se izbjegle ove poteškoće postavlja se pitanje da li bi razuman i neutralan čovjek koji zna za ciljeve izvršioca računao sa mogućnošću izvršenja krivičnog djela (Novoselec, 2008: 736). Ovaj kriterijum, za koji možemo reći da predstavlja i svojevrstan korektiv shvatanja, doprinosi tome da se pokušaj krivičnog djela ipak utvrđuje prema objektivnom mjerilu, ali na subjektivnoj podlozi. Pored navedenog, vidi se i da preventivna potreba za kažnjavanjem pokušaja više ne proizilazi iz manifestacije volje, već prvenstveno iz prijetnje pravno zaštićenim dobrima (Schönke, Schröder, 2010: 411–414), čime opasnost kao materijalni element dolazi do izražaja.

Individualno-formalne teorije – *Teilaktstheorie.* Iako vode računa o planu izvršioca, one u svom meritumu imaju kriterijum bića krivičnog djela dopuštajući pomjeranje granice početka izvršenja i na one djelatnosti koje su prostorno i vremenski bliske njegovom ostvarenju.[7] To su one radnje ili međuakti između kojih i radnje kojom se ostvaruje biće krivičnog djela nema više drugih međuakata. Posmatra se svaki korak izvršioca prema objektu napada u smislu izolovanog, nezavisnog čina, a zatim se pretpostavlja da je pokušajni onaj *„posljednji akt"* nakon kojeg ne slijede drugi međuakti. S obzirom na činjenicu da u ovakvim slučajevima može biti riječi o bilo kojem aktu, kriterijum je nužno dopunjen u smislu „kvaliteta" posljednjeg akta koji nije izvršen, na način da će pokušaj krivičnog djela postojati u slučaju da između akta koji je preduzet i radnje kojom se ostvaruje biće krivičnog djela ne postoje međuakti koji

ocjene. Činjenica da li određena radnja predstavlja pokušajnu djelatnost ne zasnivase na procjeni izvršioca krivičnog djela već na osnovu objektivnih standarda.

7 Ova teorija u kombinaciji sa Frankovom formulom je relativno uspješna u razraničenju pripremnih radnji i pokušaja krivičnog djela (Roxin, 2003: 373).

se označavaju *„bitnim".*[8] *S tim u vezi, Kul (Kühl)* opravdano ističe da se prilikom primjene ove teorije treba postupati obazrivo zbog činjenice da čovjekovo ponašanje nije vještački razdijeljeno (Roxin, 2003: 374). Slično navedenom, i kod Ezera *(Eser)* se uočavaju kritike ovako formalno *„nacrtanog"* početka izvršenja krivičnog djela; prema njemu postoje krivična djela koja se vrše radnjama koje se u konačnici nalaze u odnosu *„neprimjetnog spajanja toka koji im prethodi"*, kao što je kriminalitet bijelog okovratnika (Schönke, Schröder, 2010: 414). Opravdane su kritike da „slaganje" čovjekovih radnji nije zadovoljavajući kriterijum za određivanje početka izvršenja krivičnog djela. U slučaju djelatnosti koje ne predstavljaju radnju izvršenja krivičnog djela trebao bi se uzeti u obzir i materijalni element čiji je nosilac svaka od pomenutih djelatnosti.[9] Ovdje se sada već javlja drugi problem; naime, može se desiti da opasnost pojedine djelatnosti (međuakta) i rizik koji ona nosi može biti takvog karaktera da je može označiti pokušajnom djelatnošću iako nije posljednji akt koji prethodi izvršenju krivičnog djela. I upravo se zbog ovakvih slučajeva kao dodatni kriterijum nameće plan izvršioca o izvršenju krivičnog djela. Drugim riječima, umjesno je postaviti dodatno pitanje: da li je, prema planu izvršioca, već dostignut stadijumu kome je prema njegovom shvatanju predmetno pravno dobro već ugroženo (kombinacija individualnih i materijalnih elemenata) (Schönke, Schrö- der, 2010: 414).

Konkretizujuća teorija djelimičnog akta *(Die konkretisierte Teilaktstheorie).* Teorija djelimičnog akta je zahtijevala daljnju konkretizaciju pa se u njemačkoj krivičnopravnoj doktrini izdiferencirala i Konkretizujuća teorija djelimičnog akta. Naime, Roksin produbljuje prethodno navedeno shvatanje i određuje dodatne kriterijume za kvalifikovanje pokušajne djelatnosti. To više nije samo posljednji akt, već preduzeti akt u slučaju da se ostvare postavljeni uslovi: da se utvrdi *„bliska vremenska veza"* sa radnjom izvršenja i da se ostvari *„zahvat"* u sferu bića ili žrtve krivičnog djela. Ako su ispunjena ova dva kriterijuma onda to i ne mora da bude posljednji preduzeti (među)akt.[10] Značajno je samo da kriterijumi

8 *„Bitnost"* preduzetog akta došla je do izražaja i kod Novoseleca *(Novoselec)* u njegovom zalaganju za napuštanje formalno-objektivne i materijalno-objektivne teorije, (Novoselec, 2008: 741).

9 Zbog toga se u razgraničenju pripremnih radnji i pokušaja krivičnog djela treba rukovoditi procjenom rizika (Schönke, Schröder, 2010: 414).

10 Autor ovo objašnjava na primjeru krađe tašne iz automobila. Ukoliko osoba uđe u automobil i posegne za štapom da bi dohvatila tašnu koja se nalazi na zadnjem sjedištu, prema Teoriji djelimičnog akta nalazi se u stadijumu pripremanja krivičnog djela jer još uvijek predstoje međuakti koje je potrebno preduzeti, a

budu ispunjeni kumulativno.[11] Ovo je u konačnici i preovlađujuće teorijsko promišljanje koje je našlo svoj put i u praksi njemačkih sudova, upravo zbog konkretizacije Teorije djelimičnog akta; naime, priznaje se kao pokušajna djelatnost ona radnja koja u neometanom toku i bez drugih međuradnji vodi ostvarenju bića krivičnog djela, ali ukoliko to nije slučaj onda se treba rukovoditi konkretizujućim kriterijumima bliske vremenske veze i zahvata u sferu bića, odnosno žrtve krivičnog djela.[12]

3. Pokušaj krivičnog djela u anglosaksonskom krivičnom pravu

Uređenje pokušajne djelatnosti u zemljama sa područja anglosaksonskog pravnog sistema jednako je značajno kao i u evrokontinentalnom krivičnom pravu. Štaviše, upravo je u engleskom krivičnom pravu još davne 1649. godine u djelu *Coke's Third Institute* (utemeljenom na Stanfordovom *(Standford)* „*Pleas of the Crown*") pažnja bila posvećena problematici pokušaja krivičnog djela gdje su, između ostalog, pokušaji imovinskih krivičnih djela bili kažnjavani na osnovu maksime *voluntas reputabatur pro facto*" (Sayre, 1928: 821). Danas u većini zakonodavstava iz anglosaksonskog pravnog sistema postoji odredba o početku izvršenja krivičnog djela, a uočava se i poseban akt koji je u meritumu posvećen ovoj problematici. Za razliku od krivičnih zakonodavstava evrokontinentalnog pravnog sistema koji materiju stadijuma ostvarenja krivičnog djela regulišu u opštem dijelu krivičnih zakona, ovdje se kod većine zakonodavstava pokušaj krivičnog djela svrstava u kategoriju nepotpunih ili prethodnih krivičnih djela *(Inchoate offences).*

Govoreći o sastavnicama pokušaja krivičnog djela, uz napomenu da niti u ovom sistemu nisu izostala ekstremna shvatanja koja priznaju kao mjerodavan isključivo objektivni ili subjektivni element, primjetno je da je pokušajna djelatnost, odnosno pokušavanje *(Try)* utemeljeno

koji bi zasnovali pokušajnu djelatnost. Za razliku od toga, prema Konkretizujućoj teoriji djelimičnog akta, ovim djelatnostima ostvarena je vremenska povezanosti zahvat u sferu žrtve, te preduzete djelatnosti valja kvalifikovati kao pokušaj krivičnog djela (Roxin, 2003: 374).

11 Tako, ukoliko lice stoji ispred automobila u koji treba da uđe da bi uzeo tašnu, postojaće bliska vremenska veza, ali ne i zahvat u sferu žrtve, i pokušaj će biti isključen. Isto tako, ukoliko neko drži pištolj blizu žrtve ali ne želi još da žrtvu liši života neće postojati pokušaj ubistva.

12 Kazeni zakon Hrvatske u čl. 33 sadrži ovakvo rješenje. Za pokušaj krivičnog djela traži se namjera i radnja koja prostorno i vremenski neposredno prethodi ostvarenju bića krivičnog djela, vid. Kazneni zakon Hrvatske – KZH, *Narodne novine RH,* 125/11, 144/12, 56/15, 61/15, 101/17, 118/18 i 126/19.

na subjektivnom *mens rea (intent)*[13] *i objektivnom (actus reus)* elementu (Klotter, Pollock, 2006: 116). Ono što se ne primjećuje u anglosaksonskom krivičnopravnom sistemu, odnosno doktrini sa ovog područja jesu teorije koje obrazlažu razgraničenje pripremnih radnji i pokušaja krivičnog djela. Za razliku od toga, razvijeni su odgovarajući testovi. Prema njima kriterijum za razgraničenje pokušaja od pripremnih radnji može biti *„svaki akt"*, *„značajan korak",* akt koji je *„više od pripremanja", „prvi akt", „posljednji akt"* i sl. Vidljivo je da su kriterijumi različiti, ali pažlji- vim posmatranjem mogu se uočiti dva: vrijeme/bliskost preduzimanja radnje izvršenja i kriterijum karaktera preduzete djelatnosti.

3.1. Određivanje početka izvršenja krivičnog djela prema kriterijumu vremena/blizine preduzete djelatnosti

U meritumu ovih shvatanja nalazi se odgovor na pitanje da li je optuženikovo ponašanje „*dovoljno blizu*" izvršenju krivičnog djela, odnosno „*koliko blizu*" je „*dovoljno blizu*"? Niti jedan akt ne može se smarati pokušajem krivičnog djela osim ukoliko ne predstavlja korak kaostvarenju kriminalne namjere i njegovim preduzimanjem izvršilac se ili direktno približava izvršenju krivičnog djela ili je odmah povezan sa izvršenjem (Shahar, Harel, 1996: 320). U kategoriju testova koji početak izvršenja krivičnog djela određuju prema kriterijumu vremena, odnosno blizine preduzete djelatnosti, uvrštavaju se Test prvog koraka *(the first act test)*, Test posljednjeg koraka *(the last act test* ili *last proximate act test)* (Fishman, 2015: 247) i Test značajnog koraka *(substantial step test)* (Hamish,2001: 402; Mathis, 2004: 330–332).

Prva dva testa predstavljaju krajnosti. Tako, Test prvog koraka za pokušaj krivičnog djela određuje prvu djelatnost putem koje se ispoljava kriminalna namjera. Strogo utemeljen na subjektivnom elementu, slično subjektivnim teorijama prisutnim u evrokontinentalnom pravnom sistemu, ovaj test ne vodi računa o kvalitetu i karakteru pokušajne djelatnosti. Sa druge strane, Test posljednjeg koraka je krajnje objektivan test koji kao pokušaj vidi posljednju djelatnost nakon koje izvršilac krivičnog djela ne treba da dalje djeluje da bi krivično djelo bilo dovršeno. Odmah se primjećuje da se njihovom primjenom uveliko pomjera

13 Ističe se da je pokušaj krivičnog djala bez namjere nezamisliv. Sa druge strane, javljaju se shvatanja prema kojima bi ukoliko je odgovarajući stepen subjektivnog elementa dovoljan za dovršeno krivično djelo, on dovoljan i za pokušaj (Enker, 1977: 847, 866). Uočavaju se shvatanja da je za pokušaj krivičnog djela potrebna namjera čak i u slučajevima kada ze za dovršeno krivično djelo zahtijeva nemar *(negligence)* ili nesmotrenost *(recklessnes),* (Shahar, Harel, 1996: 329).

linija razgraničenja nekažnjivog i kažnjivog stadijuma ostvarenja krivičnog djela. Prvi korak načinjen sa namjerom da se izvrši krivično djelo, pomjera sa jedne strane početak izvršenja u stadijum pripremnih radnji jer po prirodi stvari to može biti djelatnost koja se nalazi u stadijumu pripremanja krivičnog djela. U svojoj drugoj krajnosti, određivanje pokušaja krivičog djela uz pomoć kriterijuma posljednje preduzete djelatnosti sužava mogućnost njegovog postojanja, reklo bi se, samo na dovršeni pokušaj (izvršilac je preduzeo sve što je prema njegovoj zamisli trebao preduzeti da nastupi zabranjena posljedica) (Wishart, 2013: 80). S obzirom na to da je u ovom slučaju, a kako to ističe *Lord Diplock,* ispoljen zahtjev da se *„Rubikon prijeđe sa čamcem",* a nakon toga *„čamac spali",* jasno je da nedovršenog pokušaja ovdje i nema, već samo pripremne radnje (Mathis, 2004: 331). Nekakvu sredinu u razgraničenju pripremnih radnji i pokušaja krivičnog djela pronalazimo u *non last act* testu kod *Wishart-a* prema kome je pokušajna djelatnost ona koja se nalazi u nekakvom *„sivilu"* između pripremnih radnji i posljednjeg akta" (Wishart, 2013: 80). Kada je riječ o pravnim aktima, treba istaći da blizinu preduzete djelatnosti kao kriterijum određivanja pokušaja krivičnog djela (Test značajnog koraka[14]) poznaje američko zakonodavstvo *(Model Penal Code)* i jedan dio međunarodnog krivičnog prava (Rimski statut Međunarodnog krivičnog suda[15]). Pokušaj predstavlja prije svega nepotpuno krivično djelo i za njegovo zasnivanje neophodno je sa namjerom ostvariti *„suštinski korak" (substantial step)* u njegovom ostvarenju (Fis- hman, 2015: 345; Cambell, 2013: 949).[16] Uočljivo je da, iako se potencira sintagma *„suštinskog koraka",* test nije ekstremno objektivan, već se ovom djelatnošću potvrđuje izvršiočeva *namjera,* odnosno kriminalni cilj.

14 Ovaj segment zakonskog određenja je pozajmljen iz koncepta blizine ostvarenja krivičnog djela. Drugi segment određenja, ispoljen u zahtjevu da preduzete djelatnosti treba da nedvosmisleno ilustruju izvršiočevu nameru preuzet je iz druge kategorije testova baziranih na kriterijumu karaktera preduzete djelatnosti, konkretno Testa nedvosmislenosti.

15 Vid. čl. 25, st. 3, tač. f Rimskog statuta (Rome Statute of the International Criminal Court, *United Nations, Treaty Series, vol. 2187,* No. 38544. Preuzeto 11. 1. 2022. *https://www. icc-cpi.int/sites/default/files/RS-Eng.pdf.)*

16 Ovakva formulacija korištena je prvi put u krivičnom zakonodavstvu Novog Zelanda i tada je čin optuženika označen kao *„stvarni i praktični korak"* i s tim u vezi predstavljao je *Test stvarnog i praktičnog koraka (Substantial and practical act Test).* Formulacija je izmijenjena, pa danas kao i u američkom *Model Penal Code* riječ je o *„stvarnom i suštinkom koraku".* Interesantno je pomenuti shvatanja prema kojima se ovaj test na Novom Zelandu ne primjenjuje samo kao sredstvo za utvrđivanje da li je neki čin dovoljno blizak ili ne, već i kao pomoćno i dopunjujuće sredstvo sa ciljem utvrđivanja da li i „dovoljno blisko" može predstavljati pokušaj (Sim, 1955: 620–623).

Kako se pomenutom formulacijom ne precizira linija razgraničenja, američki zakonodavac se opredijelio za prilično dobro rješenje da kao pomoćne kriterijume u određivanju pokušaja krivičnog djela, odnosno njegovoj eliminaciji navede i određene djelatnosti koje, bez obzira na to što su snažno potkrijepljene izvršiočevom namjerom ne predstavljaju pokušaj.[17] U pitanju je konstelacija djelatnosti koje se u savremenom krivičnom pravu redovno označavaju pripremnim radnjama.

3.2. Određivanje početka izvršenja krivičnog djela prema kriterijumu karaktera preduzete djelatnosti

Vremenska odrednica, na kojoj počiva kriterijum neposrednosti u određenju pokušaja krivičnog djela, zasigurno ne može dati odgovarajuće rezultate bez uzimanja u obzir i kvaliteta radnje izvršenja. To je (doduše u evrokontinentalnom pravu) priznato i u pomenutim teorijama u smislu „*bitnosti*" odnosno „*nebitnosti*" preduzetih (među)akata. U anglosaksonskom krivičnom pravu svojim značajem se izdvajaju dva shvatanja koja liniju razgraničenja vide u kvalitetu preduzete djelatnosti: Test zdravog razuma *(the common sense test)* i Test nedvosmislenosti *(the unequivocal test).*

Test zdravog razuma. Kriterijum koji ovaj test nudi u razgraničenju krivičnog djela sazdan je iz više sastavnica. Za kvalifikovanje jedne djelatnosti kao pokušajne uzima se u obzir čitav splet okolnosti koje su povezane sa preduzetom radnjom.[18] Tako je ova kvalitativna razlika između

17 Djelatnosti kojima zakonodavac odriče mogućnost da same za sebe zasnuju pokušaj krivičnog djela predviđene su u odredbi 5.01(2) i to su: čekanje, traženje ili praćenje potencijalne žrtve krivičnog djela, obmanjivanje ili traženje od potencijalne žrtve da ode do mjesta gdje će krivično djelo biti izvršeno, izviđanje mjesta koje je predviđeno za izvršenje krivičnog djela, nezakonit ulazak u konstrukcije, vozila ili ograđene prostore na kojima se pretpostavlja da će krivično djelo biti izvršeno, posjedovanje materijala posebno konstruisanog za izvršenje krivičnog djela ili materijala koji se u datim okolnostima ne mogu koristiti ni u kakve zakonte svrhe, posjedovanje, prikupljanje ili izrada materijala koji će se koristiti u svrhu izvršenja krivičnog djela ili u blizini mjesta predviđenog za izvršenje krivičnog djela ukoliko se takvo posjedovanje, prikupljanje ili izrada ne vrši u zakonite svrhe i traženje nevinog agenta da se uključi u ponašanje koje predstavlja element krivičnog djela, vid. (5.01(2) Model Penal Code. Pristupljeno 18. 12. 2021. https://www.rravo.unizg.hr

18 S tim u vezi je i shvatanje Vrhovnog suda Kanade u kome je u slučaju *Deutsch vs Queen* (1986) naglašeno da nema zadovoljavajućeg kriterijuma za razgraničenje pripremnih radnji i pokušaja krivičnog djela, ali i da je vrijeme preduzete djelatnosti samo jedan od njih, (Hamish, 2001: 403).

pripremnih radnji i pokušaja krivičnog djela utemeljena na prirodi samog krivičnog djela, prirodi i kvalitetu preduzete djelatnosti, ali i na mjestu i vremenu njenog preduzimanja. Pored ovoga, test je značajan i sa jednog drugog aspekta. Prilikom kvalifikovanja određene djelatnosti kao pokušajne ne vodi se računa o shvatanju izvršioca (nije individualan), već je, kako se iz i naziva testa vidi, značajno shvatanje *„zdravorazumskog čovjeka".*

Test nedvosmislenosti. Izvorno iniciran od strane Karara *(Carara),* a orginalno razvijen od Salmonda *(Salmond)* očitava se u preduzimanju radnje iz koje je vidljiva kriminalna namjera (Hall, 1940: 824; Duff: 2012, 49). Prema ovom testu samo oni akti koji *„nose"* kriminalnu namjeru i predstavljaju njen dokaz (Shahar, Harel, 1996: 325; Fishman, 2015: 31; Becker, 1974: 351) mogu se kvalifikovati kao pokušaj krivičnog djela, tako da slučaj bude predstavljen u smislu *reps ipsa loquitur.* Dakle, objektivni element pokušaja je akt optuženog koji predstavlja korak ka izvršenju krivičnog djela, a činjenje takvog koraka ne može se razumno shvatiti drugačije nego da je preduzeto u svrhu izvršenja krivičnog djela. Uočljivo je ispoljavanje zahtjeva za postojanjem objektivnog i subjektivnog elementa u smislu zasnivanja pokušajne djelatnosti. Međutim, jasno je da se pretežni značaj ovdje daje subjektivnom elementu. Zbog toga pokušaj krivičnog djela može biti samo radnja koja ima taj dodatni kvalitet, kvalitet *„očitog"* nosioca kriminalne namjere. Rješenje je dosta kritikovano, ali nije izgubilo na značaju i opredmećeno je, kako smo i ukazali u američkom *Model Penal Code-u* u kome je pored primarno istaknutog kriterijuma *„značajnog koraka"* ispoljen i zahtjev da ponašanje koje predstavlja značajan korak bude *„snažno potkrijepljeno kriminalnim ciljem".*[19] *Test je nužno modifikovan od strane Brudnera (Brudner)* i Ripštajna *(Ripstein)* postavljanjem zahtjeva da se nedvosmislenost kriminalne namjere utvrđuje od strane „*drugog čovjeka*" (Hamish, 2001: 406). Otuda i već pomenuto da je to onaj akt koji se ne može drugačije razumno interpretirati osim u smislu pokušaja krivičnog djela (Duff, 2004: 49). S tim u vezi, moglo bi se reći da test nije ekstremno subjektivistički, odnosno da nema predznak individualnog. Kod ovakvog načina određenja pokušaja krivičnog djela sporno je što se u njegovom centru nalazi samo djelatnost, a ne vodi se računa o relevantnim okolnostima u konkretnom slučaju. A one mogu npr. ukazivati na postojanje namjere. Primjera radi, nije jasno da li čovjek koji nosi pištolj to čini sa namjerom da ubije nekoga ili da se odbrani od napada ukoliko za to bude potrebe, a njegov položaj u krivičnom pravu se u te dvije situacije uveliko razlikuje.

19 Vid. odredbu 5.01.(2) *Model Penal Code-a.* Pronalaze se i shvatanja da je u stvari riječ o značajno oslabljenoj verziji testa nedvosmislenosti (Duff, 2004: 78).

Pokušaj krivičnog djela u *Criminal Attempt Act-u.* Engleska i Vels problematiku pokušaja krivičnog djela uređuju u posebnom aktu donesenom 1981. godine. Određivanje pokušajne djelatnosti izvršeno je nešto drugačije nego što je to slučaj u već prezentovanim rješenjima u anglosaksonskom krivičnom pravu. U čl. 1 istaknuto je da je za pokušaj krivičnog djela odgovoran onaj ko sa namjerom preduzme akt koji je *„više od pripremnog"* (Jefferson, 2007: 416). Detaljnije razrađivanje kriterijuma početka izvršenja krivičnog djela u ovom aktu se ne pronalazi, dok je sama formulacija pokušajne djelatnosti prilično nejasna i nesigurna. Sličan prigovor se pronalazi kod Džefersona *(Jefferson),* prema kome, štaviše, to ne mora biti niti opasan akt, već akt koji će *mens rea* pretvoriti u krivično djelo.[20] Zbog toga se u praksi od ovoga i odstupa. Naime, u slučaju Gulefer *(Gullefer)* konstatovano je da pokušaj krivičnog djela postoji onda kada optuženi *„krene u zločin",* a sudovi su to upotpunili kriterijumom da je preduzetim aktivnostima došlo do *„sukoba sa žrtvom"* ili *„sukoba sa imovinom"* (Clarkson, 2009: 27). Vidljivo je da je predočeni zakonski osnov pokušaja krivičnog djela preširok, dok sudovi sa svojim kriterijumima uveliko umanjuju mogućnost da određena radnja bude kvalifikovana kao pokušaj, pa je zbog toga i pokušana njegova revizija. Međutim, kako je rješenje koje je predloženo kao supstitut pomjeralo granicu pokušajne djelatnosti ka *„posljednjem aktu"* zvanično je odbačeno.[21] Uvažavajući činjenicu da prijedlozi u smislu definisanja pokušajne djelatnosti u krivičnopravnoj teoriji ne jenjavaju prihvatljivim se čini Klarksonovo *(Clarkson)* shvatanje prema kome pokušaj krivičnog djela postoji kada osoba počini djelo koje je više od pripremnog i koje je usko povezano sa izvršenjem krivičnog djela u smislu vremena, mjesta i preostalih akata koji se nalaze pod kontrolom optuženog, a koji trebaju da se izvrše (Clarkson, 2009: 27).

4. Zaključak

Ne postoje jedinstveni stavovi u određenju početka izvršenja krivičnog djela iako se oko njega sukobljavaju najvažniji principi krivičnog

20 S obzirom na upotrijebljenu sintagmu prema kojoj izvršilac treba da *„preduzme akt",* postavlja se pitanje postojanja pokušaja u slučaju radnji nečinjenja (Jefferson, 2007: 421).

21 Učinjeni su i napori da se izmijeni zakonodavstvo koje se odnosi na pokušaj krivičnog djela. Imenovana Komisija je predložila da postojeće zakonsko rješenje bude zamijenjeno sa dva odvojena *„prethodna"* krivična djela: krivično djelo pripremnih radnji i krivično djelo pokušaja koji bi činio *„posljednji akt"* potreban za izvršenje namjeravanog krivičnog djela (Clarkson, 2009: 27).

prava. On i dalje ostaje trajno pitanje i problem u najuticajnijim krivično-pravnim sistemima. Jednostrane objektivne teorije pokazale su se isuviše rigidnim, dok razgraničenje zasnovano isključivo na subjektivnom elementu vodi ka dubokoj interferenciji u načelno nekažnjivi stadijum pripremanja krivičnog djela. Zbog toga se traga za razlikovanjem koje je utemeljeno na materijalno-objektivnim i subjektivnim sastavnicama.

Formalno-objektivna teorija, reklo bi se, predstavlja dobru polaznu osnovu. Izuzevši nekoliko konstelacija krivičnih djela, ona u većini slučajeva nudi zadovoljavajući kriterijum razgraničenja – radnju izvršenja. No, kako se i uvidjelo u pitanju su nesporni slučajevi. Razgraničenje pripremnih radnji i pokušaja krivičnog djela je u većini slučajeva dosta složenije. Zbog toga demarkacija nužno počiva na dodatnim elementima. Potrebno je uzeti u obzir izvršiočevu predstavu o početku izvršenja krivičnog djela, koja zajedno sa umišljajem predstavlja subjektivni element i samo jednu sastavnicu pokušaja. Drugu bi činila ili u biću predviđena radnja izvršenja ili djelatnost kojau biću krivičnog djela nije formalno određena kao takva. Jasno je da se promišljanja razlikuju u pogledu ovoga pitanja. Objektivni element ne bi trebao da počiva na neodređenim sintagmama, već je neophodno precizirati kriterijume za njegovo određenje. Ispravno je shvatanje da se čovjekova djelatnost može razložiti na niz sekvenci i da, s tim u vezi, jedna od tih radnji u konačnici nužno tangira sa radnjom izvršenja (ako je predviđena u biću krivičnog djela). Međutim, kako je teško odrediti ovu „posljednju“ radnju, neophodno je voditi računa i o njenoj bitnosti kao i vremenskoj i prostornoj udaljenosti ali u smislu ostvarenja bića krivičnog djela. Samo na ovaj način se mogu odijeliti nekažnjive pripremne radnje od početka izvršenja krivičnog djela.

U evrokontinentalnom krivičnom pravu, a pod uticajem njemačkog krivično-pravnog sistema, pretežno se uvažava već pomenuti koncept realizacije objektivnih elemenata koji prema ukupnom planu izvršioca ugrožavaju krivičnopravni objekat zaštite. Diferencijacija nije izostala niti u rješenjima u anglosaksonskom pravnom sistemu. I ovdje rješenja (testovi) ne priznaju početak izvršenja krivičnog djela utemeljen na samo jednoj njegovoj sastavnici. S tim vezi, kod dva najuticajnija zakonodavstva ispoljava se zahtjev za postojanjem namjere i preduzetih akata koji oslikavaju ili odlučujući korak kojim se ona nedvosmisleno manifestuje ili su više od pripremanja krivičnog djela. Kakva god formulacija da se upotrijebi, stiče se utisak da zakonodavstva, odnosno sistemi imaju i dodatnih dodirnih tačaka. Uočava se razlaganje

radnje izvršenja na akte/međuakte, a zatim i da su akti koji su u jednom dijelu anglosaksonskog krivičnopravnog sistema označeni kao „više od pripremnih" u stvari svojevrstan ekvivalent djelatnostima koje su u njemačkom pravu označene kao akti koji u nesmetanom toku bez dodatnih međuakata vode ka ostvarenju bića krivičnog dela.

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COMMENCING THE COMMISION OF A CRIMINAL ACT IN THE EUROPEAN-CONTINENTAL AND THE ANGLO-SAXON CRIMINAL LAW

Summary

A clear and precise definition of the activity that marks the beginning of the commission of a criminal act (Fr. commencemnt d'exécution), as the boundary between the non-punishable and the punishable stage in the commision of a crime, is of great importance for criminal law. The contemporary criminal legislation and criminal law doctrine are guided by different criteria in determining this boundary. In the European-continental legal system, the definition of criminal attempt is found in criminal law theories, while the criminal legislation in the Anglo-Saxon criminal justice system rely on appropriate tests in establishing the causal link. In this article, the author analyzes the theoretical and legislative solutions in the European-continental and the Anglo-Saxon criminal law on the activity that marks the beginning of the commission of a criminal offense and its delimitation from the preparatory stage.

Keywords*: criminal attempt, criminal act, preparatory actions, European-continental criminal law, Anglo-Saxon criminal law.*

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