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GUEST EDITORIAL / UVODNI ESEJ

*Timothy William Waters**

ESCAPING GENOCIDE'S GRAVITY

1. Introduction: The Unbearable Weight of the Ultimate Crime

Genocide is seen as the supreme crime.[1] Many people consider genocide the worst crime imaginable, certainly the worst among the crimes typically tried in international courts. Its grim stature is not merely the consequence of moral intuition – a proper naming of paramount evil – but also a strategic asset. Activists and victims often assign an almost talismanic power to this legal category, as if calling something genocide might mobilise public opinion, diplomacy, and power in a way that 'mere' war crimes or crimes against humanity evidently do not.

This potential is so evident – so recognisably valuable as a tool of shame and censure – that people regularly debate which terrible atrocities might legitimately count as genocide. Is it just the Holocaust, just a small number of the most extreme events like Rwanda or Srebrenica or the Armenian massacres, or are there many genocides? That last view has become dominant as claimants for the bleak mantle have proliferated:[2] Gaza, Israel, Ukraine, Sudan, Myanmar, Congo, Ethiopia, Xinjiang, Syria, Iraq, Canada, the United States, South Africa [...] But whatever view is taken,

* Richard S. Melvin Professor, Indiana University Maurer School of Law; e-mail: tiwaters@iu.edu ORCID ID: 0000-0003-0205-6457. Special thanks to Prof. Mark A. Drumbl and Prof. Kirsten Fisher, who first suggested I write on this subject for the 'Transitional Justice Newness, Innovation, and Refraction' conference, University of Saskatchewan, October 2024; thanks also to participants in that conference, as well as participants in the 'International Law Workshop,' William & Mary Law School, March 2025 (some of whom are mentioned in specific notes), the Association for the Study of Nationalities annual conference, Columbia University, May 2025, and Marko Prelec, for valuable comments on subsequent drafts.

1 See, *e.g.*, Schabas, W. A., 2009, *Genocide in International Law: The Crime of Crimes*, Cambridge, Cambridge University Press, 2nd ed.

2 Genocide Watch, Genocide Watch Recommendations 2024: Genocide Emergencies and Warnings, (https://www.genocidewatch.com/_files/ugd/df1038_c0b09883aa-28417ba4e5d832c80aef98.pdf, 31. 1. 2025).

genocide is typically understood to be a supreme and unique evil, the 'word that forms the very emotional heart of international criminal law.'[3]

Still, despite its preeminence, genocide is a troubling candidate for apex crime. In its origins, definition, jurisprudence, and politics, genocide is almost paralytically narrow and radically out of step with important values and sensibilities underpinning other important elements of the global order. Specifically, genocide exhibits a defective, minimally useful definition; is redundant of other crimes; and deploys a moral logic and grammar dramatically misaligned with the individualistic purposes of human rights and international criminal law (ICL). And its very seriousness – the social gravity conceded to genocide as a legal category[4] – makes it hard to prosecute while also displacing other ways of responding to great harm. In short, this Essay argues that genocide exerts a distorting influence on law, transitional justice, and politics – one that may be impossible to separate from genocide's influences on and interactions with ICL itself.

In Part 2, I review the origins, rationales, text and treatment of genocide as a crime. Then in Part 3, I turn to critiques, some familiar and well-rehearsed, others less so: of genocide's narrow definition, which many have observed and criticised, but also its redundancy. In Parts 4 and 5, I consider genocide's poor moral fit and problematic position atop a pyramid of evil. I might be wrong about that misfit – but if so, genocide's effects may be even more troubling. Parts 6 and 7 conclude with a radical thought-experiment – imagining a world without the crime of genocide. Whether genocide is a misfit outlier or the moral centre of our law, what might the world, and the law, look like without it?

2. Foundations: Genocide's Ascent

Genocide is often associated with the Holocaust, but although Raphael Lemkin coined the word in the early 1940s, he began his advocacy during what is now called the interwar period, motivated in part by the Armenian massacres during the Great War. Lemkin imagined a two-fold crime: 'acts of barbarity,' similar to what we recognise as genocide today; and 'acts of vandalism,' focused on harms we now call cultural genocide.

3 Drumbl, M. A., 2018, Genocide: The Choppy Journey to Codification, *Washington & Lee Public Legal Studies Research Paper Series*, Working Paper Series No. 2018–17, p. 22, (http://ssrn.com/abstract=3269430, 31. 1. 2025).

4 'Gravity' has a specific meaning in ICL, as a measure of seriousness. That meaning differs from the focus of my title and Essay. On the legal concept of gravity, see de-Guzman, M. M., 2020, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford, Oxford University Press.

The unifying key to this dual structure, however, was the perpetrators' motivation, the intention to destroy some national or ethnic group's cultural pattern and replace it with the perpetrators' own.

Genocide is mentioned in the Nuremberg indictment, though not as a separate crime, but rather as 'a descriptive term' for war crimes against civilians in occupied territory.[5] Genocide is not mentioned in the judgment. After Nuremberg, however, the term's ascent was swift, and it was soon recognised as an international crime.[6] The definition in the Genocide Convention of 1948 departed from Lemkin's earlier proposals. 'Vandalism' disappeared almost entirely, leaving a conceptual chapeau and set of predicate crimes that mostly presumed biological destruction of the members of some group.[7]

The Genocide Convention provides that

> Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[8]

Thus the definition requires an intent to commit an underlying harm – killing members of the group or putting them in conditions calculated to cause their destruction, for example – and an intent to commit that harm for the purpose of destroying the group 'as such.'

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5 Genocide Timeline, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/genocide-timeline?parent=en%2F10048, 31. 1. 2025). See Nuremberg Trial Proceedings, Vol. 1, Indictment: Count Three, *The Avalon Project*, (https://avalon.law.yale.edu/imt/count3.asp, 31. 1. 2025). It remains unclear if genocide was anyone's priority at Nuremberg, where the new concept of crimes against humanity was in the ascendant. See Drumbl, M. A., 2018, (discussing this point and drawing on the argument in Philippe Sands' *East West Street*).

6 General Assembly Resolution 96(I), (The Crime of Genocide), 11 December 1946, A/Res/96-I.

7 'Mostly' because mental harm, preventing births, and removing children remain in the definition, but other proposed elements, such as forced impregnation and forced divorce, did not survive.

8 Convention on the Prevention and Punishment of the Crime of Genocide 9 Dec. 1948, entry into force 12 Jan. 1951, United Nations Treaty Series, (further in the text: Genocide Convention), Vol. 78, p. 277, Art. 2, (https://ihl-databases.icrc.org/assets/treaties/357-IHL-51-EN.pdf, 31. 1. 2025).

This second element is called special intent. It is relatively rare in domestic law – where similar mental elements are called motive[9] – but it does occur: common-law burglary, for example, or hate crimes. Although both intents must be present – I intend to kill, and by so doing I intend to destroy the group – the governing element is the intent to destroy the group. Several predicate acts against members of the group can underlie genocide – even attempted acts[10] – but only one element directly relates to the group itself. The intent to destroy the group is the essential feature of genocide.[11]

Like crimes against humanity, genocide can be committed in war or peace.[12] Although the Genocide Convention also describes state obligations along with providing for individual prosecution, it appears to contemplate trial only in the jurisdiction where the crime occurred or in an international forum,[13] rather than universal jurisdiction, which has nonetheless developed, along with genocide's status as a *jus cogens* violation of customary international law.[14]

Notwithstanding its increasing status, the crime itself was rarely invoked.[15] This was not due solely to some unique feature of genocide: ICL as a whole was largely dormant after the post-World War Two trials,[16]

9 In a 1946 article, Lemkin argues that a separate crime of genocide is needed because 'mass murder' is not an adequate descriptor, 'since it does not connote the motivation of the crime, especially when the motivation is based upon racial, national, or religious considerations'. Lemkin, R., 1946, Genocide, *American Scholar*, Vol. 15, No. 2, pp. 227–330, (http://www.preventgenocide.org/lemkin/americanscholar1946.htm, 31. 1. 2025).

10 This focus on intention partly explains why attempt, conspiracy, and incitement to commit genocide are also crimes even though inchoate crimes are quite rare in ICL. It is theoretically possible to commit one of these inchoate crimes without any of the predicate acts being completed.

11 The intended destruction can be 'in whole or in part', but this does not significantly affect the essential focus. Another element – 'as such' – plays a more important role, and will be examined later on in this Essay.

12 Genocide Convention, Art. 1.

13 *Ibid*., Art. 6.

14 Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, *Legal analysis of the conduct of Israel in Gaza pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, U.N. Human Rights Council, 16 Sept. 2025, A /HRC/60/CRP.3, p. 4. ("The prohibition of genocide is a peremptory norm of international law (*jus cogens*)").

15 See Weiss-Wendt, A., The interpretation and (non-)application of the Genocide Convention during the Cold War, in: Simon, D., Kahn, L., (eds.), 2023, *Handbook of Genocide Studies*, Cheltenham, Edward Elgar Publishing, p. 85.

16 Beside, Nuremberg and Tokyo, trials were conducted by the Allied powers, as well as in individual countries. These trials generally relied on crimes against humanity or domestic criminal law. The *Greiser* trial in Poland in 1946 was the first conviction for genocide, and 'used Lemkin's definition of genocide from [his book] Axis Rule, including the 'cultural and spiritual aspects' of the crime, to find Greiser guilty of genocide for pursuing the German policy of removing Polish national patterns

only reviving in the 1990s with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and then the International Criminal Court (ICC). The first international conviction for genocide was in 1998, entered against Jean-Paul Akayesu in Rwanda.[17] Since then, an efflorescent jurisprudence has developed, both in international courts and domestic courts relying on universal jurisdiction principles; in parallel, provisions of the Genocide Convention have been invoked in state-to-state proceedings before the International Court of Justice. Today, there are numerous active legal proceedings, both against individuals and states, and accusations of historical or ongoing genocide have become commonplace.[18] Genocide's prominence appears more secure, more relevant, and weightier than ever.

3. Weightlessness – The Insubstantiality of Genocide

Before considering the problem of that weight, it's important first to consider its opposite: genocide's lightness and insubstantiality. Genocide

in Warthegau and imposing German national patterns through Germanisation efforts[.]' Irvin-Erickson, D., The History of Rapha'l Lemkin and the UN Genocide Convention, in: Simon, D., Kahn, L., 2023, p. 8. Thereafter, trials only rarely used genocide as a legal category. For example, in the 1960s, Eichmann was convicted of 'crimes against the Jewish people' – an Israeli statute – and crimes against humanity, while in the Frankfurt *Auschwitz* trials, 20 defendants were charged under German domestic law with murder and related crimes. See Postwar Trials and Denazification, The Holocaust Explained, *The Wiener Holocaust Library*, (https://www.theholocaust-explained.org/survival-and-legacy/postwar-trials-and-denazification/the-nuremberg-trial/, 31. 1. 2025); Postwar Trials, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/war-crimes-trials, 31. 1. 2025); Subsequent Nuremberg Proceedings, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/subsequent-nuremberg-proceedings, 31. 1. 2025).

17 Rwanda: The First Conviction for Genocide, United States Holocaust Memorial Museum, *Holocaust Encyclopaedia*, (https://encyclopaedia.ushmm.org/content/en/article/rwanda-the-first-conviction-for-genocide, 31. 1. 2025).

18 Many cases at the ICTR and ICTY included genocide charges. At the ICTR, convictions covered the whole range of massacres against Tutsis; at the ICTY, convictions were limited to Srebrenica. The ICC has issued one indictment for genocide against former Sudanese President al-Bashir. The ECCC convicted for genocide only for a very limited set of the Khmer Rouge's persecution and killings. State-to-state litigation before the International Court of Justice has also expanded dramatically: A few cases arose out of the Yugoslav wars, but recently there have been cases involving Myanmar, Ukraine, and Palestine. More broadly, popular, journalistic, and scholarly discourse has increasingly resorted to claims of genocide, most prominently in connection with the war in Gaza, but also in many other conflicts.

has a notoriously narrow definition, which excludes many atrocities that laymen commonsensically, if inaccurately, think of as genocide. Three narrowings in particular merit mention: definition of the group, exclusion of cultural genocide, and the effects of special intent. These features are familiar – some have been the source of criticism since genocide's conception – but here I want to consider them anew and examine what their obvious insufficiencies add up to.

3.1. THE GROUP

The requirement that genocide be committed against one of four protected groups – racial, national, ethnic,[19] and religious – excludes many large-scale killings and persecutions. The most significant example is the Cambodian genocide, as it is commonly called. Juridically, the extermination of roughly one quarter of Cambodia's population was mostly not genocide, and it is only because the Khmer Rouge also killed members of smaller ethnic groups like the Cham that genocide charges succeeded. This is often misinterpreted as the exclusion of 'auto-genocide,' but there is no reason members of a group could not commit genocide against their own. The real stumbling block is that the killers chose their victims for their political and ideological qualities, which the definition excludes.

This narrowness – a function of negotiating positions when the Convention was drafted[20] – is familiar, and the source of much criticism. The usual remedy is to expand the definition to include political groups and sexual minorities – to head in the direction of the layman's sensibilities that genocide is large-scale extermination, if still for some specific purpose.

19 The Genocide Convention refers to this as 'ethnical' – regretabbly, since 'ethnic' is preferable to native speakers. But one often encounters the longer, less correct form – a lexical example of the rigidity arising from law's conservatism and the original definition's sticky prestige.

20 Irvin-Erickson, D., 2023, pp. 21–22. ('Careful scholarship of the negotiations of the treaty has shown the extent to which the delegations of UN member states worked to scrub from the definition of genocide anything that could expose their governments to international prosecution. [...] Stalin and Vyshinky poured over every draft of the convention to make sure there was nothing in the treaty that could be used against Soviet famines, the USSR's nationalities policies, state terror, and the gulags. [...] While many genocide scholars and anti-genocide activists uphold the UN Genocide Convention as a kind of moral document, the convention was a product of post-Second World War geopolitics, starting as an explicitly anti-colonial idea that was transformed into a treaty that colonial powers could tolerate').

3.2. KILLING CULTURE

The predicate acts list has also been criticised for its narrowness, in particular excluding acts that would fit Lemkin's 'vandalism' or cultural genocide.[21] Lemkin certainly imagined genocide as not limited to, or indeed even focusing on physical destruction – '[h]is concern lay more with the extirpation of identity than of life'[22] – and the current definition encompasses much more than killing. Theoretically, genocide can be committed without killing anyone, for example by removing children from families or preventing births through sterilisation.

Yet there are no successful prosecutions for genocide and few widely recognised acts of genocide that do not involve significant killing.[23] Nor is this mere accident, the Brownian motions of jurisprudence: This narrowed focus is consistent with both early paradigmatic instances of genocide – the physical destruction of Armenians and Jews – and the drafting of the Convention. The narrowness in the predicate acts, if not essential to the nature of genocide, is closely woven into its realised form.

The typical remedy, as with critiques of the group definition, is the obvious one: expand the list of predicate acts to include acts that radically alter a group's culture and way of life, even if the group's members are not killed – a shift that would also align the definition more closely with Lemkin's original.

3.3. GENOCIDE AS SUCH: SPECIAL INTENT

Like the group definition and the predicate acts list, special intent dramatically narrows the scope of genocide, removing many atrocities from its ambit because they lack this additional *dolus* – at least, because it is difficult to demonstrate they have it.

Jelisić, a case at the ICTY, demonstrates this feature. Goran Jelisić, the self-described 'Serbian Adolf,' admitted to killing and torturing numerous Muslims in Bosnia and pled guilty to 31 counts of war crimes and crimes against humanity – but not genocide. That charge went to trial and was dismissed. On appeal, the court found this was in error, but refused to reinstate proceedings, citing judicial economy and prudential concerns.[24]

21 See, *e.g.*, Schabas, W. A., 2009, pp. 207–215.

22 Drumbl, M. A., 2018, p. 3.

23 See, *e.g.*, National Inquiry into Missing and Murdered Indigenous Women and Girls, A Legal Analysis of Genocide – Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, (https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Supplementary-Report_Genocide.pdf, 31. 1. 2025).

24 See ICTY, *Brčko*, (IT-95-10) Goran Jelisić – Case Information Sheet, (https://www.icty.org/x/cases/jelisic/cis/en/cis_jelisic.pdf, 31. 1. 2025).

Nor was this an outlier: All of the ICTY prosecutor's numerous attempts to charge genocide beyond Srebrenica failed, and the tribunal as a whole produced a singularly narrow jurisprudence – a 'little genocide.'[25]

Narrowness is evident at the ICC as well, where prosecutors have successfully brought genocide charges only once, against Sudan's President al-Bashir – on the second try. On the first, the evidence they confidently presented for al-Bashir's intent to destroy particular ethnic groups was instead read by the Pre-Trial Chamber as ambiguous.[26] Recently, the ICC prosecutor brought charges against leaders of Russia, Israel, and Hamas, but not for genocide, despite widespread belief that genocide is occurring in those conflicts. It cannot be known with certainty why the prosecutor didn't do something, but it is reasonable to suppose – especially as the predicate acts could easily be met (including, for Israeli leaders, large-scale killing, and for Putin, removal of children) – that either doctrine or politics made genocide charges inadvisable.

None of this means that convictions are impossible. The ICTR produced many convictions, even taking judicial notice of the genocide.[27] But the Rwandan genocide involved killing on an unprecedented level – perhaps 800,000 people in three months, mostly well away from combat zones. On more ambiguous facts – smaller numbers of deaths, intertwined with combat – convicting for genocide has proven vanishingly difficult. Yugoslavia, not Rwanda, is the paradigm. Even the most confident assertions that what is happening in Gaza is genocide will face considerably greater obstacles of proof if ever they are aired in a courtroom.[28] This narrowness is no accident, but a consequence of genocide's structure.

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25 Waters, T. W., 2016, The little genocide: A Karadzic conviction in The Hague that will satisfy no one, *Los Angeles Times*, Los Angeles, (http://www.latimes.com/opinion/op-ed/la-oe-0327-waters-karadzic-genocide-20160325-story.html, 31. 1. 2025).

26 See International Criminal Court, *Al Bashir case: The Appeals Chamber directs Pre-Trial Chamber I to decide anew on the genocide charge*, Press Release 3 February 2010, (https://www.icc-cpi.int/news/al-bashir-case-appeals-chamber-directs-pre-trial-chamber-i-decide-anew-genocide-charge, 31. 1. 2025). Nor does success on the second try alter this bleak analysis, because the threshold for sustaining an indictment is quite low.

27 United Nations International Residual Mechanism for Criminal Tribunals, *ICTR Appeals Chamber takes Judicial Notice of Genocide in Rwanda*, Press Release 20 June 2006, (https://unictr.irmct.org/en/news/ictr-appeals-chamber-takes-judicial-notice-genocide-rwanda, 31. 1. 2025).

28 On the differences between courtroom standards and other standards (such as for investigative commissions) – as well as the conceptual challenges commonly encountered in thinking about the evidentiary proofs required for genocide – see Milanovic, M., Proving Genocide, *EJIL: Talk!*, 18 Sept. 2025, https://www.ejiltalk.org/proving-genocide/; and, *contra*, Ambos, K., Proving Genocide: A Follow-up to Marko Milanovic, *EJIL: Talk!*, 1 Oct. 2025, (https://www.ejiltalk.org/proving-genocide-a-follow-up-to-marko-milanovic/).

3.4. STRANGE ACTION – REDUNDANCY

Perhaps narrowness is just a feature – after all, there are other crimes to cover other cruelties. But in fact that feature is not a gap, but an overlap: genocide, narrow as it is, does not cover any truly unique space.

Like most international crimes, genocide is a 'crime [...] of characterisation.'[29] It shares with other crimes the same underlying *actus* and is distinguished from them by characterizing those acts and facts according to some abstract criteria. This is why, in *Jelisić*, the ICTY Appeals Chamber declined to order a retrial. The facts – the killings – were not at issue and indeed were the basis of Jelisić's guilty pleas. The only question was if those same killings were also genocide. In fact, there is almost no act of genocide that is not also a crime against humanity (and often a war crime). Genocide only qualifies and characterises those acts; it is almost entirely[30] redundant – a Venn diagram of one circle.

This drive to characterise has consequences. When the ICTR sought to transfer the case of Michel Bagaragaza, a genocide participant and co-operating witness, Norway offered its domestic courts as venues, relying on its domestic murder statutes. The ICTR Chamber rejected this, insisting on a complementary jurisdictional basis – that is, charges of genocide. A subsequent attempt to transfer Bagaragaza to the Netherlands similarly failed. Eventually the ICTR was obliged to try him.[31] Bagaragaza's acts had to be characterised as genocide as such.

A different characterisation is a difference, and arguably treating the Holocaust as 'just murder multiplied' misses something essential. Geno-

29 Waters, T. W., 2019, The Persecution of Stones: War Crimes, Law's Autonomy and the Co-optation of Cultural Heritage, *Chicago Journal of International Law*, Vol. 20, No. 1, p. 97.

30 'Almost': Because of genocide's intent standard and lack of an 'attack' requirement, it is possible to imagine a lone figure bent on genocide even in the absence of the contextual circumstances needed for crimes against humanity. (In addition, genocide criminalises inchoate acts that crimes against humanity don't.) But these are vanishingly narrow circumstances, and they haven't occurred in actual cases, in which, in practice, genocidal acts have occurred in the context of widespread and systematic attacks. Thus, someone like Jelisić could have been convicted on such a theory, had he done what he did in isolation, but in the actual event there was a campaign of ethnic cleansing going on – a factual context so obvious that he pleaded guilty for crimes against humanity for the same acts. The ICC's elements of the crime require evidence of a plan or policy, which seems to import some of the contextual elements required by crimes against humanity, making genocide in certain respects even more redundant, as well as harder to prove. Thanks to Margaret deGuzman for these clarifying points.

31 Ryngaert, C., 2009, The Failed Referral of Michel Bagaragaza from the ICTR to the Netherlands, *Hague Justice Journal*, Vol. 4, No. 3, p. 235.

cide names a specific form of atrocity. Special intent does similar work in hate crimes, which define some underlying, otherwise redundant crime by its meaning and motive, thereby deepening condemnation. In that sense, genocide's 'characterisation' is a valuable conceptual distinction. Indeed, the Holocaust was not merely six million murders, but something connected and more profound. According to Sands, Lemkin saw 'an excessive focus on individuals [as] naïve [because] it ignored the reality of conflict and violence: individuals were targeted because they were members of a particular group, not because of their individual qualities.'[32]

However, it is in fact possible to prosecute acts of genocide using ordinary crimes without ignoring the character of the crime. Oskar Grüning was convicted for being an accessory to the murder of 300,000 people at Auschwitz; Bruno Dey for contributing to the murder of 5,230 people at Stutthof.[33] The legal category was ordinary murder; the context – about which no one could be mistaken – was the Holocaust. Norway, in offering to try Bagaragaza, evidently believed it could do the same sort of justice for the Rwandan genocide; the ICTR's rejection of that offer was based, not on an essential social meaning, but a judicially generated distinction.

These criticisms – about group definition, predicate acts, and special intent – are commonplace.[34] It is a separate matter what one should do about them, and from here, my argument will depart from the more usual run of observations and remedies – a criticism less commonly made, which goes to the heart of the problem with genocide, or maybe with ICL.

4. Victim, Nation – Genocide's Moral Mismatch

Genocide's odd admixture of narrowness and redundancy might be remediable. Many crimes are narrow in focus, and redundancy is, well, a repeated feature of ICL.[35] But there is a more foundational divergence that is not so readily reparable: Genocide invokes a moral grammar radically out of step with the individual logic that originally motivated ICL and

32 Sands, P., 2016, *East West Street: On the Origins of 'Genocide' and 'Crimes Against Humanity'*, New York, Knopf, p. 291, as cited in Drumbl, M. A., 2018, p. 7.

33 See, *e.g.*, The Wiener Holocaust Library.

34 See, *e.g.*, Kinstler, L., 2024, The Bitter Fight over the Meaning of 'Genocide', *New York Times Magazine*, New York, (https://www.nytimes.com/2024/08/20/magazine/genocide-definition.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb, 31. 1. 2025), (reviewing critiques of genocide's definition and jurisprudence and proposals for reform).

35 *Cf.* Waters, T. W., 2019, pp. 95–97, (describing the redundancy of charging practices in ICL, with reference to war crimes and crimes against humanity).

human rights. Genocide is very much a conceptual creature of its era, and that era was suffused with assumptions about humans' national essence.

Much criticism of genocide's definition focuses on which groups aren't included. Less noticed, perhaps, is what groups are: national, ethnic, racial, and religious – the traditional elements of the nation. These are qualities for which people are often discriminated against or persecuted, but the definition goes further. It requires the predicate acts be done in order to destroy the protected group 'as such.' As we've seen, this is conventionally seen as the genius of the definition, the essential move that explains why a separate characterisation and crime is needed: to condemn violence that harms and kills for this reason.

However, in doing this, the definition shifts the moral and analytical focus. Harm to individual humans is not, strictly speaking, the crime. Genocide is a crime against a group, and the individuals constituting that group take on a very different formal quality. Genocide presumes organic national identities to which individuals are essentially attached, while reifying culture, ethnicity, and race. In genocide's moral universe, individuals are not victims, but indicia of a generalised, abstract crime against a nation. They, and their suffering, are evidence.

Contrast this with crimes against humanity, which proscribes certain acts when committed as part of a systematic or widespread attack on a population. Although superficially similar to genocide's 'act and an intent,' crimes against humanity focus on the criminality of the act – the attack is simply the context in which a specific harm occurs: necessary, but not essential. Even the usual formula for indictments and judgments makes this difference plain: war crimes and crimes against humanity are always described by the predicate act, which is then characterised: 'murder as a crime against humanity,' for instance, or 'pillage as a war crime.'[36] But genocide is called 'genocide,' specified only by mode: 'genocide by killing,' 'genocide by causing serious bodily or mental harm.'[37] Even lexically, the difference is clear: one, harm to an individual because he belongs to a targeted group; the other, harm to the group caused by harming an individual.

Although much that Lemkin advocated for fell away, his focus on the group survived: 'Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their

36 ICC, *Pros. v. Al-Bashir*, Warrant for Arrest of Omar Hassan Ahmad Al-Bashir, 4 March 2009, ICC-02/05-01/09 (Public), (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01514.PDF, 1. 2. 2025).

37 ICC, *Pros. v. Al-Bashir*, Second Warrant for Arrest of Omar Hassan Ahmad Al-Bashir, 12 July 2010, ICC-02/05-01/09 (Public), (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2010_04825.PDF, 1. 2. 2025).

individual capacity, but as members of the national group.'[38] Lemkin was quite clear that the harm was against a nation's essence, which is why he focused so intently on the purging and replacement of a group's cultural pattern. It was not biological death, but cultural destruction that was at the heart of his concern, the loss of an integral connection of group to place:

> *Generally speaking, genocide does not necessarily mean the immediate destruction of a nation [...] It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves [...] Genocide has two phases: one, the destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population, which is allowed to remain, or upon the territory alone after removal of the population and the colonisation of the area by the oppressor's own nationals.*[39]

Lemkin's was, in short, a concern grounded in the *Weltanschauung* of the 19th and early 20th centuries: the line from Hegel and Fichte through European national liberation movements to Wilsonian and Leninist self-determination. Lemkin was concerned with the brutal excesses of that order – he lived in his times – but his vision was of the same order. He was not worried about nationalism, only its persecution. The narrow group definition in the Convention is not a politically informed limitation. It is a worldview.

And, as such, a view mismatched with much that happened after the war. ICL and human rights, for all their failures and faults, arose in an era defined by a moral and legal grammar of the individual. Of course, these timelines overlap – the Genocide Convention and the Universal Declaration of Human Rights were adopted literally one day apart. But crimes against humanity and human rights were conceived as turns away from the apotheosis of the nation and state. Reflecting that, ICL became individualist in method and teleology. Indeed, a frequently expressed purpose of ICL is to assign responsibility for crimes to individuals so that collec-

38 Lemkin, R., 2008, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Clark, New Jersey, Lawbook Exchange, 2nd ed., p. 79, cited in Raphael Lemkin and the Genocide Convention, *Facing History and Ourselves*, 2 August 2016, (https://www.facinghistory.org/resource-library/raphael-lemkin-genocide-convention, 31. 1. 2025).

39 Lemkin, R., 1944, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington, DC, Carnegie Endowment for International Peace, cited in Excerpt from Axis Rule in Occupied Europe by Raphael Lemkin, *Facing History and Ourselves*, 16 March 2008, (https://www.facinghistory.org/resource-library/excerpt-axis-rule-occupied-europe-raphael-lemkin, 31. 1. 2025).

tives might be spared condemnation.[40] These projects are a rebuke to statism and nationalism by declaring the individual as the moral centre of our shared politics.

By contrast, genocide is premised on something entirely different. Genocide was a rebuke to nationalism's excess. It accepted the underlying collective matrix and insisted that a proper nationalism would preserve all groups as such. Even seen as a defence of diverse humanity, genocide's four categories describe a particular kind of diversity, one premised on core, immutable attributes, not easily changeable affinities. Genocide as a crime defends the nation against destruction, but in so doing, it assumes an essential nation.

Concern with the national, even tribal focus of genocide has been voiced almost since Lemkin first mooted the idea. Lauterpacht's advocacy for crimes against humanity, in many respects in opposition to Lemkin's for genocide,

> *was motivated by a desire to reinforce the protection of each individual, irrespective of which group she or he happened to belong to, to limit the potent force of tribalism, not reinforce it. By focusing on the individual, not the group, Lauterpacht wanted to diminish the force of intergroup conflict. It was a rational, enlightened view, and also an idealistic one.*[41]

40 See, *e.g.*, Drumbl, M., 2007, *Atrocity, Punishment, and International Law*, Cambridge, Cambridge University Press. Drumbl is skeptical about that move, as I am – but the move was made. It's important to recall that in ICL, the individual focus is primarily on the perpetrators and their individual responsibility. It's entirely consistent with that project, in theory, to conceptualise crimes against groups or indeed even objects – a crime to destroy cultural heritage, for example. So even if genocide's victims are treated as evidence, as part of a group, as long as perpetrators are tried as individuals, then arguably focusing on their wrongful, essentialising reduction of individual victims to group members is appropriate to their crime, whatever its effects on others' view of the victims. (Thanks to William Dodge for this point.) I think that's true, but by that same token would hardly justify actually embracing their reductive worldview, which is arguably what genocide jurisprudence encourages. And it's also clear that ICL, following larger trends in domestic criminal law and human rights, has focused increasingly on victims as the rationale for the project – that is, victims as individuals. Individualism isn't just about responsibility but also about harm, and it is with this sensibility that genocide seems out of alignment.

41 Sands, P., 2016, p. 291. Schabas suggests that support for genocide's entrenchment in law was in part motivated by a desire to limit the expansion of crimes against humanity, favouring instead 'a more narrowly described form of crime against humanity: genocide'. Schabas, W. A., 2006, "The Odious Scourge": Evolving Interpretations of the Crime of Genocide, *Genocide Studies and Prevention: An International Journal*, Vol. 1, No. 2, p. 96. (https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1241&context=gsp, 31. 1. 2025).

The crimped definition we have today is not Lemkin's. Indeed, at various points Lemkin advocated much more capacious definitions protecting 'almost any social group imaginable [...]'[42] But they share a conceptual core, especially the destruction of the group as such, which seems radically different from the broader individualistic trend in postwar law.

Of course, I might be wrong or out of date: It has been a long time since human rights focused only on atomised individuals: indigenous peoples, minority rights, hate crimes, identity politics, and the fashion for post-colonial analysis – many trends suggest collective identities are now central to how we think about humans and law. Perhaps individualism was a mid-century product, and over time everything has come to look a little more like Lemkin's groups. Indeed, many proposals for expanding the definition – like cultural genocide – would actually align genocide more closely with Lemkin's nationalist vision, reinforcing the view that harm to individuals is damage to some ineffable collective quality called culture. So perhaps genocide is closer to the sensibilities of modern human rights and the ICL that I have suggested – even a leading indicator, in which case we should rather say they are closer to it.

If so, that may simply indicate the enormous gravitational power of genocide, which has drawn attention away from a different trajectory and back towards categories of meaning that seemingly had been left behind in the ashes of the world wars.

5. Gravity – Genocide's Distorting Power

Genocide is either an outlier or the weather, driving the direction in which the international legal order is heading. Regardless, many of genocide's features present real challenges, which might be addressed if genocide occupied only a small or co-equal space in the constellational imaginary of ICL. But genocide has attained an outsized hierarchical priority – both inside the discipline and in the public mind. Genocide is gravitational.

Personally, I have long found this preeminence analytically and morally questionable: 'It is not more wrong to kill people because of their ethnicity than it is to kill them because of their political beliefs, gender, or for the sheer pleasure of watching them die [...] [y]et this is precisely what elevating genocide presupposes.'[43] But even if the moral

42 Irvin-Erickson, D., 2023, p. 14.

43 Waters, T. W., 2012, Never Again to Genocide Trials, *Project Syndicate*, (https://www.project-syndicate.org/commentary/never-again-to-genocide-trials-2012-07, 31. 1. 2025).

supremacy of genocide is accepted, this does not mean genocide is actually doing the work it should. Debates about Israel and Palestine, or Russia and Ukraine, suggest the simultaneous centrality and uselessness of genocide, trapped in a rhetorical cycle of its own prestige: So valuable it is invoked for every crisis, as proof that the crisis matters; but so valuable it cannot be used, lest it cheapen and become meaningless. The result is conceptual and practical paralysis:

> *As an almost perverse methodology, governments and institutions seem incapable of responding effectively to atrocities because these have not yet been determined to be genocide. If and when such events are painstakingly defined as genocide, the same governments and organisations are paralyzed, prevented from acting by the presumption that any action will trigger that nation's or organisation's legal responsibility to commit enough personnel and resources, and stay the course long enough, to defeat the forces of genocide.*[44]

Instead of encouraging effective responses, 'genocide's technicality, its legalism and formalism create a stultifying, distracting simulacrum — a set piece of condemnatory theater.'[45]

Being a priority has not reordered politics. Genocide prosecution – or centering our rhetoric about conflict around genocide – has not appreciably encouraged rapprochement or shared understanding. In the Balkans, the divisiveness of the ultimate crime exacerbates communal tensions; likewise, naming the Armenian massacres 'genocide' has made the Turkish state and society less willing to acknowledge them. Frankly, it is difficult to see how claims of genocide ameliorate tensions in Gaza or the broader Middle East.

Meanwhile, there are costs, because the economy of justice is finite. Attention paid to genocide trials is drawn from the budget of outrage and mobilisation – and literal fiscal budgets – that might support intervention or rebuilding. The Yezidis believe that they have been the victims of over 70 genocides throughout history. The accounting is an historical anachronism, but also a moral claim for support, sympathy, and resources: 'They know their suffering will only be validated if it rises to the level of genocide; victimhood depends on mobilising this name.'[46] Whether even that name will get them what they so desperately need, of course, is another

44 Scheffer, D., 2006, Genocide and Atrocity Crimes, *Genocide Studies and Prevention: An International Journal*, Vol. 1, No. 3, pp. 229–230.

45 Waters, T. W., 2016, Yezidis vs. ISIS at the ICC, *Foreign Affairs*, (https://www.foreignaffairs.com/articles/iraq/2016-03-29/yezidis-vs-isis-icc, 31. 1. 2025).

46 *Ibid*.

question.[47] In the meantime, there are other claimants, a list that expands because victimhood is a valuable if wasting asset.[48]

Prestige has systemic effects. Prestige displaces other crimes and discourses, trivialising their value. Consider *Jelisić* again: I was at the ICTY when the trial and appeals judgments came down. One would have thought the prosecution had lost, rather than securing conviction on 31 out of 32 counts. Only genocide mattered. Similar angst broke out when Radovan Karadžić – like every other Serb the Tribunal charged with genocide – was acquitted for all but Srebrenica.[49] When the ICC prosecutor first charged al-Bashir, the press release ran several pages, almost entirely about genocide; the few paragraphs on war crimes and crimes against humanity – the only charges to survive – were tacked on to the end, like an afterthought.

This risk was recognised early on. Lauterpacht's concern about genocide was motivated, in part, by concern that this '"crime of crimes' [would] elevat[e] the protection of groups above that of individuals. Perhaps it was the power of Lemkin's word, but as Lauterpacht feared there emerged a race between victims, one in which a crime against humanity came to be seen as the lesser evil [...]'[50]

If there were evidence that the crime of genocide actually prevented genocide or mitigated its harm, it might well be worth keeping whatever its incoherence or distorting effects. But there is no evidence that this happens. In part this is a problem of epistemology – observers still debate the effect of domestic criminal law, so is it surprising that the effects of this thin new field are not known? However, 'no evidence' is not just a knowledge problem, it is the better reading of what is known, namely the absence of evidence that genocide, as a crime, is doing the work assigned to it – or much of anything really.

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47 *Cf.* United Nations Office of the High Commissioner for Human Rights, *Ten years after the Yazidi genocide: UN Syria Commission of Inquiry calls for justice, including accountability and effective remedies, for ISIL crimes* (2 August 2024), (https://www.ohchr.org/en/press-releases/2024/08/ten-years-after-yazidi-genocide-un-syria-commission-inquiry-calls-justice, 31. 1. 2025).

48 Even the recent expansion of genocide cannot keep pace with the demand. Events that might plausibly be qualified as genocide – like the mass killings of 'Communist' ethnic Chinese in Indonesia in the 1960s – are not generally recognised. (Thanks to Geoff Dancy for this observation.) Having stepped away from the 'singularity of the Holocaust', there is simply no end to the expansive potential, and no morally or intellectually stable stopping point for counting genocides.

49 Waters, T. W., 2016.

50 Sands, P., 2016, p. 380, cited in Drumbl, M. A., 2018, p. 22.

Still, many decades have passed since 1948. This world is one in which genocide is defined. Perhaps it ought never to have been, but what's done is done, and there is no escape. Or is there?

6. Escape Velocity – The Abolition of Genocide

Genocide is simultaneously too insubstantial and too weighty to do serious, useful work, so morally elevated it becomes unwieldly and impractical, but its prestige also makes reform seem implausible. Human rights and ICL have evolved – perhaps towards genocide's collectivist instincts – but at least they can move. Genocide's mid-century definition is among the most rigid in international law – the extremely modest changes confirm its magisterial inertia.[51]

Nearly twenty years ago, David Scheffer proposed a category of 'atrocity crime' that would encompass the various international crimes, with the purpose of 'liberat[ing] governments and international organisations from the genocide factor [...] to enable them to readily identify precursors of genocide without being constrained by legal requirements that must be met to properly identify the crime of genocide.'[52] In proposing a sweeping simplification of ICL, Scheffer intuitively centred on genocide: trouble with the whole field, but special trouble there. Unsurprisingly, Scheffer's proposal has not been taken up.

Sheffer nonetheless still spoke in the language of reform and law, and perhaps that's too modest a goal. Would it be possible to 'liberate genocide from law' altogether?[53] I am not even sure genocide's preeminence is a legal problem at all. Perhaps it is social: the hopes people insistently place on this crimped minimally usable legal category. If only it weren't the object of such idolatry! So, if the legal definition cannot be strengthened, perhaps another approach is to deflate its bloated social currency, to recognise that it is just a narrow, technical category, rarely invoked and rightly so. Still, that is probably an even harder project, and anyway I suspect genocide's special social role – the heightened, talismanic expectation

51 Compare Schabas, W. A., 2009, p. 93. (describing 'significant' broadening of the definition, but identifying narrow, technical issues: the existence of a state plan or policy, or the subjective approach to identifying the group, and acknowledging failure to include cultural destruction). Reportedly, as late as the Rome negotiations, there was at least some marginal discussion about folding genocide into crimes against humanity, but this did not happen. Thanks to Margaret deGuzman for this observation.

52 Scheffer, D., 2006, p. 229.

53 Thanks to David Lefkowitz for this formulation.

surrounding the word – is related to its special legal definition. Its remedy will not be one thing or the other.

So, perhaps it must be neither. Consider, despite the impossibility, what a world without genocide law might look like: Delegalized genocide, still a social category of great power, but not a legal one, much like 'ethnic cleansing.' Without genocide weighing atop it, might the modern system of transitional justice, legal order, and politics be more manageable and morally rational? Might other crimes then gain an independent signaling effect not automatically compared and called lesser? In diplomacy and politics, might the mobilisation of outrage – a dubious, chimerical resource in the best of circumstances – no longer be subordinated to an unrealisable, legalised standard?

Maybe, but it seems improbable to me that anything would be much better, and I wonder if questioning genocide isn't just a proxy for something larger. It is hard to be satisfied with the genocide law we have today – but what if 'genocide' were replaced in that sentence with 'ICL'? If genocide is an outlier, that misfit is a problem for the system of ICL – but it is not as if ICL's individualism works well. It's not as if the entire judicialized ICL project has produced clear, measurable payoffs any more than genocide has.

And if genocide is not an outlier – if it has become the impenetrable, immovable centre of ICL's moral universe – then that whole project is even less likely to do anything useful. ICL is a set of legal processes structured around the norms and methods of criminal law, doctrinally focused on individuals, but using those methods to adjudge complex, collective violence. An ICL assimilated to the concepts of genocide is a project aspiring to judge the most fraught aspects of human conflict – not only the atrocities, but the purposes and meanings those atrocities serve. A world in which all rights and laws are modelled on genocide's assumptions is a formula for failure. Indeed, if there is one thing in which genocide is not an outlier, it is its fundamental marginality and the distracting effects of treating violent politics as a legal question.

7. Conclusion: A Modest Thought Experiment

Well, suddenly the abolition of genocide looks modest by comparison. It is getting to be too much for a practical person. I will not here describe an actionable path for the abolition of genocide as a crime. I would not know where to begin or how to do it. Abolition seems not only impossible, but unstartable: Having invented the crime of genocide, it would be seen as a moral setback to be rid of it – a *status quo* fallacy, but fallacies have power. So my purpose is not a practical design, but a thought experiment,

like a more gruesome Schrödinger's cat: Before the world can escape the crushing insubstantiality of genocide – or come to realize just how deeply imbricated genocide is in how the whole of ICL works – it must first realise that there is some alternative to escape to. Not just reforms on the margins – a revised definition, expanded lists, tweaks to intent – but a world without the crime of genocide, in which genocide has been stripped of its legal particularity, subsumed into 'atrocity,' or simply abolished – and with it, whatever part of the ICL project partakes of its nature.

It would be a leap, a jump to an entirely different condition. What it would be, we cannot say. But we can be sure abolition would not be a paradise: On the day genocide or ICL was abolished, somewhere something truly terrible would be happening that used to be called the crime of crimes. And would continue: There is no game of language that will answer for the evil humans do. But that truth is no reason to persist in holding fast to concepts that make even our most imperfect responses harder. Precisely because this is not a game of language, it should not be treated like one. Perhaps thinking about a world without this crime – or the idea that crime is how to respond to the harm humans do – is the only plausible first step towards realising it. That impossibility – that very unthinkability – is the thing we ought to think about.

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ORIGINAL SCIENTIFIC ARTICLE

ARTICLES/ČLANCI

*Goran Dajović**

HOMO IURIDICUS AND LEGAL REASONING

Abstract: *The paper examines the method of ideal-typical concepts, which the author previously applied in his book Osnovi pravnog rasuđivanja (The fundamentals of legal reasoning). Since the book contains only a few remarks on the topic, the article aims to offer a systematic account of the method employed and its implications. In the book, the ideal type is constructed as homo iuridicus, the subject whose reasoning is guided exclusively by authoritative legal reasons. This subject is a rational, rather than an empirically existing agent. The paper argues that the ideal type provides a framework for conceptualizing legal reasoning without resorting to the idiosyncrasies of individual judges or particular legal communities. When the reasoning of such a homo iuridicus is compared to actual judicial practice, it becomes evident that judges do not always decide or justify their rulings solely by referencing authoritative legal reasons. In this way, the usefulness of Weber's notion of ideal-typical concepts for jurisprudence is brought to light.*

Key words: *Homo Iuridicus*, Ideal Type, Max Weber, Legal Reasoning, Interpretation of Law.

1. Introduction

At the beginning of the book *Osnovi pravnog rasuđivanja* (The fundamentals of legal reasoning), I emphasize its purpose and my intention: on the one hand, the book is meant to serve as a handbook on legal reasoning for students and practicing lawyers, and on the other hand, it aims to be theoretically and methodologically sound. These two objectives make the book both an easy and a difficult read. The central part dedicated to interpretive arguments, which is also the most practical part, is certainly an

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easier one. However, the credibility of this easier part would be questionable without the preceding theoretical and conceptual clarifications in the first and second parts.

However, these clarifications did not include methodological considerations. The book did not delve into detailed description or defense of the chosen methodological tool – the ideal-typical concept of *homo iuridicus*. Given that the primary aim of the book was to make it practical and accessible for practitioners, I believed that such discussions would be both difficult to read and tedious for the target audience. Therefore, the book includes only a few methodological notes and one section describing the positions of various tiers of legal professionals within the legal system, as well as their differing approaches to legal reasoning.[1]

This text should therefore be understood as a "methodological supplement" to the book. However, its primary purpose is not to serve as a methodological guide for reading the book (though it can fulfill that role as well), but rather to demonstrate – through the example of the phenomenon of legal reasoning – the applicability of Weber's method of ideal types in the conceptualization of social phenomena.[2]

Why is this phenomenon a suitable illustration of the value that legal theory can derive from this method? The primary reason lies in the complexity involved in conceptualizing the phenomenon of legal reasoning. To address the conceptual question "What is legal reasoning?", one must first determine which agents are being considered, and then identify which types of their actions – or more precisely, which segments of those actions – are the focus of analysis. Once the scope of the empirical phenomenon is narrowed, another question emerges: how can such a heterogeneous phenomenon, full of idiosyncrasies of individual cases, be captured under a single concept? Are there any shared (implicit) agents' motivations within these actions that can be reconstructed?

The answer to these questions can be grounded in the following social fact: law, as an institutional practice, plays a distinctive role in the lives of its addressees – a role that varies depending on the individual – and in doing so, shapes their perspectives on law and legal phenomena. While each person brings something personal to their experience of social relations and practices, there is also much that is shared in the beliefs and attitudes of individuals within a given community. What is shared stems from the fact that each individual's beliefs are embedded in

1 Dajović, G., 2023, *Osnovi pravnog rasuđivanja* (The fundamentals of legal reasoning), Belgrade, Pravni fakultet Univerziteta u Beogradu, pp. 21, 72–77.

2 The second purpose, of course, is to present the central ideas about legal reasoning that have been developed, in part through the application of the described method.

a broader political or legal culture, and that shared language, ideologies, as well as conventions and institutions, all help to shape those beliefs and attitudes.[3] This state of affairs suggests that the internal perspectives of different legal agents could in fact be constructed as ideal-typical models in the Weberian methodological sense. Ideal types are conceptual frameworks stripped of contingency, but grounded in reality – more precisely, they are constructed and "heightened" versions of reality. They serve to help us understand and explain meanings embedded in empirical phenomena.

For these reasons, the following section will outline Weber's approach to the methodology of cultural and social sciences, focusing primarily on his understanding of ideal types as a distinct category of concepts. At the end of the section, attention will be given to an example that demonstrates the suitability of this approach in jurisprudence. The third section will then present key insights about legal reasoning that can be derived using the ideal type of *homo iuridicus*, which are elaborated in greater detail in the book. Finally, before the concluding remarks, the benefits resulting from this conceptual approach to the phenomenon of legal reasoning will be identified – benefits that may also potentially apply to the study of other legal phenomena.

2. Weber's Ideal Types

2.1. ON WEBER'S METHODOLOGICAL APPROACH TO THE SOCIAL SCIENCES

Every theoretical (re)construction of legal practice (as well as any other social practice) faces, among other things, the fundamental epistemological dilemma: how to connect or "bring together" the conceptual and the empirical when studying that practice?[4] On the one hand, legal

3 Balkin, J., 1993, Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence, *Yale Law Journal*, Vol. 103, No. 1, pp. 107–108.

4 For example, Isaac Reed, in his book *Interpretation and Social Knowledge*, argues that the key debates in social science are not primarily about whether social facts exist and how we establish their existence (although these debates do occur). According to him, the main disagreements arise around "how we can claim to correctly and effectively explain, criticize, or interpret [social phenomena]" (Reed, I., 2011, *Interpretation and Social Knowledge. On the Use of Theory in the Human Sciences*, Chicago & London, The University of Chicago Press, p. 3). Therefore, Reed claims, "the responsibility of the social researcher is not only to report the facts, but to propose a deeper or broader understanding of them. When investigators attempt to do this, we reach for our theories" (*ibid*., p. 17).

theory aims to (re)construct and analyze general concepts related to law. On the other hand, although legal theory does not refer to specific legal systems in the way legal science does, it pretends to refer to the reality of law (admittedly, to "more general reality", so to speak). This question becomes even more pressing when the subject of theoretical inquiry is closely tied to legal practice itself, as is the case with legal reasoning or with the question what does it mean "to think like a lawyer".

Max Weber addressed similar questions, albeit within the broader context of the social and cultural sciences.[5] The fundamental question to which he sought a methodological answer concerns the relationship between the concepts and claims of the social and cultural sciences, on the one hand, and concrete historical and social reality, on the other. In this sense, Weber was particularly interested in "what is the logical function and structure of the concepts which [social science] uses" or more precisely, "what is the significance of theory and theoretical conceptualization (*theoretische Begriffsbildung*) for our knowledge of cultural reality?"[6]

According to Weber, the problem lies in the fact that, in the natural sciences, scientific concepts and laws are viewed as generalizing abstractions of concrete phenomena, while these concrete, individual instances are regarded merely as "representative illustrations" of those concepts and laws.[7] However, Weber argues that such an approach is not possible in the social sciences. Attempts to define scientific concepts in the classical manner (*per genus proximum*), according to which social phenomena in the social and cultural sciences could then be subsumed, are "nonsense"[8] due to the endless diversity of social phenomena and the very nature of those phenomena.

Precisely because of the nature of social phenomena, the social science researcher must understand (and to understand, must interpret) the subjective attitudes, perspectives, and motives of the agents in social relations. The social sciences strive for the understanding (*Verstehen*) of social phenomena – through the interpretation of the meanings individuals attribute to their actions. For this reason, Weber regarded sociology as "a science concerning itself with the interpretive understanding

5 Weber's ideas on methodology in the social sciences and on ideal-typical concepts are presented based on insights from his unfinished work Economy and Society and his key methodological essay, "Objectivity" in Social Science and Social Policy, originally published in 1904 (this article uses the version found in Weber, M., 1949, *The Methodology of the Social Sciences*, Glencoe, Free Press, pp. 50–110).

6 Weber, M., 1949, p. 85.

7 *Ibid*., p. 86.

8 *Ibid*., p. 93.

of social action and thereby with a causal explanation of its course and consequences."[9]

How did Weber construct his methodological approach in line with this understanding of sociology as a science?[10] First and foremost, the understanding of social action that truly serves the purpose of its causal explanation[11] relates to the meaning the agent attributes to it, in terms of motive. Weber held that it is the agent's actual motive that the investigator must seek to identify, since it is the true cause of the action that needs to be explained. It is important to note that Weber's formulations typically deal with whole patterns or sequences of behavior, rather than isolated actions.[12]

Regarding the context in which the researcher seeks to interpret meaning (motives), this can relate to the concrete actions of a specific individual, to those prevailing or average within a particular group, and finally, to those attributed to a constructed "typical" agent.[13] Of these three, the most important context of meaning is the latter, which is formulated through ideal types, since they are "deliberately constructed to project a hypothetical 'progression' of external behaviors that could be fully explained in terms of understandable 'motives'."[14]

For Weber, the problem of the ideal type is the central problem of all the social sciences.[15] The reason is that ideal types are a necessary episte-

9 Weber, M., 1978, *Economy and Society: An Outline of Interpretive Sociology*, Berkeley – Los Angeles – London, University of California Press, p. 4.

10 The answer to this question can hardly be a complete or precise account of Weber's methodology: firstly, because there is neither space nor need for that here, and secondly, because any attempt to present Weber's ideas of this kind inevitably faces inherent challenges related to his work – Weber's writing style is complex, his ideas are sophisticated, he employs specialized terminology, etc.

11 "[F]or a science which is concerned with the subjective meaning of action, explanation requires a grasp of the complex of meaning in which an actual course of understandable action thus interpreted belongs" (Weber, M., 1978, p. 9).

12 "The particular act has been placed in an understandable sequence of *motivation*, the understanding of which can be treated as an explanation of the actual course of behavior" (Weber, M., 1978, p. 9, emphasis by author).

13 "Understanding involves the interpretive grasp of the meaning present in one of the following contexts: (a) as in the historical approach, the actually intended meaning for concrete individual action; or (b) as in cases of sociological mass phenomena, the average of, or an approximation to, the actually intended meaning; or (c) the meaning appropriate to a scientifically formulated pure type (an ideal type) of a common phenomenon" (*ibid.*).

14 Ringer, F., 1997, *Max Weber's Methodology: The Unification of the Cultural and Social Sciences*, Cambridge MA, London, Harvard University Press, p. 114.

15 Schütz, A., 1967, *The Phenomenology of the Social World*, Evanston, Northwestern University Press, p. 224.

mological tool if we aim to not merely describe but to explain historical and social phenomena. Of course, sociology also employs average, empirical-statistical types, but according to Weber, "[t]heoretical differentiation (*Kasuistik*) is possible in sociology only in terms of ideal or pure types."[16]

2.2. ON WEBER'S IDEAL-TYPICAL CONCEPTS

For the sake of clarity, Weber's idea of ideal-typical concepts will be presented analytically, i.e., through brief answers to three questions. The first question is: what does "ideal" mean in this context? The second: what does "typical" mean? And finally, the third: what is the function of these concepts in the social sciences?

2.2.1. What Does "Ideal" Mean?

An ideal type is constructed by emphasizing only one aspect of reality, i.e., one particular motivation of social agents, in such a way that its diffuse, individual perspectives and motivations are abstracted and synthesized into a consistent, one-sidedly accentuated mental construct. Weber argued that such concepts cannot be constructed without taking into account the actual motives of social agents. At the same time, however, it is not possible to use the often unreflected motives, uses of terms, and understandings of phenomena held by real agents in their raw, unprocessed form – if they are to have any epistemological or heuristic value.

Therefore, when we say that an ideal-typical concept is "one-sided", we mean that it has been "purified",[17] i.e., cleansed of all incidental or secondary elements that are present in reality. When we say that it is consistent, we mean that a single conceptual pattern encompasses specific motives and perspectives of the agents in social life, in such a way that the selected and emphasized elements are internally connected into a logically coherent whole.

But how can we know whether an ideal-typical interpretation of the social agents' motives is reliable or epistemologically useful?

16 Weber, M., 1978, p. 20.

17 Rheinstein refers to ideal types as "pure" types (see Rheinstein, M., Introduction, in: Weber, M., 1954, *Max Weber on Law in Economy and Society*, Cambridge MA, Harvard University Press, p. xxxvii). After all, Weber himself also uses the terms "pure type" and "ideal type" interchangeably (cf. Weber, M., 1978, p. 20). The term "pure" seems to reflect Weber's original intent more accurately, while also avoiding the ambiguity he felt compelled to clarify – namely, that "ideal" does not mean desirable, prescriptive, or normatively correct.

First, an ideal-typical concept must be adequate in terms of the meaning it seeks to capture. As Weber puts it, one must "formulate pure ideal types of the corresponding forms of action which in each case involve the highest possible degree of logical integration by virtue of their complete adequacy on the level of meaning."[18] An interpretation is "adequate on the level of meaning insofar as, according to our habitual modes of thought and feeling, its component parts taken in their mutual relation are recognized to constitute a 'typical' complex of meaning."[19] What this somewhat opaque formulation implies is that by "habitual modes of thought and feeling" Weber is not referring to the thoughts and feelings of the researcher constructing the ideal type, but rather to those of the agents whose actions are being interpreted. However, in order for the researcher to be able to recognize the "component parts taken in their mutual relation," they must have some knowledge of those thoughts and feelings. Finally, the ideal type must be formulated as a pure and coherent construct, without any admixture of other relationships or contexts of meaning. The person so conceived behaves as a "type" only insofar as they act within the stipulated situation. In other situations, their behavior may not be typical at all.[20] For example, the ideal-typical concept of the bureaucrat explains only their behavior in the workplace, and not, for example, in their personal relationships with friends.

In addition to the "adequacy on the level of meaning," Weber proposes a second condition for the "verification" of the usefulness of ideal-typical concepts: causal adequacy. It is clear that a "pure" type does not have a direct counterpart in reality; it is not suited to serve as a conceptual pattern under which actual situations, relationships, or attitudes can be subsumed as concrete and complete instantiations of the concept.[21] However, although the social researcher "goes beyond" the observable forms of real subjective attitudes and positions of social agents, they should not ignore or distort them, since, after all, the real phenomena are what they ultimately want to explain.[22] Only if "there is some kind of proof for the existence of a probability that action in fact normally takes the course which has been held to be meaningful"[23] can the ideal-typical concept be said to be "causally adequate". In other words, this means that it can be empirically observed, with a reasonable

18 Weber, M., 1978, p. 20.
19 *Ibid*., p. 21.
20 Schütz, A., 1967, p. 236.
21 Weber, M., 1949, p. 93.
22 Reed, I., 2011, p. 91.
23 Weber, M., 1978, p. 12.

degree of approximation, that the ideal-typical motives could have led to a certain action and, more strictly, that they probably did so and that there is a likelihood they will do so again.[24]

Both types of adequacy are necessary for an ideal type to be epistemologically useful. No matter how often the behavior predicted by the type occurs in reality, without adequacy on the level of meaning, such regularities will remain unintelligible. Conversely, if the context of meaning is correctly grasped, but in practice the behavior does not unfold in any way as the ideal type "predicts", then the concept is useless.[25]

Weber assigns the highest degree of reliability to ideal-typical concepts based on so-called purposive-rational (*zweckrational*) motives. His favorite example is *homo oeconomicus*. In this kind of ideal-typical concept, both adequacy on the level of meaning and causal adequacy are at their highest, because if we assume that the behavior of the ideal-typical subject is purposive-rational, then the actions that follow from such motivation will also be rational means for achieving the intended end.[26] In such cases, "the relations of means and end will be clearly understandable on grounds of experience."[27] This type of ideal-typical concept will be discussed further below.

Finally, it is important to emphasize that ideal types are not prescriptive constructions. Weber insists that it is the scholar's elementary duty to approach social phenomena and the motives and standpoints of social agents in a value-neutral way. It means that they have to maintain a clear and strict distinction "between the logically comparative analysis of reality by ideal types in the logical sense and the value-judgment of reality on the basis of ideals."[28] For Weber, arguments based on value-judgments have no place in empirical research.[29] Therefore, the "ideal type [...] has no connection at all with value-judgments, and it has nothing to do with any type of perfection other than a purely logical one."[30] Ideal types are not normative or value-laden – they are epistemological constructs, grounded in empirical reality.[31]

24 Schütz, A., 1967, p. 236.

25 Weber, M., 1978, p. 22.

26 Ringer, F., 1997, p. 106.

27 Weber, M., 1978, p. 18.

28 Weber, M., 1949, p. 98.

29 Weber, M., 1978, p. 17.

30 Weber, M., 1949, pp. 98–99.

31 However, Weber does not deny the possibility – which is frequently realized in practice – that an ideal type may reflect ideals genuinely held by actual participants in social life, which they strive to realize in their practical actions or use as guiding maxims for regulating social relations (Weber, M., 1949, pp. 95, 98).

2.2.2. What Does "Typical" Mean?

The aim of every science is to organize the facts of the segment of reality it investigates through a system of concepts, whose content is shaped, refined, and revised through careful observation of empirical data, and through causal relationships, by formulating and testing hypotheses. This process continues until the system of scientific laws becomes sufficiently developed to allow us to speak of a "deductive science".[32]

In this regard, both philosophy and cognitive psychology today make use of classically defined concepts (*per genus et differentiam*), but also of so-called prototypical concepts. As for the former, it has already been noted that, according to Weber, they are inadequate for the purposes of the social sciences. Regarding the latter – prototypical concepts – their defining feature is that they capture properties of the phenomenon that are statistically most prevalent, i.e. average. These concepts abstract what is "typical", i.e., most frequent, from the empirical data, through induction.

However, the similarity in terminology should not be misleading: "typical", in this sense, is not the same as "ideal-typical". As already mentioned,[33] Weber recognizes the relevance of "average" phenomena and the need to conceptualize them, but he does not see this as a significant methodological challenge. They may well be captured through prototypical concepts, but they cannot fulfill the specific role that Weber believed interpretive sociology must play.

Therefore, when Weberian sociology refers to "typical cases", it does not mean empirically or statistically average ones, but rather "ideal types".[34] As Weber himself puts it, "[t]he goal of ideal-typical concept-construction is always to make clearly explicit not the class or average character but rather the unique individual character of cultural phenomena."[35] For example, the "typical" or average official in a corrupted legal system may be a fanatical or corrupt loyalist. But the "ideal-typical" *homo iuris* would be someone committed only to the valid legal order and motivated by that commitment, consistently applying it. The former becomes fully intelligible only in contrast with the latter.

2.2.3. What is the Function of Ideal-Typical Concepts?

According to Weber, ideal-typical concepts are not the goal of the social and cultural sciences – as concepts and theories often are in the natural sciences – but rather a means to an end. "The ideal-type concept [...]

32 Weber, M., 1949, p. 106.

33 See *supra* note 13.

34 Weber, M., 1978, p. 20.

35 Weber, M., 1949, p. 101.

is no [scientific] 'hypothesis,' but it offers guidance to the construction of hypotheses. It is not a description of reality but aims to provide unambiguous means of expression to such a description."[36]

Of course, anyone constructing an ideal type observes reality and selectively draws certain elements from it, in line with their research aims and interests, while omitting or discarding others. Without such a relation to reality, ideal types would lack any epistemological value or utility. However, Weber argues that their connection to empirical data lies primarily in the fact that the characteristic features of the type – those to which the abstract construct refers – are features that exist, either explicitly or implicitly, in the real world. These features become pragmatically clear and intelligible precisely through reference to the ideal type.

Ideal-typical concepts, as Weber explains, are "a technical aid which facilitates a more lucid arrangement and terminology [which allows us] to determine the degree of approximation of the [...] phenomenon to the theoretically constructed type."[37] The function of such concepts in empirical research is to serve as a reference point against which social facts can be compared, allowing us to assess the extent to which those facts approximate or deviate from the ideal types. This, in turn, enables the explanation of causal relations in social reality using relatively clear and structured conceptual tools.[38] Therefore, the construction and use of ideal-typical concepts are necessary for both heuristic and expository purposes, since the attitudes and motives of agents within concrete social relationships can be made fully explicit only through such constructions.[39] When ideal types achieve these goals, they fulfill their epistemological function, even though it remains clear that they diverge from empirical reality.[40]

36 *Ibid*., p. 90.

37 Weber, M., 1946, pp. 323–324.

38 Weber, M., 1917, Der Sinn der "Wertfreiheit" der soziologischen und ökonomischen Wissenschaften, *Logos*, Vol. 7, pp. 83–84.

39 Weber, M., 1949, p. 101.

40 Weber, M., 1949, p. 90. Weber's insight that ideal types, although not accurate descriptions of reality, are nonetheless epistemologically and heuristically justified, has found support in certain currents of contemporary epistemology. The ideas advanced over a long period by Catherine Elgin are particularly instructive in this regard. Elgin argues that "science routinely transgresses the boundary between truth and falsity. [...] It develops and deploys simplified models that diverge, sometimes considerably, from the phenomena they purport to represent". (Elgin, C. Z., 2017, *True Enough*, Cambridge MA – London, The MIT Press, p. 15). She illustrates this claim with numerous examples, concluding that thought experiments or theoretical concepts, the scientific model can nonetheless be epistemically valuable even when partially inaccurate, provided that it "exemplifies features it shares with the phenomena it bears on. By making those features salient, such a representation enables us to appreciate their significance for the phenomena" (*ibid*., p. 5). These kinds of epistemic tools filter out irrelevant

This applies especially to the abovementioned ideal types constructed on the basis of purposive rationality. Namely, purposively rational (*zweckrational*) action is the most intelligible type of behavior. Once the sociologist projects the course of action that would result from such rationality, they must then trace the deviations between that projection and the actual progression of behavior. This, in turn, enables the causal attribution of those deviations "from the rationally understandable 'progression' to divergences between the 'motivations' stipulated in the type and those actually moving the agents involved."[41]

In this sense, let us return to the ideal-typical concept of *homo oeconomicus*, who, in economic action, is motivated solely by rational economic objectives. According to this concept, if market actors were to behave in a strictly purposively rational manner, they would have to act in precisely one way and no other. This means, for example, that they would act in accordance with the principle of marginal utility and, more generally, would behave and make decisions so as to minimize costs and maximize benefits. By comparing such an ideal-typical concept of the economic actor with the actual behavior of real-world market participants, we are able to understand the influence of misconceptions, emotions, and biases on the actions and decisions they make.[42] In short, we can both understand and explain their real motives for economic decisions through the deviations of actual behavior from the ideal type.[43]

2.3. WEBER'S APPROACH – AN EXAMPLE FROM CONTEMPORARY JURISPRUDENCE

The potential relevance of Weber's methodological approach to the social sciences for jurisprudence was demonstrated by David Galligan through

factors, bringing the relevant characteristics into sharper focus and thereby revealing aspects of the phenomenon that would otherwise remain hidden (*ibid*., p. 2). Without going into the details of Elgin's theory, it is clear that her approach closely aligns with Weber's account of ideal types – as concepts rooted in but not fully representative of empirical reality, and as tools for epistemological insight. In a response to a question from the author, Elgin confirmed that Weber's model of ideal-typical concepts fully corresponds to her epistemological views, even though she does not explicitly mention him in her work (Belgrade Legal Theory Group online seminar, 4 March 2024, (https://www.youtube.com/watch?v=NkkrEQvSvDI, 10. 11. 2025)).

41 Ringer, F., 1997, p. 114.

42 The significant influence of these noneconomic factors on economic decision-making – stemming from the specific architecture of the human mind – is today considered beyond doubt (see Kahneman, D., 2011, *Thinking, Fast and Slow*, New York, Farrar, Straus and Giroux).

43 Weber, M., 1978, p. 21.

a somewhat unexpected example: H.L.A. Hart's theory of law.[44] Anyone familiar with Hart's work knows that at the very beginning of *The Concept of Law*, Hart describes his book, among other things, as "an essay in descriptive sociology".[45] However, this self-characterization of Hart's seminal work struck some scholars as confusing or even inaccurate,[46] given that orthodox theoretical opinion tends to categorize Hart's approach as "analytical jurisprudence", with conceptual analysis as its key method.[47]

Despite such doubts, it is undeniable that Hart's endeavor is at least partially empirical. As Hart himself explains, he employs an analysis of ordinary language use – an empirical method – to support claims about how law actually functions. Moreover, as Schauer highlights, prior to his academic career, Hart spent nine years at the bar as a practicing lawyer, which provided him with an "insider's" perspective on the legal system in action.[48]

However, Galligan goes a step further in affirming the empirical dimension of Hart's work. He argues that the significance of Hart's remark becomes fully clear only when his work is viewed through the lens of Weber's interpretative method and the use of ideal-typical concepts.[49] For Galligan, it is indisputable that Hart investigates law as a social phenomenon, as a social practice. Crucially, Hart's approach to this practice does not rely on the mere observation of external behavioral patterns but strives to examine how law appears from the perspective of those who are "inside" the legal system. As Galligan puts it, "to [...] neglect the way law is experienced and understood in a multitude of situations across communities [...] is to omit or neglect the social dimension."[50]

Therefore, to approach this dimension, it is necessary to understand the behaviors and actions of social agents, and to understand those, one must interpret their attitudes and motives, i.e., understand the meanings

44 See Galligan, D., 2015, Concepts the currency of social understanding of law: A review essay on the later work of William Twining, *Oxford Journal of Legal Studies*, Vol. 35, No. 2, pp. 373–402.

45 Hart, H. L. A., 1994, *The Concept of Law*, Oxford, Clarendon Press, p. v.

46 Coleman, J. L., 1998, Incorporationism, Conventionality, and the Practical Difference Thesis, *Legal Theory*, Vol. 4, No. 4, pp. 381, 387–95.

47 In fact, Hart himself states at the beginning of the book that it is "an essay in analytical jurisprudence, for it is concerned with the clarification of the general framework of legal thought" (Hart, H. L. A., 1994, p. v).

48 Schauer, F., 2004, Limited Domain of The Law, *Virginia Law Review*, Vol. 90, No. 7, p. 1912.

49 Moreover, this perspective reveals a possible answer to the question of "how analytical jurisprudence contributes to a social understanding of law" (Galligan, D., 2015, p. 383).

50 *Ibid*., p. 374.

behind their actions, interactions, and linguistic practices.[51] As previously emphasized, the Weberian approach to the social sciences presupposes that understanding social phenomena (social actions) depends on the meanings that social agents attribute to their own behavior. This meaning is revealed "by entering the social world and considering [...] how they experience, explain and justify what they are doing."[52]

According to Galligan, this is precisely what Hart does. Focusing on the analysis of ordinary language use and with a keen sensitivity to the concepts embedded within that language,[53] Hart recognizes the significance of the internal perspective of agents in legal thought and action, as well as its explanatory power.[54] However, in order to construct appropriate concepts, he must decide which segment of a social practice should be singled out for examination, and then, based on observing that segment, identify the ideal-typical concepts implicitly present within it. In this regard, "Hart settled on the segment involving courts, lawyers and other officials,[55] within which he judged the concept of rules to be implicit." "In constructing concepts, Hart was attentive to social practice, focusing on how [...] the officials understand their actions as rule-based."[56]

What does that mean? Hart believes that rules in social life (and in the legal order) play a significant role since members of a community attribute to them the meaning of binding standards of behavior. Thus, the existence of a social rule does not simply imply that there is a regular, external pattern of behavior among members of the community in a given situation,

51 As Galligan puts it, "the assumption is that people's actions are guided by meanings, so that to understand meaning is to understand action" (*ibid*., p. 382).

52 *Ibid*., pp. 383–384.

53 "Language is the intermediary between thought and action: the meaning of action, the way people subjectively regard an action, such as following rules, is known from the language they use in speech and writing" (Galligan, D., 2015, p. 385).

54 Hart did not adopt the idea of the internal point of view from Weber, but from Peter Winch (see Hart, H. L. A., 1994, p. 289). Moreover, Hart was not entirely consistent in his use of the term, applying it to denote different phenomena (see Tamanaha, B. Z., 2006, A Socio-Legal Methodology for the Internal/External Distinction: Jurisprudential Implications, *Fordham Law Review*, Vol. 75, No. 3). Nevertheless, this does not undermine the applicability of Weber's method to Hart's theory. On the contrary, it appears that this approach allows for a sharpening and refinement of Hart's original ideas.

55 When it comes to officials, it is important to note that Hart most often refers to the attitudes of judges and courts, rather than, for example, prison guards or tax inspectors. In any case, he does not include any segment of ordinary citizens. As Galligan points out, if an observer turns their attention to other segments of society, they will find that "the meanings the parties attribute to their experience of law differ from Hart's depiction of rule-governed behaviour, sometimes subtly, at other times strikingly" (Galligan, D., 2015, p. 389).

56 *Ibid*.

but it also involves the practical stance of those addressed by that pattern; Hart calls this practical stance toward rules the "internal point of view". Officials' attitude toward rules,[57] therefore, has a characteristic "internal aspect",[58] because they "view behaviour [in accordance with a rule] as a general standard to be followed by the group as a whole."[59] Furthermore, they have what Hart terms a "reflective critical attitude" toward the behavior of those officials who violate the rule.[60] All in all, the consequence of taking the internal point of view toward a rule is the "acceptance"[61] of that rule as both a reason for acting and a reason for criticizing the actions of others. In short, to take the internal point of view toward a rule[62] is to accept the rule as a source of reasons.

Why does Galligan regard the internal point of view as an ideal-typical concept? Because it is not the attitude of every "insider" within a legal system – perhaps not even of a majority of insiders. It is therefore not a simple empirical generalization but a rational reconstruction of the motivations and attitudes of the system's officials. Someone within a legal system may fail to treat the rules of that system as standards for their own conduct or for the conduct of others (above all with respect to the rule of recognition). The famous Holmesian "bad man", for example, adopts the external point of view even though he may be an insider within a legal system.[63] Hart, however, maintains that this concept is indispensable for

57 Of course, when it comes to officials, this kind of attitude toward rules is postulated only in relation to the so-called *rule of recognition*, understood as the ultimate and supreme rule of a legal system. Since the focus of this paper is not to provide a full account of Hart's theory, but rather to examine it through the lens of Weber's notion of ideal-typical concepts, there is no need to dwell on this issue here.

58 Hart, H. L. A., 1994, p. 56.

59 *Ibid*.

60 *Ibid*., p. 57.

61 The counterpart of "acceptance" is "rejection". A rule is "rejected" when it is not taken as a standard for one's own behavior or the behavior of others, but is instead merely acknowledged for its potential to bring about unpleasant consequences if violated. As Shapiro puts it, "[a]nyone who accepts the rules has, according to Hart, taken the internal point of view. Anyone who does not accept the rules, either because he is like the bad man and takes the practical, but non-accepting, point of view, or because he is merely observing and hence does not take a practical stance at all, has taken the external point of view" (Shapiro, S. J., 2006, What is the internal point of view, *Fordham Law Review*, Vol. 75, No. 3, p. 1160).

62 As Kaplan rightly notes, it would be more accurate to say that the internal point of view is not directed at the rule itself, but "is directed at patterns of behavior, or emerging patterns of behavior, and it is partly in virtue of this that these patterns become rules" (Kaplan, J., 2017, Attitude and The Normativity of Law, *Law and Philosophy*, Vol. 36, No. 5, p. 471).

63 Holmes, O. W., 1897, The Path of Law, *Harvard Law Review*, Vol. 10, No. 8, pp. 457, 459–461.

understanding a legal order as a system of (primary and secondary) rules, and that failing to construct it leaves a large part of the social practice we call "law" without an adequate explanation. This is precisely where the epistemological and theoretical significance of this ideal-typical concept lies – a significance that Weber ascribes to such concepts generally.

The claim that an internal point of view is taken toward certain established patterns of behavior, which thereby become rules and reasons for action, is of great theoretical importance because it serves as a constraint on our theories of law. As Kaplan succinctly explains, "[s]ince law is normative in this minimal sense, habit or sanction-based positivist theories of law are doomed. Hart can capture rules, whereas Holmes, Austin, and Bentham can only capture regularities."[64] In this way, our understanding of law as a social phenomenon is improved, while at the same time cases of what Hart calls the "pathology of a legal system" are brought to light.[65]

3. *Homo Iuridicus* as the Legal Reasoner

3.1. *HOMO IURIDICUS*

The term *homo iuridicus* is not unfamiliar within the discourse of legal and humanistic disciplines. It is true that in this discourse it appears less frequent than related terms, such as *homo oeconomicus*, *homo faber*, and *homo politicus*. On the other hand, the term is polysemous. For instance, some argue that there exists an academic (or more precisely, a legal-theoretical) *homo iuridicus*, embodied in Hans Kelsen's view on the purity of legal theory.[66] Alternatively, it is suggested that there exists a *homo iuridicus* from the perspective of legal regulations and norms, understood as a subject of the law's narrative as presented in the valid legal text.[67]

Although the term *homo iuridicus* is used in various contexts, its different meanings are loosely connected in the sense that "the notion of *homo iuridicus* pertains to a human person in his law-oriented role. This is

64 Kaplan, J., 2017, p. 484.

65 Hart, H. L. A., 1994, p. 117.

66 Basta, D. N., 2001, Slobodan Jovanović i Hans Kelzen, *Annals of the Faculty of Law in Belgrade*, Vol. 49, No. 1–4, pp. 25–43.

67 See Chauvin, T., 2014, Homo iuridicus. *Człowiek jako podmiot prawa publicznego*, (*Homo iuridicus*. Man as a subject of public law), Warsaw, C. H. Beck, p. 5. From the perspective of the Latin roots – *homo* (human, as a being distinct from animals and deities) and *iuridicus* (a noun denoting either a judge or a place where courts are held) – the combination of these words in this context is not particularly felicitous. Strictly linguistically, the term *homo iuris* might be more appropriate in such (extra-judicial) contexts.

an important [...] role for all legal professionals and scholars."[68] But what does it mean for a person in social life to play a law-oriented role, and why is this role especially relevant for legal professionals and scholars? A vivid answer to this question is offered by John Finnis, who observes that "a lawyer sees the desired future social order from a professionally structured viewpoint, as a stylized and manageable drama. In this drama, many characters, situations, and actions known to common sense, sociology, and ethics are missing, while many other characters, relationships, and transactions known only or originally only to the lawyer are introduced."[69]

As the examples of usage suggest, when conceptualizing reality through the ideal-typical notion of *homo iuridicus*, it is necessary to define the segment of experience under consideration toward which the agent's motives and actions are directed, and which serves as the empirical material for its "distillation". Since the ideal-typical construct must be grounded in actual agents and their motives and actions, it is first necessary to determine which agents are involved and, second, which actions and decisions are relevant, in relation to which these agents adopt certain stances that will form the basis for constructing the ideal type.

The answer to the first question is already suggested in Finnis's words: these are professional legal practitioners. As noted in the introduction, in all types of social relations, the manner in which actions are performed and reasoning is conducted is largely determined by the social role occupied by an individual. Based on this role, the individual understands which decisions and behaviors are socially acceptable and which are not. This connection between a specific social role and patterns of reasoning can be observed across different professions and, accordingly, within the legal profession. Thanks to their expertise, experience, and training, lawyers actively participate in the shaping of legal practices and adopt a specific stance toward the law.

However, a question arises: are lawyers a monolithic group, or do different segments within the legal profession play distinct roles in the creation and application of the law, holding different attitudes and motivations toward the legal system? While the legal profession as a whole may be considered a source of potential information from which the ideal-typical *homo iuridicus* can be conceptualized, it seems most appropriate to focus on the practice of judges (as a subset of lawyers). Several reasons support this approach.

68 Schilfgaarde, P. van, 2019, *Law and Life. Why Law?*, Cham, Springer Nature, p. 104.

69 Finnis, J., 2011, *Natural Law and Natural Rights*, Oxford, Clarendon Law – Oxford University Press, pp. 282–283.

First, judges' understanding of legal reasoning is shaped by the institutional position they occupy – they are vested with the authority to resolve any legal dispute brought before them in an impartial and conclusive manner. Second, because they adjudicate concrete legal disputes, their decision-making is necessarily oriented toward legal reasoning, as they are required to justify their rulings, i.e., to provide publicly stated reasons for their decisions. Third, these factors together explain why the mode of judicial reasoning is both complex and (potentially) rational.[70]

The second question in formulating the ideal type of *homo iuridicus* concerns, as noted earlier, the specific actions and decisions of judges toward which they adopt particular stances and which serve as the empirical basis for constructing the ideal type. The answer lies in drawing a distinction between the kinds of issues a judge typically reasons about when deciding a case – namely, the distinction between a "question of law" and a "question of fact". Understanding this distinction is crucial for grasping what *homo iuridicus* reasons about when engaging in legal reasoning. For if reasoning "about law" or "within law" is to warrant the designation "legal", this implies that such reasoning differs in some essential respect from ordinary factual reasoning, i.e., reasoning about facts.[71]

What, then, does this distinction consist in? Despite the practical and theoretical difficulties surrounding their differentiation, "questions of law" and "questions of fact" differ fundamentally in the mode of reasoning by which answers to them – and the justifications of those answers – are reached. A "question of law" is addressed through interpretive argumentation, whereas a "question of fact" is resolved through evidential reasoning. Accordingly, although factual reasoning in law has certain specific features, it does not differ in any essential way from the reasoning of a physician, a detective, or a meteorologist when they deliberate about a diagnosis, the circumstances of a crime, or weather conditions. For this reason, the ideal-typical concept of legal reasoning attributed to *homo iuridicus* is constructed only with respect to the stance he adopts when reasoning about "questions of law".

Consequently, when legal reasoning is directed toward the application of positive law in disputed cases (and most such cases are decided in court), it is developed and refined by judges acting as officials within the legal system. Their decisions, motivations, and attitudes provide the empirical material for constructing the concept of *homo iuridicus* as the legal reasoner.

70 Dajović, G., 2023, pp. 74–75.

71 Put differently, "thinking like a lawyer" centers on legal reasoning.

Finally, once the questions "who is the subject of reasoning?" and "what does the reasoning concern?" have been addressed, it is necessary to answer the question "how does the agent reason?" Judges, after all, are first and foremost human beings. Since the conscious, "reasoning" component constitutes only a fragment of the architecture of the human mind, judges – like all individuals – rely, in their practical action and decision-making, on deliberation, as well as on intuition, heuristics, emotions, moral convictions, etc. Although the conscious and unconscious, fast and slow "systems" of human thought and decision-making are inextricably intertwined,[72] it is nonetheless possible, at the level of an ideal-typical construct, to isolate them analytically. Accordingly, the ideal type of *homo iuridicus* is oriented toward the conscious, rational mode of legal thought, with reasoning itself serving as the defining expression of this legal mindset.

Such a rational approach to judging, given the already mentioned fact that judges, like all humans, are susceptible to irrational, intuitive, and biased decision-making, can be reliably constructed only if one observes the justification process of their decisions, rather than the underlying psychological decision-making itself. In practice, judges do not resolve contested questions of law solely on the basis of reasoning grounded in applicable law; their decisions are influenced by intuition, heuristics, prejudices, moral and political beliefs, and other factors. By contrast, the process of justifying a decision is primarily grounded in legal reasoning. It follows that, in legal practice, the decision-making process and the justification process are not causally linked. In other words, judges often do not decide based on the (legal) reasons they later state in their explanations. Therefore, in constructing the ideal-type *homo iuridicus* as the legal reasoner, one relies on the practice of justifying decisions[73] concerning contested questions of law. These justifications are predominantly expressed in the reasoning (or grounds) of the judicial decision.

3.2. *HOMO IURIDICUS* AND LEGAL REASONING

How does the ideal-typical *homo iuridicus*, constructed in this way, engage in legal reasoning? What is the key element of their stance toward reasoning about questions of law? To address these questions, it is useful to recall two widely recognized (and in a sense also ideal-typical) modes

72 Kahneman, D., 2011, pp. 15–24.

73 Hence, in *Osnovi pravnog rasuđivanja* I take argumentation to be a "verbalized, social, and rational activity" through which, in formal terms, the process of justifying decisions on a legal dispute is conducted – without implying, of course, that such justification always occurs in practice exactly as described in the ideal-typical construct.

of practical reasoning, which stand in opposition to one another: purely practical reasoning and legal reasoning.

According to the first mode, the agent decides and acts on the balance of all relevant reasons. In doing so, they are not bound by any prior authoritative reasons, such as rules or commands from an authority dictating what should or should not be done in a particular situation. The agent considers all valid substantive reasons and, through reasoning, arrives at a conclusion (a decision) about how to act.

By contrast, *homo iuridicus* grounds his reasoning exclusively on so-called authoritative reasons, which preempt consideration of all other relevant reasons. When such an ideal-typical agent reaches a decision, he takes the applicable legal provision as a premise and decides in accordance with the facts as described in the provision, even in cases where a particular decision-maker, considering all relevant reasons, might have reached a different conclusion.[74] In short, the core element of reasoning for the ideal-typical *homo iuridicus* is reliance on authoritative legal reasons contained in the formal and factual sources of law.[75]

It is precisely based on these characteristics that the central part of the book reconstructs the activity of legal interpretation, understood as a core component of *homo iuridicus*' legal reasoning, since authoritative legal reasons – contained in both formal and factual sources of law – are discursive constructs.

In the book, the activity of legal interpretation is primarily related to so-called "hard" cases, so that the distinction between them and "easy" ones is explained in detail,[76] followed by an account of the main reasons

74 According to Schauer, an understanding of the law's inherent narrowness and the ways in which its characteristic modalities effectively filter out arguments, relevant facts, and values that might be considered in other decision-making contexts, lies at the core of understanding both the phenomenon of law and the nature of legal reasoning (Schauer, F., 2004, p. 1910).

75 Analysis of judicial reasoning practice suggests that judges also rely on so-called supplementary or "factual" sources of law. The distinction between formal and factual sources is explained in theory as follows: "Where legislation, for instance, is a formal source of law, judges consider themselves duty-bound to use it and (in all but exceptional circumstances) enforce the norm derived from it. When it comes to non-mandatory sources of law, [...] judges do not take themselves to be duty-bound to use them, but still to be permitted or to have good reason to do so" (Shecaira, F. P., 2015, Sources of Law Are not Legal Norms, *Ratio Juris*, Vol. 28, No. 1, p. 18). Examples of these other, permissive or factual, sources of law include judicial precedents, legal scholarship, decisions of courts in other jurisdictions, and so forth.

76 If the outcomes are certain and no disagreements can be grounded in any of the reasons that could render a case contentious, we are dealing with an "easy" case. In such cases, the process of justifying the decision typically amounts merely to citing the applicable norm and describing the established facts that fall under its terms (Feteris,

why "hard" cases arise.[77] Furthermore, the book describes how interpretation and argumentation are connected, i.e., how interpretive arguments are (rationally) constructed. In this sense, in Vandevelde's words, the book attempts "to describe what [lawyers] do, even if they are not entirely aware that they are doing it, much in the way that a coach might assist a tennis player in analyzing her forehand stroke."[78] Or, using applied terminology, how the ideal-typical *homo iuridicus* engages in interpretive reasoning.

In *Osnovi pravnog rasuđivanja*, fifteen interpretative arguments are described in detail, mostly classified into four basic types. These are well-known (both in theory and practice) as types of interpretative argumentation or methods (canons) of interpretation: linguistic, teleological, systemic, and historical. Their use is not only widely accepted but anthropologically grounded[79], according to some authors, while normatively justified according to others.[80] From the perspective of *homo iuridicus*,

E., Argumentative patterns with symptomatic argumentation in the justification of judicial decisions, in: Eemeren, F. H. van, (ed.), 2017, *Prototypical Argumentative Patterns. Exploring the relationship between argumentative discourse and institutional context*, Amsterdam – Philadelphia, John Benjamins Publishing Company, pp. 129–130). It is true, however, that contrary examples can also be found in judicial practice. For instance, Žaklina Harašić cites cases in which the court employed elaborated interpretive arguments even though they were dealing with easy cases (see Harašić, Ž., 2006, Problem razgraničenja „lakih slučajeva" (easy cases) i „teških slučajeva" (hard cases), *Zbornik PFZ*, Vol. 56, No. 1, pp. 98–102). The construction of the ideal type of *homo iuridicus* as the legal reasoner allows for understanding such instances of legal practice as unnecessary "aberrations".

77 In "hard" cases, the legal provisions do not provide a clear answer, either because (1) it is linguistically indeterminate in relation to the specific case; (2) they contradict the text of another valid legal provision; (3) they yields a clear but, for some reason, unsatisfactory or "bad" answer; or (4) they provide no answer at all. However, in addition to this first-order indeterminacy – rooted in the legal texts themselves – there exists a second-order indeterminacy, which arises from disagreement over the ranking of interpretive methods. This second-order indeterminacy stems from differing normative theories of interpretation, understood as systematic accounts of how legal texts ought to be interpreted (Dajović, G., 2023, pp. 93, 128).

78 Vandevelde, K. J., 2011, *Thinking Like a Lawyer: An Introduction to Legal Reasoning*, 2nd ed., Boulder, Westview Press, p. 143.

79 For instance, Winfried Brugger finds that these four types of interpretative argumentation are, so to speak, anthropologically rooted in human personality. Consequently, "judicial interpretations must take all four perspectives into account [...] (i) they cannot be reduced to any one of these perspectives, since all form the constitutive parts of the perception and definition of our personal, political, and legal identity" (Brugger, W., 1994, Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks From a German Point of View, *American Journal of Comparative Law*, Vol. 42, No. 2, p. 420).

80 For example, "[b]ehind linguistic interpretation lies an aim of preserving clarity and accuracy in legislative language and a principle of justice that forbids retrospective judicial rewriting of the legislature's chosen words; behind systemic interpretation

however, their use is rational, because legal texts, for example, are linguistic constructs (hence linguistic arguments), they are embedded within the legal system (hence systemic arguments), they are created as intentional acts (hence arguments from intent and historical interpretation), and, being human creations, they serve specific (practical) purposes or goals that can be rationally discerned at the moment of their application (hence teleological arguments). Yet, it is also noted that *homo iuridicus* does not provide an answer to the question that arises when these arguments conflict. In other words, he remains neutral with respect to the correctness of any normative theory of legal interpretation; adherence to any such theory would effectively convert him into a *homo ethicus* or *homo politicus*.

3.3. WEBER'S IDEAL TYPES OF LEGAL SITUATIONS AND *HOMO IURIDICUS*

Weber himself constructed certain ideal types of situations within the legal system, concerning law-making and law-finding activities. In *Economy and Society*, he formulateed two key ideal types of situations: the irrational and the rational.[81]

The irrational type is characteristic of systems in which officials do not create or apply law according to preestablished, general rules. It can appear as formal – when legal agents make decisions not through reasoning but, for instance, by rolling dice, consulting an oracle, or invoking divine judgment – or as substantive – when decisions are made *ad hoc*, on a case-by-case basis.[82]

Rational situations also have both substantive and formal ideal types. Law-makers and law-finders are substantively rational insofar as they consciously follow (to a greater or lesser extent) conceived and articulated general principles of some kind. These principles may be ethical, political, religious, or of any other nature that is used as a basis of legal rules. In this sense, substantially rational systems can be found, for example, in Soviet, Sharia, and English law alike. This concerns practical rationality, understood as the adoption and consistent application of a

lies a principle of rationality grounded in the value of coherence and integrity in a legal system; behind teleological/deontological interpretation lies respect for the demand of practical reason that human activity be guided either by some sense of values to be realised by action or by principles to be observed in it" (MacCormick, N., 1993, Argumentation and Interpretation in Law, *Ratio Juris*, Vol. 6, No. 1, pp. 16–29).

81 Weber, M., 1978, pp. 656–658.

82 "Lawmaking and lawfinding are substantively irrational on the other hand to the extent that decision is influenced by concrete factors of the particular case evaluated upon an ethical, emotional, or political basis rather than by general norms" (*ibid*., p. 656).

more or less determined set of principles (whether supra-legal or extra-legal) when creating and applying law.

In contrast, logical (formal) rationality in law-making and law-finding exists when legal agents act exclusively on the basis of general legal rules formulated through abstract concepts. In Weber's own words, law-making and law-finding are formally rational in the logical sense insofar as "the legally relevant characteristics of the facts are disclosed through the logical analysis of meaning and where, accordingly, definitely fixed legal concepts in the form of highly abstract rules are formulated and applied."[83] The subsequent use of the term "logically formal rationality" clarifies that Weber refers precisely to the method later known as "conceptual jurisprudence".[84]

A system based on formally logical legal rationality exhibits well-known characteristics: each decision is the application of general legal rules to a specific dispute, each decision is reached through a purely logical operation (a legal syllogism), deducing the individual decision from the general rule – and that law must constitute a "gapless" system of legal propositions or must at least be treated as if it were such a system. Weber's ideal-typical Bureaucrat embodies the legal agent who perceives and acts on law in this manner.

Based on the aforementioned, the distinction between Weber's ideal-typical formally rational legal agent and the *homo iuridicus* is most clearly seen as follows. While Weber's formally rational legal agent appears only in so-called "easy" cases, the *homo iuridicus* emerges also in "hard" ones. Consequently, in resolving such disputes, he cannot rely solely on the logical interpretive tools that Weber associates with his formally rational ideal type; rather, he employs a broader and more sophisticated set of interpretive tools. It should be emphasized, however, that these remain interpretive tools in service of attributing meaning to authoritative legal texts, to which he remains as faithful as possible. In this way, the ideal-typical *homo iuridicus* becomes simultaneously more complex and more useful, aiding in our understanding of the stances and reasoning of legal agents (judges) in "hard" cases, which, although less frequent in legal reality, are of greater practical significance and research interest.

4. Functions of the Weberian Approach in a Concrete Case

At this point, it is necessary to consider the functions of the methodological approach adopted in *Osnovi pravnog rasuđivanja*, namely its theoretical and practical utility. The first function is to delineate the ques-

83 *Ibid*., p. 657.

84 Rheinstein, M., 1954, pp. xlix–l.

tions that the book addresses. Accordingly, the book does not discuss abstract (doctrinal) interpretation, proportionality analysis, or constitutional review, which some authors classify under legal reasoning. The reason is that these issues fall outside the activities of the ideal-typical *homo iuridicus* as the legal reasoner.

Second, the characteristic of ideal-type concepts, similar to geometric solids such as a sphere or cube, is that they represent constructs that are not found in "pure" form in reality. For instance, in the actual world of legal decision-making, *homo iuridicus* is embodied only sporadically and partially. This is clearly emphasized when attention is drawn to the fact that the architecture of legal thinking in practice is not constituted solely by reasoning, but also engages intuition, emotions, heuristics, and so forth. Furthermore, a more extensive account of several empirical studies – examining, for example, the influence of political preferences[85] or cognitive biases[86] on judicial decisions, as reported in the book – further reinforces this conclusion.

Moreover, even when it comes to the justification of decisions, judges rarely conform fully to the ideal-type. For example, one seldom finds in judicial opinions the elaborate argumentative schemes described in the book. Additionally, these opinions often exhibit vague or even "improper" uses of various interpretative arguments, and sometimes arguments are simply superfluous. Several passages in the book highlight this. However, the applied methodology allows for a theoretical critique of misapplied or redundant argumentation, since the ideal-type *homo iuridicus* serves as a benchmark for evaluating practice. Naturally, this is not intended for normative substantive, but for epistemic evaluation.

This brings us to the third function of the applied methodology: the ideal type serves as an epistemological tool for understanding social reality. Accordingly, the ideal-type concept allows for the analysis of existing practice – e.g., when studying the case law of certain courts in light of a survey and analysis of the interpretative arguments that they employ. Moreover, the concept can generate and test useful theoretical hypotheses about the practice itself. In a concrete instance, for example, it makes it easier to identify the points at which actual legal practitioners (judges, for instance) reason like ordinary people or when they reason like politicians – situations in which such reasoning is, so to speak, inevitable due to the nature of sources of law or legal institutions. This insight is important because it highlights why and in what situations judges (and other legal practitioners) do not reason solely according to authoritative legal

85 Dajović, G., 2023, p. 45, n. 53.

86 *Ibid*., p. 149, n. 225.

reasons, but also rely on purely practical reasoning. Practical prudence is a rational supplement to the "legal prudence" of *homo iuridicus*.[87]

5. Conclusion

One effective way to tackle the challenge of conceptualizing social practice is through ideal-type concepts. In Weberian sociology, ideal types serve as methodological constructs designed to strip away contingencies, incidental details, and epistemologically redundant elements from real-world phenomena, and to simplify and highlight certain features of agents' relationships and stances that are meaning adequate. In this way, they provide researchers with an epistemic tool for understanding and explaining social reality.

The ideal-type *homo iuridicus* is neither a normative prescription nor a mere description. It is not simply a generalization of empirical data, nor does it depict a standard or typical case of legal reality, even though it has an empirical grounding. Rather, it is a model capturing the some salient aspects of a legal practice, organized into a coherent and logically consistent representation. "This 'construction' has a 'utopian' character, in that it is obtained by conceptually 'heightening' certain aspects of reality" (Ringer, F., 1997, p. 111).

The ideal-type *homo iuridicus* offers a useful way to conceptualize legal reasoning, avoiding the idiosyncrasies of individual lawyers' or judges' reasoning, or the variations found across legal communities within specific systems. Legal reasoning is therefore understood through this rational but hypothetical agent, whose judgments are guided by authoritative legal reasons.

When the reasoning of *homo iuridicus* is compared to what actually occurs in legal practice, the points where this reasoning proves insufficient for deciding every legal case become clear. In this sense, the construction of *homo iuridicus*, as the legal reasoner, clearly supports the conclusion – often overlooked in public discourse – that it is an illusion to view judges as agents who base their decisions solely on authoritative legal reasons. This conclusion, together with the analysis of Hart's concept of the internal aspect of rules, shows that Weberian methodology can serve as a reliable ally for legal theorists seeking to conceptualize important legal phenomena and deepen our understanding of them.

87 Several sections of the book illustrate this point – for example, through discussions of value hierarchies in teleological interpretation, the concretization of legal principles, uses of *argumentum ad absurdum*, and consequentialist reasoning.

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PRAVNO RASUĐIVANJE *HOMO IURIDICUS*-A

Goran Dajović

APSTRAKT

Predmet članka je metoda idealtipskih koncepata koju sam primenio u knjizi „Osnovi pravnog rasuđivanja". Pošto knjiga sadrži samo nekoliko raštrkanih beležaka o toj temi, javila se ideja da se, u posebnom članku, detaljnije objasni primenjena metoda i njeni efekti. U knjizi je idealni tip konstruisan kao *homo iuridicus*, subjekt pravnog rasuđivanja, kojeg pri rasuđivanju motivišu isključivo autoritativni pravni razlozi. On je racionalan, a ne stvarno postojeći, agent. Pokazuje se da je idealni tip pogodan način da se konceptualizuje pravno rasuđivanje, a da se ne zalazi u idiosinkrazije rasuđivanja konkretnih pravnika ili zajednice pravnika unutar pojedinih sistema. Kada se rasuđivanje takvog *homo iuridicus*-a uporedi s onim što se događa u stvarnosti, uočava se da sudije svoje odluke niti donose niti opravdavaju autoritativnim pravnim razlozima u svakom konkretnom sporu. Na taj način se pokazuje korisnost Veberove ideje idealtipskih koncepta za jurisprudenciju.

Ključne reči: *homo iuridicus*, idealni tip, Maks Veber, pravno rasuđivanje, tumačenje prava.

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ORIGINAL SCIENTIFIC ARTICLE

*Giovanni Chiarini**

BEYOND GUILTY PLEAS: THE PROCEDURALIZATION OF NEGOTIATED JUSTICE IN INTERNATIONAL CRIMINAL TRIBUNALS

***Abstract**: Negotiated justice was first codified within the UN Ad Hoc Tribunals, where a consistent body of case law was developed. In contrast, plea-bargaining and guilty pleas were substantially denied in the earlier Nuremberg and Tokyo trials. The paper examines the theoretical and practical development of plea bargaining, tracing the proceduralization of negotiated justice in international criminal tribunals, which has ultimately resulted in the ICC's abbreviated proceedings on an admission of guilt – a hybrid model incorporating features from civil law and common law systems, representing a compromise of Anglo-Saxon and European legal traditions. The paper also shows that at the ICC, the use of plea bargaining has reached an impasse, primarily due to two factors: its extremely limited application – reflected in only a single case to date – and unclear norms regarding the accused's rights as well as the length of the proceedings.*

Key words: ICC, International Criminal Court, International Criminal Procedure, Nuremberg Trials, United Nations Tribunals, Guilty Pleas, International Criminal Law, Comparative Criminal Procedure.

1. Introduction

In the field of criminal justice, "plea bargaining consists of the exchange of official concessions for a defendant's act of self-conviction."[1] Moreover, "plea bargaining involves negotiations between the defendant (through an attorney in the standard case) and the prosecutor as to the conditions under which the defendant will enter a guilty plea."[2] These concessions, or conditions, "may relate to the sentence imposed by the

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1 Alschuler, A., 1979, Plea Bargaining and Its History, *Columbia Law Review*, Vol. 79, No. 1, p. 1.

2 Kipnis, K., 1976, Criminal Justice and the Negotiated Plea, *Ethics*, Vol. 86, No. 2, p. 93.

court or recommended by the prosecutor, the offense charged, or a variety of other circumstances,"[3] therefore "plea bargains bring about an enormous punishment-maximizing effect."[4] Historically, "plea bargaining was unknown during most of the history of the common law"[5], and significant evidence of its practice in either England or America does not appear until the nineteenth century[6]. As observed, "In modern times, plea bargaining has become the primary procedure through which we dispose of the vast proportion of cases of serious crime."[7] However, this practice is relatively new in international criminal law, with the first plea bargaining dating back to May 1996.[8] As of 1998, the ICC Rome Statute[9] has introduced unique mechanisms for negotiated justice related to international crimes. Referred to as "proceedings on an admission of guilt", in Article 65 of the ICC Rome Statute, this procedure represents a unique approach to plea-bargaining in international criminal law. Unlike domestic criminal justice systems, the ICC's process reflects a hybrid model, blending elements of Anglo-Saxon and European legal traditions into a hybrid model incorporating features from both the common law and civil law systems. Negotiated justice in international criminal proceedings can be traced back to the United Nations ad hoc tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). These tribunals established the first consistent body of case law on plea-bargaining in cases of international crimes, creating an important foundation for the ICC's later approach. On the other hand, the post-World War II international military tribunals at Nuremberg and Tokyo rejected the idea of introducing plea-bargaining in their statutes.

2. The Post-World War II Tribunals

> "No charity can disguise the fact that the forces which these defendants represent, the forces that would advantage and delight in their acquittal, are the darkest and most sinister forces in society-dictatorship and

3 Alschuler, A., 1979, p. 3.

4 Howe, S. W., 2005, The Value of Plea Bargaining, *Oklahoma Law Review*, Vol. 58, No. 4, p. 605. See, also, Langbein, J. H., 1979, Understanding the Short History of Plea Bargaining, *Law and Society Review*, Vol. 13, No. 2, p. 261, who essentially explains how plea bargaining became institutionalized as a standard feature of American urban criminal courts in the late 19th century.

5 Langbein, J. H., 1979, p. 261.

6 *Ibid*.

7 *Ibid*.

8 Turner, J. I., 2017, Plea Bargaining and International Criminal Justice, *The University of the Pacific Law Review*, Vol. 48, p. 229.

9 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9*, 17 July 1998.

> oppression, malevolence and passion, militarism and lawlessness. [...] This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors."[10]

With these words, the Chief Counsel for the United States at the International Military Tribunal (IMT), Robert H. Jackson, delivered the opening statement at the first Nuremberg trial. It was almost unimaginable that a Nazi high-ranking leader defendant could be permitted to negotiate a sentence for such heinous crimes. And indeed, it was not allowed. Articles 24(a) and (b) of the Nuremberg Statute, contained in the London Agreement[11] of 8 August 1945, only allowed a defendant to plead guilty or not guilty, without any opportunity to negotiate the sentence.

Similarly, plea bargaining was excluded at the International Military Tribunal for the Far East (IMTFE).[12] Article 13(a), concerning the admissibility of evidence, allowed the defendant to make only spontaneous statement, while Article 15(b) largely mirrored the provisions of the Nuremberg Statute, permitting a guilty plea but making no mention of the possibility of negotiating the sentence or the charges. Both norms were included in Section IV of the respective charters, which addresses the powers of the tribunal and the conduct of the trial, as opposed to Section III, which pertains to the fair trial rights of the accused.

Not surprisingly, the outcome of both the Nuremberg and Tokyo trials was that none of the defendants pleaded guilty. However, one trait of procedural development can be observed in the Tokyo Trial, which took place just a year after Nuremberg. Although both Statutes denied the possibility of negotiating the sentence, the Tokyo Statute, under Article 15(c), allowed the defendant to make a "concise opening statement," in contrast to Nuremberg where no such opportunity was granted. An example from Nuremberg is the case of Hermann Göring, as attested by the original trial records of 21 November 1945. In this case, the IMT President, the British judge, Lord Justice Geoffrey Lawrence, immediately stopped the defendant from making any statement and only invited him to plead guilty or not guilty.

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10 Chief Counsel for the United States at the International Military Tribunal (IMT), Robert H. Jackson, in opening statement before the IMT, 21 November 1945, *Trial of the Major War Criminals before the International Military Tribunal, Vol. II. Proceedings: 11/14/1945-11/30/1945*. Nuremberg: IMT, 1947, pp. 98–102.

11 UN, Agreement for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, *United Nations – Treaty Series*, Vol. 82, No. 251, p. 298.

12 The Tokyo Statute was adopted on 19 January 1946, through a "special proclamation" of Supreme Commander of the Allied Forces, General Douglas MacArthur (UN Treaties and Other International Acts Series 1589).

> *"THE PRESIDENT: I will now call upon the defendants to plead guilty or not guilty to the charges against them.*
>
> *"HERMANN WILHELM GOERING: Before I answer the question of the Tribunal whether or not I am guilty...*
>
> *"THE PRESIDENT: I informed the Court that defendants were not entitled to make a statement. You must plead guilty or not guilty."*[13]

What emerges from a comparison between the Statutes of the IMT and IMTFE is the notion of a harsh justice toward the major war criminals brought before these courts, specifically a concept of a "just and prompt trial and punishment," as stated in Article 1 of the Nuremberg Charter, with no room for negotiated justice, which was considered a procedural escape. While this approach would likely be considered unfair today, it was deemed appropriate for the time. As other authors observed, "the Nuremberg and Tokyo trials were supposed to usher in an era of accountability for international crimes."[14] Furthermore, it has been noted that "Nuremberg, especially in its condemnation of aggressive war, focused not only on the offenses of these defendants but also on establishing a precedent designed to punish and to deter aggression in the future."[15] In this context, permitting a defendant to negotiate their sentence would have suggested the possibility of "evading" justice even in cases of international crimes. Additionally, these trials played a crucial role in establishing a historical record of the atrocities committed by the defendants. In other words, "there was hope that the legacy of Nuremberg would be the institutionalization of a judicial response to atrocities committed by anyone, anywhere around the globe."[16] In the end, "the trial record surely serves as a corrective of such fantastic revisionism"[17].

If any trait of procedural evolution can be identified from Nuremberg to Tokyo, it is the possibility of entering a "concise opening statement". This marked a very small step toward the changes that would characterize the subsequent international criminal tribunals – the ICTY and the ICTR.

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13 International Military Tribunal, 1947, *Trial of the Major War Criminals before the International Military Tribunal (1945), Vol. II. Proceedings: 11/14/1945–11/30/1945.* Nuremberg, IMT, p. 97.

14 Combs, N. A., 2002, Copping a Plea to Genocide: The Plea Bargaining of International Crimes, *University of Pennsylvania Law Review*, Vol. 151, No. 1, p. 155.

15 Beltzer, B. D., 1996, War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia, *Valparaiso University Law Review*, Vol. 30, No. 3, p. 904.

16 Scharf, M. P., 1997, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, Durham, Carolina Academic Press, p. xiii.

17 "The evidence of the Holocaust was so strong in 1945 that I doubt that anyone then foresaw the so-called Auschwitz lie – the recent denials that the Holocaust actually happened. The trial record surely serves as a corrective of such fantastic revisionism" (Beltzer, B. D., 1996, p. 902).

3. The UN *Ad Hoc* Tribunals

Almost 50 years after the establishment of the International Military Tribunals of Nuremberg and Tokyo, plea bargaining emerged as an accepted practice and procedural mechanism. This development occurred with the creation of the ad hoc tribunals established by the United Nations, namely the International Criminal Tribunal for the Former Yugoslavia (ICTY), founded by UN Security Council Resolution 827 in 1993[18], and the International Criminal Tribunal for Rwanda (ICTR), established by UN Security Council Resolution 955 in 1994[19].

The ICTY and ICTR statutes and their Rules of Procedure and Evidence (RPE) initially allowed only the possibility of entering a guilty plea, without specifying the procedure or codifying its consequences – similarly to the IMT and the IMTFE in Nuremberg and Tokyo, respectively. However, the emergence of early jurisprudence from the ICTY and subsequent amendments to the Rules of Procedure and Evidence paved the way for a significant use of plea bargaining and its development in practice.

3.1. ETHICAL IMPLICATION AND INITIAL CONCERNS

The perspective of applying plea bargaining in an international criminal trial initially caused significant concern. As stated by former ICTY President Antonio Cassese:

> *"[W]e always have to keep in mind that this Tribunal is not a municipal criminal court but one that is charged with the task of trying persons accused of the gravest possible of all crimes. The persons appearing before us will be charged with genocide, torture, murder, sexual assault, wanton destruction, persecution and other inhumane acts."*[20]

However, as observed by Scharf, "while the judges of the ICTY initially determined that plea-bargaining would be incompatible with the unique purpose of the international war crimes Tribunals, seven years later they reversed course and began to aggressively pursue plea-bargains."[21]

18 Security Council Resolution 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827 (May 25, 1993).

19 Security Council Resolution 955, UN SCOR, 48th Sess., 3453th mtg., UN Doc. S/RES/955, 8 November 1994.

20 Morris, V., Scharf, M. P., 1995, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, London, Transnational Press, pp. 649–652.

21 Scharf, M. P., 2004, Trading Justice for Efficiency Plea-Bargaining and International Tribunals, *Journal of International Criminal Justice*, Vol. 2, No. 4, p. 1073.

This shift was also facilitated by a change in the Tribunal's presidency and the differing legal cultures of the presidents themselves. As Scharf noted, "this about-face occurred shortly after Judge Gabrielle Kirk McDonald of the United States replaced Antonio Cassese as President of the Tribunal."[22] While the Italian Judge Antonio Cassese was rooted in a European civil law tradition, where plea bargaining was typically restricted to minor crimes, Judge McDonald brought the experience of a federal judge in the United States – specifically in Texas, where around 95 percent of criminal cases are resolved through plea bargains[23] (and in the broader US context, "approximately 90 percent of criminal cases are settled via plea bargaining"[24]). This kind of "Americanization" of the ICTY's procedures played a crucial role in breaking the taboo surrounding plea bargaining at the international criminal law level. This occurred during a historical moment marked by the "globalization of plea bargaining"[25] wherein "[t]he debate about Americanization of law is, to a great extent, a debate about legal cultures"[26], as observed by Langer, although in a different context,[27] in 2004. Concerning the influence of American legal culture on the ICTY and the usage of plea bargaining, it has been stated that "over the course of the Tribunal's first ten years, only eight cases through May 2003 had been resolved through negotiated dispositions."[28] Moreover, "in response to increasing external pressure to expedite its adjudication process from both the U.N. Security Council (which has insisted that no new indictments issue after 2004 and that all trials conclude in 2008) and the George W. Bush administration (which supplies approximately one-quarter of the

22 *Ibid*.

23 *Ibid*.

24 Ma, Y., 2002, Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, Italy: A Comparative Perspective, *International Criminal Justice Review*, Vol. 12, No. 1, p. 25.

25 See Langer, M., 2004, From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure, *Harvard International Law Journal*, Vol. 45.

26 *Ibid*., p. 64.

27 *Ibid*. The author also observed that "In other words, it is a debate about how law is understood, thought of, and practiced in different jurisdictions, as well as about how certain conceptions of legal phenomena that prevail in the United States may overcome other conceptions." (*Ibid*.) See Damaška, M., 1997, The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments, *The American Journal of Comparative Law*, Vol. 45, No. 4, p. 839, who stated that "[i]n criminal procedure, a few good lessons have already been learned about problems that arise when factfinding arrangements from one family are incorporated into the institutional milieu of the other".

28 Cook, J. A. III, 2005, Plea Bargaining at the Hague, *Yale Journal of International Law*, Vol. 30, p. 475.

Tribunal's funding), the practice of plea bargaining has become a staple of ICTY activity."[29]

In the practice of the UN ad hoc tribunals, and especially the ICTY, plea bargaining was employed for several reasons beyond merely expediting proceedings. Henham and Drumbl summarized some of these reasons, noting concerns that, "as time passes, the memories of witnesses dim,"[30] and "the rigours of direct and cross-examination may retraumatise those who have survived mass atrocity"[31]; furthermore, "ICTY judges also have expressed their understanding that guilty pleas promote reconciliation in areas afflicted by violence the rehabilitation of offenders."[32] They also concluded that their analysis "has revealed inconsistency and obfuscation as regards the praxis of pleading guilty and plea bargaining and raised serious doubts about the contribution such practices can make to the achievement of peace and reconciliation in post-conflict societies beyond the furtherance of the purely system interests of the institutions of international criminal justice."[33] Other authors have noted that "[t]he ICTY has justified its use of plea-bargains on two main grounds – that they save the Tribunal time and resources and that they facilitate reconciliation."[34] As observed by Clark, for instance, the "Tribunal's use of plea bargains exposes a significant gap between, on one hand, its ambitious mandate and, on the other hand, the external pressures it faces to finish its work in accordance with its completion strategy. This, in turn, raises fundamental questions about whether and to what extent the Tribunal's mandate – to deliver justice, to deter, and to contribute to the restoration and maintenance of peace – is in fact realistic, that is to say achievable."[35]

Although it has been highlighted that "many feel that the gravity of the crimes within the jurisdiction of international criminal courts prohibits any negotiations with the alleged perpetrators,"[36] some authors have pointed out that "the histories of both the ICTY and the ICTR reveal the

29 *Ibid*.

30 See Henham, R., Drumbl, M., 2005, Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia, *Criminal Law Forum*, Vol. 16, No. 1, p. 60.

31 *Ibid*.

32 *Ibid*.

33 *Ibid*. p. 86.

34 Clark, J. N., 2009, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, *The European Journal of International Law*, Vol. 20, No. 2, p. 433.

35 *Ibid*.

36 Rauxloh, R. E., 2010, Plea bargaining in international criminal justice – Can the International Criminal Court afford to avoid trials?, *The Journal of Criminal Justice Research*, Vol. 1, No. 2, p. 2.

substantial advantages to incorporating plea bargaining into the international criminal adjudication process."[37]

Some of the abovementioned scholarly opinions were previously summarized by President Antonio Cassese. In a separate and dissenting opinion in 1997, specifically in the *Erdemović* case,[38] he emphasized the significance and advantages of a guilty plea in international criminal proceedings. According to Cassese,[39] guilty pleas could avoid potentially lengthy trials with their attendant challenges, including the complexities of collecting evidence. Moreover, they could offer public benefits by reducing the significant costs associated with international criminal proceedings. These costs include tasks such as victim and witness protection, hosting facilities for the parties, simultaneous interpretation into multiple languages, transportation, and other forms of logistical assistance. Cassese also highlighted the potential advantages for the accused, including the possibility of a more lenient sentence, avoidance of public exposure during a trial, and mitigation of negative consequences for the accused's family and social position. However, Cassese argued that, in cases of guilty pleas, it is imperative to safeguard the fundamental rights of the accused. He emphasized that the waiver of the right to a trial should only be permitted under stringent conditions to ensure fairness and justice.[40]

Other ICTY judges held differing views. One notable example is Judge Wolfgang Schomburg, who, in a dissenting opinion in the *Deronjić* case,[41] expressed significant concerns, stating that pretrial agreement between the accused and the prosecutor (referred to as the "Understanding of the Parties") was, for unknown reasons, not included in the plea agreement submitted to the Trial Chamber.[42] Judge Schomburg argued: "*Da mihi factum, dabo tibi jus* – give me (all) the facts and I will present you the applicable law (and a just decision). This wise Roman principle unfortunately is not part of our Rules."[43] And he continues "[o]ne might say, under the Rules of this Tribunal, that it is for the Prosecutor alone to decide whom, and under which charges, to indict. In principle, this is

37 Kovarovic, K., 2011, Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Resolution at the International Criminal Court, *Journal of Dispute Resolution*, Vol. 2011, No. 2, p. 284.

38 ICTY, *Prosecutor v. Dražen Erdemović*, IT-96-22-T, Separate and Dissenting Opinion of Judge Cassese, Appeals Chamber, 7 October 1997, para. 8.

39 *Ibid*., para. 9.

40 *Ibid*.

41 ICTY, *Prosecutor v. Deronjić*, IT-02-61-S, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, 30 March 2004, para. 11.

42 *Ibid*., para. 12.

43 *Ibid*., para. 6.

correct. However, it is also for the Prosecutor to safeguard that justice is seen to be done and to convince, in particular, those people on whose behalf this Tribunal is working that there is no arbitrary selection of persons to be indicted and no arbitrary selection of charges or facts in case of an indictment. I am afraid that such an unjustified premature procedure has been applied in the proceedings against Miroslav [Deronjić]. I accept that, in order to break up a circle of silence among perpetrators, some promises can be made by the Prosecutor vis à vis credible and reliable perpetrators. However, these promises shall, proprio motu, be disclosed to the bench by the Prosecutor. a) Promises, furthermore, can not result in de facto granting partial amnesty/impunity by the Prosecutor, particularly not in an institution established to avoid impunity. b) Amnesty can only be granted after an appropriate sentence has been determined. c) A limited amnesty or early release, if at all, can only be granted by those to whom this power is or will be vested, based on a sentenced person's entire post-crime conduct, or in order to restore peace. There is no legal basis in the Statute or the Rules for the Prosecutor to promise in the beginning of each statement that information provided by the Accused would never be used against him."[44] As Turner noted, "Judge Schomburg compared charge bargains to 'de facto granting partial amnesty/impunity by the Prosecutor' and criticized them as conflicting with the Tribunals' mission to avoid impunity, to establish the truth, and to promote peace and reconciliation."[45] This view also reflects the idea of other authors, stating that "there is no glory in plea bargaining. In place of a noble clash for truth, plea bargaining gives us a skulking truce. Opposing lawyers shrink from battle, and the jury's empty box signals the system's disappointment. But though its victory merits no fanfare, plea bargaining has triumphed. Bloodlessly and clandestinely, it has swept across the penal landscape and driven our vanquished jury into small pockets of resistance. Plea bargaining may be, as some chroniclers claim, the invading barbarian. But it has won all the same."[46]

3.2. PRACTICAL APPLICATION AND CASE-LAW OF ORDINARY PLEA PROCEEDINGS

Of the 254 defendants across the ICTY (161) and ICTR (93), 30 opted for negotiated justice, including 21 before the Tribunal for the former Yugoslavia and 9 before the Tribunal for Rwanda. The first case of plea bargaining at the international level occurred on 31 May 1996 in the case of

44 *Ibid*., paras. 10–12.

45 Turner, J. I., 2017, p. 229.

46 Fisher, G., 2000, Plea Bargaining's Triumph, *The Yale Law Journal*, Vol. 109, p. 859.

Dražen Erdemović,[47] before the ICTY. At the ICTR, the first case was that of Jean Kambanda,[48] in 1998.

Both the ICTY and ICTR essentially apply the same legal framework, although with slight differences in the numbering of the articles and the rules of procedure and evidence.

Article 20(3) of the ICTY Statute, entitled "Commencement and conduct of trial proceedings", and identically Article 19(3) of the ICTR Statute, provide that "[t]he Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial." Both norms are similar to Article 24 of the Nuremberg Statute and Article 15 of the Tokyo Charter. However, the ad hoc tribunals have detailed Rules of Procedure and Evidence, which provide a precise discipline for guilty plea and plea bargaining.

Rule 62(a)(iii) of the ICTY-RPE provides that upon transfer of an accused to the seat of the Tribunal, the President assigns the case to a Trial Chamber. According to this rule, "the accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall: (i) satisfy itself, himself or herself that the right of the accused to counsel is respected; (ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment; (iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count."[49]

The same procedure is effectively outlined in Rule 62(a)(iv) of the ICTR-RPE regarding the ad hoc tribunal for Rwanda.

Rule 62 (A)(vi) of the ICTY-RPE specifies that if a plea of guilty is entered during the initial appearance, the single judge is required to forward the case file to the Trial Chamber to initiate the plea-bargaining process set forth in Rule 62 *bis* of the ICTY-RPE.

A similar provision is established for the ICTR, as per Rule 62 (A)(v).

The most relevant rule is therefore Rule 62 *bis* of the ICTY-RPE, entitled "Guilty Pleas".

47 *Erdemović*, Sentencing Judgment, 29 November 1996, para. 3.

48 ICTR, *Prosecutor v. Jean Kambanda*, ICTR-97-23-S, Sentencing Judgment, 4 September 1998, para. 5.

49 Rule 62(A)(iii) ICTY-RPE.

As per this rule, "if an accused pleads guilty, [...] or requests to change his or her plea to guilty and the Trial Chamber is satisfied that: (1) the guilty plea has been made voluntarily; (2) the guilty plea is informed; (3) the guilty plea is not equivocal; and (4) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case."[50]

Only if all the four requirements of validity of guilty plea are evaluated by the judges may the Trial Chamber enter a "finding of guilt" and instruct the Registrar to set a date for the sentencing hearing.

The four abovementioned requirements derived from the case-law and specifically from the Joint Separate Opinion of Judge McDonald and Judge Vohrah, issued in the ICTY *Erdemović* case in October 1997.[51] Judge McDonald and Judge Vohrah set out what they called as the "minimum preconditions" for the validity of a guilty plea in international criminal law. Firstly, "the guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises."[52] The voluntariness requirement also involves, as specified in the opinion,[53] two additional elements. On one hand, an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. On the other hand, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence. The voluntariness was expanded by the ICTR in the *Kambanda* case in September 1998.[54] For the ICTR judges, the guilty plea satisfies the requirement of the voluntariness only if the accused entered the plea "freely and knowingly, without pressure, threats, or promises,"[55] as well as "if he clearly understood the charges against him as well as the consequences of his guilty plea."[56] Another aspect of the voluntariness, as highlighted in the *Kambanda* case, is that a guilty plea must be "unequivocal"[57], which is if the accused "was aware that the said plea could not be refuted by any line of defence."[58]

50 Rule 62 *bis* ICTY-RPE.

51 *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Appeals Chamber, 7 October 1997, para. 8.

52 *Ibid*.

53 Rule 62 *bis* ICTY-RPE, para. 10.

54 *Jean Kambanda*, Judgment and Sentence, 4 September 1998, Trial Chamber, para. 6.

55 *Ibid*.

56 *Ibid*.

57 *Ibid*.

58 *Ibid*.

Secondly, "the guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty."[59] For the ICTY judges McDonald and Vohrah, "an informed plea would require that the Appellant understand: (a) the nature of the charges against him and the consequences of pleading guilty generally; and (b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other."[60] If the accused was not properly "informed", it must be afforded "an opportunity to replead to the charges with full knowledge of these matters."[61] Thirdly, "the guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility."[62] For the ICTY judges, "the requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise."[63] Furthermore, they observed that this requirement "imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial. The courts in common law jurisdictions all over the world, except in the United States, have consistently declared that a guilty plea must be unequivocal."[64] They also clarified that whether a plea of guilty is equivocal "must depend on a consideration, *in limine*, of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law. The Appellant pleaded guilty but claimed that he acted under duress. It follows therefore that we must now examine whether duress can constitute a complete defence to the killing of innocent persons."[65] Fourthly, the requirement on the "sufficient factual basis for the crime and the accused's participation in it" has been developed through jurisprudence, such as the case of *Ntakirutimana*[66] before the ICTR, or the case *Deronjić* where the ICTY stated that "the agreed factual basis is to be treated as mere support for the guilty plea specifically in the case where it is discrepant with the Indictment,

59 *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 10.

60 *Ibid*., para. 14.

61 *Ibid*., para. 27.

62 *Ibid*.

63 *Ibid*.

64 *Ibid*., para. 28.

65 *Ibid*., para. 31.

66 ICTR, *Prosecutor v. Ntakirutimana*, ICTR-96-17, Decision on the Prosecutor's motion for Judicial Notice of Adjudicated Facts, 26 November 2001, para. 26.

such that the Indictment shall be regarded as controlling."[67] Furthermore, the existence of a sufficient factual basis must be established, free of discrepancies with the Indictment, and there must be no contestation by the defendant regarding the factual elements supporting the charges to which they have pleaded guilty (this circumstance can be inferred from the absence of disagreement between the prosecution and defense or from independent indicia). It is important to note that, in practice, the factual basis is also evaluated by the judges. As observed by Turner, "trial chambers have usually conducted an independent inquiry into the facts and have required that evidence other than the parties' agreement support the guilty plea."[68] After the guilty plea requirements are positively evaluated, there is room to activate the plea bargaining.

Contrary to the international military tribunals of Nuremberg and Tokyo, the UN ad hoc tribunals provide a specific written discipline for this procedure, named as "plea agreement procedure", respectively provided by Rule 62 *ter* for the ICTY-RPE and Rule 62 *bis* for the ICTR-RPE. According to these rules, the prosecutor and the defense may come to an "agreement" regarding the accused's plea of guilty. If the accused pleads guilty to the indictment, or to one or more counts within it, the Prosecutor may take several actions before the Trial Chamber. Specifically, the Prosecutor may: (1) request to amend the indictment to reflect the plea; (2) recommend a specific sentence or sentencing range as appropriate; or (3) agree not to oppose the accused's request for a particular sentence or sentencing range.

However, the Trial Chamber is not bound by any such agreement made between the prosecutor and the defense. In the event that a plea agreement has been reached, the Trial Chamber requires that the details of this agreement be disclosed in open session (alternatively, if there is "good cause", the disclosure may be made in closed session).

It is important to highlight that the parties do not waive the right to appeal if the judge exceeds the agreed-upon sentence. For instance, as summarized by Tieger and Shin, in the first case of plea agreement in the history of international criminal law, the *Erdemović* case[69], "Mr Erdemović pleaded guilty to murder as a crime against humanity. The Trial Chamber sentenced him to 10 years. Following his successful appeal against that sentencing judgment, Erdemović subsequently changed his plea to one of

67 *Ibid*.

68 Turner, J. I., Plea Bargaining, in Carter, L., Pocar, F., (eds.), 2013, *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems*, Cheltenham, Edward Elgar Publishing Limited, p. 52.

69 *Erdemović*, Sentencing Judgment (SJ), 29 November 1996, para. 3.

guilty of murder as a violation of the laws and customs of war, and was sentenced to five years' imprisonment."[70]

As observed by Sayers, "the timing of a guilty plea is also significant in terms of its status as a mitigating factor. Belated pleas of guilty, deferred until the middle of the prosecution's case, or made during the accused's own case-in-chief, will generally be entitled to less credit than a plea made at a much earlier stage."[71]

According to various jurisprudence, such as the *Todorović* case, guilty pleas "should, in principle, give rise to a reduction in the sentence that the accused would otherwise have received."[72] In others case, such as *Plavšić*, it has been stated that "the Trial Chamber will accordingly give significant weight to the plea of guilty by the accused, as well as her accompanying expressed remorse and positive impact on the reconciliatory process, as a mitigating factor."[73] In *Sikirica et al*, the Trial Chamber stated that "the primary factor to be considered in mitigation of Duško Sikirica's sentence is his decision to enter a guilty plea."[74] In other judgments, such as *Deronjić,* judges have made criticism highlighting that as opposed to a pure guilty plea, a plea agreement "has two negative side effects. First, the admitted facts are limited to those in the agreement, which might not always reflect the entire available factual and legal basis. Second, it may be thought that an accused is confessing only because of the principle '*do ut des*' (give and take)."[75]

On this point, the doctrine observed that the jurisprudence "evidences a paucity of clear principles as to how pleading guilty intersects with other mitigating factors, leading to the phenomenon of what we identify as a praxis of cumulative mitigation."[76] For Henham and Drumbl, "once an offender plea bargains, does that automatically entitle the offender to a broader number of additional mitigating discounts because that offender then also can claim acceptance of responsibility, substantial cooperation

70 Tieger, A., Shin, M., 2005, Plea Agreements in the ICTY. Purpose, Effects and Propriety, *Journal of International Criminal Justice*, Vol. 3, No. 3, p. 667.

71 Sayers, S. M., 2003, Defence Perspectives on Sentencing Practice in the International Criminal Tribunal for the Former Yugoslavia, *Leiden Journal of International Law*, Vol. 16, No. 4, p. 768.

72 ICTY, *Prosecutor v. Todorović*, IT-95-9/1, Sentencing Judgment, 31 July 2001, para. 80.

73 ICTY, *Prosecutor v. Plavšić*, IT-00-39&40/1, Sentencing Judgment, 27 February 2003, para. 81.

74 ICTY, *Prosecutor v. Sikirica et al*., IT-95-8-T, Sentencing Judgment, 13 November 2001, para. 148.

75 *Deronjić*, Judgment, 30 March 2004, para. 135.

76 Henham, R., Drumbl, M., 2005, p. 60.

with prosecution, remorse, and voluntary surrender? The jurisprudence is somewhat fragmented."[77]

Regarding the determination of the sentence, Rule 100 of both the ICTY and the ICTR Rules of Procedure and Evidence leave the judges room for discretion. According to both paragraphs (a) of Rule 100, if the Trial Chamber convicts the accused on a guilty plea, "the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence."

The only prohibition, differently from Nuremberg and Tokyo tribunals, is the issuance of the death penalty, as the maximum sentence in the ad hoc tribunals is life imprisonment.

As Chifflet and Boas observed, "unlike most domestic jurisdictions, none of the international criminal tribunals has sentencing scales or tariffs that set out maximum (or possibly even minimum) penalties for the specific crimes within its jurisdiction."[78] As Hola explained, "the positive law sets only very loosely defined limits on the judges' discretion in sentence determination, the analysis focused on sentencing argumentation in individual cases."[79] In other words, and with reference to the jurisprudence of the ad hoc tribunals at these times, "Despite the recognised and increasing importance of international sentencing, it is evident that this area of international criminal law is still 'under construction' and many aspects are not regulated."[80]

In any case, plea agreements are not binding for the judges, although the "substantial cooperation with the Prosecutor by the convicted person before or after conviction" could represents a mitigating circumstance, according to Rule 101 of both ad hoc tribunals.

Finally, regarding the sentencing, it has been observed that "the ICTY has had a patchwork of sentences that might be said to reflect a lenient approach to sentencing. Meanwhile, the ICTR, at least where genocide convictions are entered, has been more consistently harsh."[81] For Chifflet and Boas, this divergence in sentencing is in part explicable by the higher percentage of defendants pleading guilty to genocide before the ICTR and

77 *Ibid*.

78 Chifflet, P., Boas, G., 2012, Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic And Miroslav Bralo, *Criminal Law Forum*, Vol. 23, No. 1, p. 138.

79 Hola, B., 2012, Sentencing of International Crimes: Consistency of Sentencing Case Law, *Amsterdam Law Forum*, Vol. 4, p. 22.

80 D'Ascoli, S., 2011, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC*, Oxford, Hart Publishing, p. 1.

81 Chifflet, P., Boas, G., 2012, p. 154.

an underutilization of plea bargaining.[82] According to other authors, "the ICTR has appropriately sentenced the principal architects and orchestrators of the genocide to life imprisonment, while developing the beginnings of a 'common law' of sentencing for serious international crimes that will benefit future tribunals."[83] For others, the difference in sentencing practice and history between the ICTY and ICTR represents "an interesting anomaly".[84] Judge Theodor Meron, specifically, and with reference to the internal divergence in sentencing in the ICTY, observed that that divergence was "partly in consequence of the ICTY's emphasis on individualized sentencing."[85]

3.3. THE SPECIAL PROCEEDINGS INVOLVING GUILTY PLEAS

In addition to the ordinary plea agreements, the statutes of the ad hoc tribunals provide two separate proceedings involving guilty pleas.

One is provided by Rule 50(b) of both the ICTY and the ICTR Rules of Procedure and Evidence, in case of amendment of the indictment. According to this rule, "if the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges."[86]

The other one is provided for both tribunals by Rule 77, in case of contempt of the tribunal. In the latter case, the only difference from the ordinary plea agreements is that, according to Rule 77(e), the time limit for entering a plea cannot each exceed ten days, (instead of the thirty days provided for the ordinary plea procedure as per Rule 62(a)(3)). Moreover, this procedure could also apply to the witnesses, as it happened in the case of witness Shefqet Kabashi,[87] who entered a guilty plea after he refused to answer as a witness in a case before the ICTY.[88] The rest of the procedures apply mutatis mutandis to this proceeding. Though, in case the contempt is committed by a counsel, Rule 77(I) confers to the judges the possibility

82 *Ibid*.

83 Sloane, R. D., 2007, Sentencing for the "Crime of Crimes": The Evolving "Common Law" of Sentencing of the International Criminal Tribunal for Rwanda, *Journal of International Criminal Justice*, Vol. 5, p. 733.

84 Sayers, S. M., 2003, p. 752.

85 ICTY, *Prosecutor v. Galić*, IT-98-29-T, Separate and Partially Dissenting Opinion of Judge Meron, 30 November 2006, para. 9.

86 Rule 50(b) of both the ICTY RPE and the ICTR RPE.

87 ICTY, *Prosecutor v. Shefqet Kabashi*, IT-04-84-R77.1, Judgment, 16 September 2011.

88 ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, IT-04-84, T. 10939-10941, 20 November 2007.

of ruling that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel, pursuant to Rule 46 of both tribunals. Both rules establish that if a counsel's conduct is deemed offensive, abusive, obstructs the proceedings, or fails to meet the requisite standards of professionalism, they can be subject to sanctions (this includes failure to uphold professional competence and ethical standards). Moreover, in both rules, the chamber or judge must first provide a warning to the counsel before imposing any sanctions. ensuring that the counsel has an opportunity to rectify their behavior before further action is taken. Furthermore, both rules provide for the possibility of reporting the misconduct of counsel to the professional regulatory body in the counsel's State of admission, or, if applicable, to the governing body of the counsel's university (in the case of an "academic lawyer"). However, the ICTY and the ICTR apply a slightly different discipline regarding the misconduct of counsel. ICTY Rule 46 enumerates several specific offenses for which counsel may be sanctioned, including offensive conduct, abusive behavior, obstruction of proceedings, and negligence or failure to meet professional standards. Furthermore, it specifies that the chamber can, after a warning, either refuse the counsel an audience or, after hearing from the counsel, declare that the counsel is no longer eligible to represent a suspect or accused. The ICTR Rule 46 provision is more general, stating that sanctions can be imposed if the counsel's conduct remains "offensive or abusive" or obstructs the proceedings, but it does not explicitly mention negligence or failure to meet professional standards. The ICTR rule also refers to misconduct that is "contrary to the interests of justice", a broader and more flexible criteria.

4. The International Criminal Court

In 1998, the UN General Assembly convened a diplomatic conference of plenipotentiaries, during which it adopted the Rome Statute of the International Criminal Court (ICC) and Resolution F of the Final Act, which created the Preparatory Commission for the ICC. The International Criminal Court was subsequently established based on the Rome Statute, which was adopted on 17 July 1998. The Rome Statute entered into force four years later, on 1 July 2002, after being ratified by 60 countries. The ICC is an independent international organization and is not part of the United Nations system. It is headquartered at The Hague, in the Netherlands.

Differently from the UN ad hoc tribunals and from Nuremberg and Tokyo, Article 65of the Rome Statute (RS) of the International Criminal

Court, provides a specific procedure for plea bargaining, named as "proceedings on an admission of guilt".

4.1. FROM ARGENTINA AND CANADA TO ROME

The current Article 65 of the ICC Rome Statute is the result of an intense yet productive debate between the representatives of the member states of Canada and Argentina, reflecting an encounter between different legal cultures: Canadian Common Law and Argentine Criminal Law.

The original provision can be found in Article 38 (1)(d) of the 1994 International Law Commission's ICC draft Statute. The proposed norm stated that "at the commencement of the trial, the Trial Chamber shall: [...] Allow the accused to enter a plea of guilty or not guilty."[89]

This drafted rule was reworded in 1995 by the Ad Hoc Committee, which was tasked with evaluating the draft and proposing appropriate amendments. This committee highlighted that "a number of delegations reiterated in the context of this provision their view that the draft was not explicit enough on procedures and that more details should be provided, possibly through the rules of the court."[90]

However, in 1996 the Preparatory Committee drew attention to the need to "bridge the gap between different legal systems [...] with emphasis being placed on finding the common denominators in different legal systems."[91] Moreover, according to the Preparatory Committee, "it was further suggested that the trial chamber should determine whether the accused fully understood the nature and consequences of admission of guilt, whether the admission was made voluntarily without coercion or undue influence and whether the admission was supported by the facts contained in the indictment and a summary of the evidence presented by the prosecution before deciding whether to request additional evidence, to conduct an expedited proceeding or to proceed with the trial."[92] Additionally, it was stated that "the Court must have the power to satisfy itself before taking a decision."[93] Also, the question of the compatibility of plea

89 International Law Commission, Report of the International Law Commission on the work of its forty-sixth session, 2 May – 22 July 1994, UN Doc. A/49/10, 1 September 1994, p. 54.

90 UN GA, Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 6 September 1995, paras. 169–170.

91 UN GA, Report of the Preparatory Committee on the Establishment of an International Criminal Court. Volume I, UN Doc. A/51/22, 13 September 1996, para. 263.

92 *Ibid*.

93 *Ibid*.

bargaining regarding international crimes was discussed. Indeed, it was expressly observed that "Paragraph 1 (d) was described as relating to the question of plea bargaining, which should be excluded given the fact that it is in contradiction with the structure of the Court and also given the serious nature of the crimes which affected the interests of the international community as a whole. However, it was also stated that guilty pleas were not inseparable from plea bargaining."[94]

Following the 1994 International Law Commission's ICC draft Statute, the Article 38(1)(d) proposal, the amendment put forward by the 1995 Ad Hoc Committee, and the observations made by the 1996 Preparatory Committee, a Working Paper submitted by Argentina ultimately proposed a clearer solution, entitled "summary procedure".

The Argentinian working paper first warned that the guilty plea "is not an institution that is accepted by legal systems based on the European-Continental model; for some countries, such a regulation could, in addition, be unacceptable by reason of limitations in their domestic law."[95] Therefore, an intermediate solution was suggested through the possibility of introducing a "summary procedure", a procedural mechanism more commonly found in European-Continental legal systems. The key distinction is that the accused is not required to enter a plea of guilty or not guilty to the charges in the indictment. Instead, they are invited to make any statement they deem appropriate after the indictment is read. The summary procedure may only be invoked if the accused acknowledges and admits the truth of the facts outlined in the indictment and after that recourse to the summary procedure.

The journey toward the current ICC "proceedings on an admission of guilt", however, was far from complete. Drawing inspiration from the Working Paper submitted by Argentina, a joint Argentine–Canadian proposal emerged,[96] embodying the latest and most significant effort, which ultimately gave rise to what we now recognize as Article 65 of the Rome Statute.

The term "admission of guilt", rather than "guilty plea", was chosen as it does not directly correspond to either the civil law or common law systems. It was selected as a hybrid solution in an attempt to merge two different legal traditions, or, as expressly highlighted by the ICC judges,

94 *Ibid*., para. 264.

95 UN GA, Preparatory Committee on the Establishment of an International Criminal Court. 12–30 August 1996, UN Doc. A/AC.249/L.6, 13 August 1996.

96 Preparatory Committee on the Establishment of an International Criminal Court. 12–30 August 1996, A/AC.249/WP.16, 20 August 1996. Proposal submitted by Argentina and Canada for Articles 38, 38 *bis*, 41 and 43.

"as an intermediate solution that blended traditional common and civil law concepts."[97]

The result of this proposal was the introduction of Article 38 *bis*, "Abbreviated proceedings on an admission of guilt", where guilty pleas and plea bargaining are separated and judges have full control over the agreement between the defense and the prosecution.

The full text of Article 38 *bis*, as drafted in the proposal submitted by Argentina and Canada,[98] was formulated as follows:

> "1. Where the accused makes an admission of guilt under article 38, paragraph 1 (d), the Trial Chamber shall determine whether: (a) the accused appreciates the nature and consequences of the admission of guilt and whether the admission is voluntarily made; and (b) the admission of guilt is firmly supported by the facts of the case that are contained in: i) the indictment and in any supplementary materials presented by the Prosecutor, and which the accused admits, and ii) any other evidence [...].
> 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph l are established, the Trial Chamber shall consider the admission of guilt as an admission of all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
> 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, the Trial Chamber shall order that the trial be continued under the ordinary trial procedures provided by this Statute, and shall consider the admission of guilt not to have been made.
> 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is otherwise required in the interests of justice, the Trial Chamber may request that the Prosecutor present additional evidence, including the testimony of witnesses, or may order that the trial be continued under the ordinary trial procedures provided by this Statute and, in the latter situation, shall consider the admission of guilt not to have been made."[99]

The subsequent and final step prior to the adoption of the ICC Rome Statute in 1998 was the proposal put forward by the Preparatory Committee on the Establishment of an International Criminal Court in 1997. In this proposal,[100] Article 38 *bis*, as initially formulated by Argentina

97 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence, 27 September 2016, para. 24.

98 UN GA, Preparatory Committee on the Establishment of an International Criminal Court, Proposal submitted by Argentina and Canada for Articles 38, 38 *bis*, 41 and 43, 12–30 August 1996, UN Doc. A/AC.249/WP.16, 20 August 1996.

99 *Ibid*.

100 Preparatory Committee on the Establishment of an International Criminal Court. 4–15 August 1997. Distr. LIMITED, A/AC.249/1997/L.8/Rev.1, 14 August 1997.

and Canada, was largely reproduced, with the addition of a new paragraph 5. This paragraph clarified that the agreement would not be binding. The content of this norm was essentially retained in the Rome Statute, where Article 38 *bis* was classified as Article 65 and named "proceedings on an admission of guilt" instead of "abbreviated proceedings on an admission of guilt."

> "1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 (a), the Trial Chamber shall determine whether:
>
> (a) The accused understands the nature and consequences of the admission of guilt;
>
> (b) The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
>
> (c) The admission of guilt is supported by the facts of the case that are contained in:
>
> (i) The charges brought by the Prosecutor and admitted by the accused;
>
> (ii) Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
>
> (iii) Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
>
> 2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
>
> 3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary trial procedures provided by this Statute and may remit the case to another Trial Chamber.
>
> 4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
>
> (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
>
> (b) Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.

Decision taken by the Preparatory Committee at its Session held from 4 to 15 August 1997, 32–33.

> 5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court."[101]

In addition to the Rome Statute, other norms, such as the Rules of Procedure and Evidence and the Regulations of the Office of the Prosecutor, also regulate this discipline. Regarding the prosecutor, the discipline is set out by the Regulations of the Office of the Prosecutor, specifically Rule 62, titled "Assessment of Admission of Guilt". According to this rule, the prosecutor is tasked with considering whether the admission of guilt is informed and voluntary and whether it is supported by the facts pleaded. Furthermore, any "credible information or evidence indicating that the admission of guilt was not informed, voluntary or supported by the facts pleaded," must be communicated by the prosecutor to the Trial Chamber. The next step is a threefold judicial duty to control, which arises from Article 65 of the Rome Statute, concerning the validity of, first, the guilty plea of the accused. This judicial review aims to assess: 1) whether the accused understands the nature of the admission of guilt; 2) whether the accused understands the consequences of that admission; 3) whether the admission of guilt is voluntarily made by the accused; 4) whether the accused has had sufficient consultation with defense counsel before pleading guilty; 5) whether the admission of guilt is supported by the facts of the case, as contained in the charges brought by the Prosecutor and admitted by the accused, or in any materials presented by the Prosecutor that supplement the charges and which the accused accepts, as well as any other evidence, including the testimony of witnesses; 6) if, and only if, the judges consider it appropriate for any reason, or at the request of a party, to order a medical, psychiatric, or psychological examination of the accused to investigate whether the accused is unfit to stand trial and therefore unable to understand the admission of guilt (this latter requirement is set by Rules 115 and 135 of the ICC Rules of Procedure and Evidence). If the Trial Chamber is not satisfied with the establishment of one or more of the abovementioned requirements, the admission of guilt will be regarded as a *tamquam non esset*, meaning that the admission of guilt is treated as though it were never made. In such cases, the trial will proceed under the ordinary trial procedures (although before a different Trial Chamber, in order to prevent any conflict of interest and to ensure the impartiality and independence of the judges in the subsequent trial).

If "the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in

101 This is the wording of previous Article 38 *bis*.

particular the interests of the victims, the Trial Chamber may request the Prosecutor to present additional evidence, including the testimony of witnesses, or order that the trial be continued under the ordinary trial procedures."[102] Even in such cases the admission of guilt is consider as not having been made, though judges have the discretion, and not the obligation, to remit the case before another Trial Chamber. If, contrary to both of the previous scenarios, the Trial Chamber is satisfied that all matters and requirements for the validity of the admission of guilt and guilty plea have been established, it will consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime. In any case, according to Rule 139 of the Rules of Procedure and Evidence, the Trial Chamber "may invite the views of the Prosecutor and the defence" before taking a decision. Moreover, it is important to note that Article 65(5) establishes the absolute non-binding nature of any agreements between the Prosecutor and the defense concerning the admission of guilt, modifications to the charges, or the penalty to be imposed. Furthermore, Rule 139 of the Rules of Procedure and Evidence provides that the Trial Chamber is required to "give reasons for this decision, which shall be placed on the record". Both aspects belong more to civil law traditions than to common law traditions. On this point, as the ICC judges observed in *Al Mahdi* that "the solution reflected in the final Article 65 of the Statute follows a 'third avenue' between the traditional common law and civil law approaches."[103]

4.2. FROM THE *AL MAHDI CASE* TO THE PROSECUTORIAL GUIDELINES

The case of Ahmad Al Faqi Al Mahdi was the first war crimes proceeding brought before the ICC related to an attack against protected objects.[104] Specifically, Al Mahdi was charged with the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, Mali, in June and July 2012. For the ICC, the targeted buildings were regarded and protected as a significant part of the cultural heritage of Timbuktu and of Mali and did not constitute military objectives.[105]

102 See Article 65 of the Rome Statute.

103 *Al Mahdi*, Judgment and Sentence, para. 27.

104 See Vrdoljak, A. F., 2018, *Prosecutor v. Ahmad Al Faqi Al Mahdi*: Judgment and Sentence & Reparations Order (Int'l Crim. Ct.), International Legal Materials.

105 ICC, Situation in the Republic of Mali ICC-PIDS-CIS-MAL-01-09/22_Eng, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15.

Some authors observed that "the International Criminal Court's ability to prosecute cultural destruction as a war crime is considered an important deterrent against iconoclastic tactics, but until recently it had never been wielded."[106] This case "was also the first conviction of its kind, and advocates of cultural preservation have celebrated it as a much-needed general deterrent in North Africa and the Middle East, where iconoclasm has become a favorite tactic of various state and non-state actors in armed conflict. However, the *Al Mahdi* trial may in fact be the exception that proves the untenability of the legal regime protecting cultural heritage sites."[107]

This case is the first – and only – case where an accused of international crimes before the ICC pleaded guilty and decided to trigger Article 65 of the Rome Statute, in so accessing the proceeding on an admission of guilt. It represents a landmark in the ICC case law since it also summarized the blend of legal cultures that characterize the international criminal procedure.[108] As observed by the Court, "an accused is afforded an opportunity to make an admission of guilt at the commencement of the trial, a procedure which looks not dissimilar to the traditional common law 'guilty plea', [...] implicitly authorizes discussions corresponding to plea agreements in common law legal systems."[109] At the same time, Article 65 also requires the Chamber to conclude that the admission is "supported by the facts of the case", specifically requiring it to consider both the admission of guilt "together with any additional evidence presented". As the ICC Trial Chamber observed in the *Al Mahdi* case, the latter is more analogous to a summary or abbreviated procedure traditionally associated with civil law systems.

Procedurally, the first step and constitutional basis of the proceeding on an admission of guilt was a document titled "agreement regarding the confirmation of the charge".[110] This agreement, made by Al Mahdi, his defense counsel and the prosecutor, highlighted that in exchange for his admission of guilt, the Prosecutor would recommend to the Trial Chamber "a

106 See Burrus, J. E., 2017, "So Far as War Allows": Why the Al Mahdi Conviction Is Unlikely to Stem the Pace of Cultural Destruction Perpetrated by Non-State Actors, *Washington International Law Journal*, Vol. 27, No. 1, p. 319. See, also, Gerstenblith, P., 2016, The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?, *J. Marshall Rev. Intell. Prop. L.*, Vol. 15, No. 3, p. 387.

107 Burrus, J. E., 2017, p. 317.

108 See Chiarini, G., 2025, *The Evolution of International Criminal Procedure. From Nuremberg and Tokyo to the International Criminal Court*, Milton Park, Routledge, p. 170.

109 *Al Mahdi*, Judgment and Sentence, para. 27.

110 ICC, Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-78-Conf-Exp, translated by author.

sentence within the range of nine to eleven (9–11) years of imprisonment, and recommend that Ahmad Al Faqi Al Mahdi be given credit for the time he has served in the custody of the Court."[111] Moreover, the Prosecutor would not appeal any sentence imposed by the Trial Chamber within the agreed range. It was also stated that the agreement did not in any way limit the parties' ability to offer admissible evidence or make submissions to the Trial Chamber regarding the factors referred to in the agreement itself or the determination of an appropriate sentence, so long as such evidence and submissions were not inconsistent with the agreement.[112]

In this document Al Mahdi was advised that, by making this agreement, "he gives up, in whole or in part, the opportunity to exercise the following rights: (a) The right to plead not guilty and to require the Prosecutor to independently prove the charge against him beyond reasonable doubt at a full trial; (b) The right not to confess guilt and to remain silent, without such silence being consideration in the determination of guilt or innocence; (c) The right to raise defences and grounds for excluding criminal responsibility, and to present admissible evidence at full trial (without prejudice to his right to make submissions and present admissible evidence under article 65 or with regard to sentencing); (d) The right to examine, or to have examined, the witnesses against him at a full trial and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him (without prejudice to his right to examine any witness that may be called to testify, and his right to call witnesses and to have them examined on his behalf, at any proceedings under article 65 or with regard to sentencing); and (e) The right to appeal a conviction, confirmation of the charge against him, or any pre-trial ruling regarding admissibility or jurisdiction, or to appeal a sentence within the range set forth at paragraph 19(a) above (without prejudice to his right to appeal pre-trial or trial rulings regarding sentencing procedure and any sentence imposed in excess of the range set forth at paragraph 19(a) above)."[113] Furthermore, the public prosecutor was required to support any potential request for a review of the sentence, in accordance with Articles 110 of the Rome Statute and Rule 223 of the Rules of Procedure and Evidence, provided that at least two-thirds of years of imprisonment would had been served.

After the confirmation of the charges hearing, held before the Pre-Trial Chamber I, which preliminary confirmed all the charges against

111 *Ibid*.

112 ICC, Situation in the Republic of Mali, Annex 1, Public Redacted Version, ICC-01/12-01/15-78-Anx1-Red2, 19 August 2016, para. 14.

113 ICC, Situation in the Republic of Mali, Annex 1, para. 21.

him,[114] Al Mahdi was sent to Trial Chamber VIII for the trial phase. At this stage, Al Mahdi formally pled guilty, in accordance with Article 65 of the Rome Statute. Nonetheless, the Trial Chamber decided to hold a three-day hearing on 22–24 August 2016[115] for cross-examination of the witnesses and the evaluation of the evidence.

The evidence presented by the prosecutor was analyzed and the witnesses were examined and cross-examined. Finally, the parties presented their final arguments, mainly in respect to the sentence criteria, and the Court set the date for the judgment for 27 September 2016[116]. As previously analyzed, "The Chamber was satisfied that the accused understood the nature and consequences of the admission of guilt and that the admission was voluntarily made after sufficient consultation with defence counsel and also that the admission of guilt was supported beyond a reasonable doubt by the facts of the case."[117] "The Chamber convicted Al Mahdi of the war crime of attacking protected objects as a co-perpetrator under articles 8(2)(e)(iv) and 25(3)(a) of the Statute and sentenced him to nine years of imprisonment"[118]. Also, on 17 August 2017, Trial Chamber VIII issued a Reparations Order[119] concluding that Al Mahdi was liable for EUR 2.7 million in expenses for individual and collective reparations for the community of Timbuktu,[120] confirmed for the most extent by the Appeals Chamber on 8 March 2018. On 25 November 2021, a panel of three judges of the Appeals Chamber[121] decided to reduce Al Mahdi's nine-year sentence of imprisonment by two years.

The *Al Mahdi* case led to the establishment of specific Guidelines for Agreements Regarding Admission of Guilt, published by the ICC Office of the Prosecutor (OTP) in October 2020.[122] The guidelines, recognizing that "guilty pleas and plea agreements have become an established feature of

114 ICC, Situation in the Republic of Mali, Public Redacted Version, ICC-01/12-01/15-84-Red, 24 March 2016.

115 ICC, *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript of hearing, ICC-01/12-01/15-T-4-Red-ENG, 22 August 2016.

116 *Al Mahdi*, Judgment and Sentence.

117 Chiarini, G., 2021, Negotiated Justice in the ICC: Following the Al Mahdi case, a Proposal to Enforce the Rights of the Accused, *PKI Global Justice Journal*, Vol. 13, No. 5.

118 *Ibid*.

119 ICC, Repatriation order, ICC-01/12-01/15-236, 17 August 2017.

120 *Ibid*.

121 Public Redacted Version of the Decision on the review concerning reduction of sentence of Mr Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15-434-Red3, 25 November 2021.

122 International Criminal Court, The Office of the Prosecutor, *Guidelines for Agreements Regarding Admission of Guilt*, October 2020.

international criminal justice," aim to provide eight requirements, titled as "relevant factors", that the Prosecutor should carefully weigh before deciding to enter into an agreement of an admission of guilt with an accused of international crimes. These relevant factors can be summarized as follows:

1) Consistency of the agreement with the Rome Statute and the goals of the Office of the Prosecutor.
2) The acceptance of responsibility of the accused of international crimes, which means providing the Prosecutor with a full and truthful account of his or her own conduct relevant to the charges. The acceptance of responsibility benefits victims, the public, the parties, and the Court; moreover, it has an impact over future generations, since it will be more difficult to contest those facts in the future decades or centuries.
3) The exercise of "particular caution" by the Prosecutor "before agreeing to seek the withdrawal or amendment of charges which have been traditionally under-prosecuted, such as crimes against or affecting children, sexual and gender-based crimes, attacks against cultural, religious, historical and other protected objects, as well as attacks against humanitarian and peacekeeping personnel."[123] Moreover, as per the guidelines, as part of any agreement, the prosecutor should ordinarily insist that the accused admit guilt with respect to all confirmed charges.
4) The evaluation of the cooperation of the accused with the office of the prosecutor, in terms of critical information on other investigations or prosecutions, including the possibility of testifying on behalf of the Prosecution in other trials; according to the guidelines, "only those accused who cooperate with the Prosecution to the full extent they are able will receive the maximum benefit."[124]
5) The sentencing recommendation should properly reflect "the gravity of the crime and the accused's role therein,"[125] and all relevant circumstances.
6) All agreements should contain a "detailed and thorough statement of the facts underlying the admission of guilt"[126] and the Prosecutor is not authorized to agree to withhold any fact material from the Trial Chamber.

123 *Ibid*.
124 *Ibid*.
125 *Ibid*.
126 *Ibid*.

7) The consideration of admission of guilt as an instrument to "ordinarily eliminate or reduce the need for victims and witnesses to testify at trial, which can be a traumatic experience [...] tak[ing] into account the interests of the victims, as well as their expressed views and concerns"[127] regarding the agreement.
8) The efficiency in terms of saving significant resources that would have been used for trial and appeal. According to the guidelines, the freeing of resources for other cases can lead to greater accountability, both through a greater number of prosecutions and also prosecutions against those most responsible for crimes. As highlighted in the *Al Mahdi* case itself, "the speed at which cases can be resolved following admissions of guilt saves the Court both time and resources, which can be otherwise spent advancing the course of international justice on other fronts."[128]

What emerges from both the *Al Mahdi* case and the OTP guidelines is the insufficient attention given to the rights of the accused. Article 65 of the Rome Statute and the legal framework related to this special proceeding would benefit from further amendments addressing the uncertainties faced by defendants who wish to make an admission of guilt.[129] Specifically, it would be helpful to clarify how many hearings an accused person might face if they admit guilt, given the complexities of the hybrid procedure. The following proposal,[130] for instance, would help to ensure the right of the accused and consists of six interconnected amendments:

> "A) An insertion of a paragraph 2 bis into article 65, namely: *'In order to establish all the essential facts that are required to prove the crime to which the admission of guilt relates, as set out in paragraph 2, the Court may hold a hearing, as long as these are limited to a reasonable time, considering abbreviated nature of the proceedings regarding an admission of guilt.'*
> "B) An additional paragraph 11 bis to article 61, namely: '*Once the charges have been confirmed in accordance with this article, and in case the accused has decided together with the Prosecutor to proceed with article 65, the Presidency – after having constituted a Trial Chamber in accordance to paragraph 11 – shall decide the number of hearings in accordance with the reasonable time requirements as set out in paragraph 2* bis *of article 65 of this Statute.'*
> "C) An additional paragraph 2 to Rule 139 of the Rules of Procedure and Evidence: '*The Trial Chamber shall respect the number of hearings decided by the Presidency under paragraph 11bis of article 61 of the Statute.'*

127 *Ibid*.
128 *Al Mahdi*, Judgment and Sentence, para. 28.
129 As proposed in Chiarini, G., 2021.
130 *Ibid*.

> "D) An amendment of Regulation 54 to the Regulations of the Court, with an additional paragraph 2: '*the decision on the number of the hearings in case of proceedings on an admission of guilt under article 65 of the Statute shall not be discussed in the Status conferences before the Trial Chamber*.'
> "E) An additional paragraph 4 bis to article 65: '*When the Trial Chamber, at the conclusion of the hearings under paragraph 11* bis *of article 61, is not satisfied that the matters referred to in paragraph 1 of this article are established, it shall order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and shall remit the case to another Trial Chamber*'.
> "F) Finally, an amendment to article 67, inserting a subparagraph (l) in paragraph 1: '*If the accused has pleaded guilty and decided to proceed under article 65 of this Statute, he has the right to be informed about the numbers of the hearings, according to paragraph 11* bis *of article 61 and with respect to the principle of reasonable time*'."

Although it may not be feasible to establish a specific number of hearings applicable to all cases, the accused should be informed that, even in instances where guilt is admitted and a sentence has been agreed with the Prosecutor, the Trial Chamber retains the discretion to schedule hearings, albeit within a "reasonable time".

5. Conclusions

The use of plea bargaining, firstly denied by the statutes of post-World War II international military tribunals of Nuremberg and Tokyo, has emerged gradually through the establishment of the UN ad hoc tribunals, particularly via the judicial interpretations of the judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). It has come to be recognized as a procedural instrument primarily guided by principles of efficiency and the reasonable duration of proceedings, and, to some extent, by a transitional justice perspective.[131] Starting in the 1990s, the use of negotiated justice raised several concerns, particularly regarding the proportionality of the sentence in relation to international crimes, which in some cases were considered excessively lenient;[132] moreover the exclusion of victims from the entire procedure has been deemed unjustifiable, especially in relation to international crimes against entire communities,

131 On the reconciliation, see Clark, J. N., 2009; *Deronjić*, Sentencing Judgement, Dissenting Opinion of Judge Schomburg, 30 March 2004.

132 See, for instance, *Erdemović*, Separate and Dissenting Opinion of Judge Cassese, para. 9; Kovarovic, K., 2011; Chifflet, P., Boas, G., 2012, p. 154.

peoples, religions, and cultures, in addition to individuals. It has also been emphasized that "[f]or the victims it is important that the factual and legal truth not be sacrificed on the altar of expediency."[133] Whether plea bargaining is viewed as appropriate in international criminal justice seems to depend on how international criminal trials are interpreted. If we consider them as "transformative structures whose primary function is to provide the means of reconciling the ideology and the morality of punishment for victims and post-conflict societies,"[134] then negotiated justice in the form of plea bargaining may face several criticisms in international criminal law, or "it may be stated tentatively that the guilty plea has come of age, which represents a triumph for pragmatism."[135] Differently, if we consider international criminal trials primarily as purely procedural mechanisms aimed at ensuring the just and prompt punishment of those accused of international crimes – while prioritizing the rights of the accused, essentially treating international criminal trials as akin to domestic trials with an international dimension – then the use of plea bargaining should be seen in a positive light, as an intrinsic component of any criminal court, whether national or international. In this view, despite critical perspectives, a plea-bargaining procedure, as the ICC proceedings on an admission of guilt, can be considered an extremely practical procedural instrument and, in some cases, a right of the accused, already recognized in many domestic criminal codes across various legal systems and traditions. However, as Damaška cautioned, "the architects of the international criminal process would be well advised to follow the motto: as many trials as possible, as much bargaining as necessary."[136] More than a decade later, this foresight appears to reflect the current state of Article 65 proceedings at the ICC, where plea bargaining remains the exception rather than the norm. The practice of plea bargaining has indeed reached an impasse in ICC proceedings. This is not only attributable to the heinous nature of international crimes and their moral consequences; procedurally, this stall is mainly attributable to (at least) two factors: the ICC's limited use of plea bargaining, with only a single case

133 Vasiliev, S., 2014, *International criminal trials: A normative theory*, PhD thesis, University of Amsterdam, 25 April, p. 884.

134 Henham, R., 2005, The Ethics of Plea Bargaining in International Criminal Trials, *Liverpool Law Review*, Vol. 26, No. 3, p. 210.

135 Jørgensen, N., 2002, The Genocide Acquittal in the Sikirica Case Before the International Criminal Tribunal for the Former Yugoslavia and the Coming of Age of the Guilty Plea, *Leiden J Int'l L*, Vol. 15, No. 2, p. 407.

136 Damaška, M., 2004, Negotiated Justice in International Criminal Courts, *Journal of International Criminal Justice*, Vol. 2, No. 4, p. 1039.

to date, and the lack of clear statutory law regarding the rights of the accused and the timing of abbreviated proceedings. If these procedural ambiguities are not addressed, they could have significant long-term negative consequences for the development of negotiated justice at the ICC. In conclusion, the study of negotiated justice in the history of international criminal law shows that modern international criminal courts have moved beyond simple guilty pleas and are going toward a proceduralization of negotiated justice itself – first by adopting plea bargaining procedures inspired by common law traditions in the UN ad hoc tribunals, and later by developing a hybrid procedure at the International Criminal Court. Yet, the limited and inconsistent use of plea bargaining at the ICC reveals that its current framework remains underdeveloped. As this paper has argued, the lack of clear procedural rights of the accused and ambiguities in the rules governing abbreviated proceedings on an admission of guilt have hindered the implementation of negotiated justice at the ICC. If more procedural rights are granted to the accused through appropriate amendments to the Rome Statute, the ICC Rules of Procedure and Evidence, and its regulations, the result could be the increased use of plea bargaining in future ICC proceedings, stabilizing the proceduralization of negotiated justice in international criminal tribunals.

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IZA PRIZNANJA KRIVICE: PROCEDURALIZACIJA NAGODBE U MEĐUNARODNIM KRIVIČNIM TRIBUNALIMA

Giovanni Chiarini

APSTRAKT

Pregovaračka nagodba je prvi put kodifikovana u okviru *ad hoc* tribunala UN, gde je razvijen konzistentan korpus sudske prakse. Nasuprot tome, pregovaranje o priznanju krivice i priznanje krivice su u velikoj meri odbijeni na ranijim Nirnberškim i Tokijskim suđenjima. Ovaj rad ispituje teorijski i praktični razvoj pregovaranja o priznanju krivice, prateći proceduralizaciju pregovaračke pravde u međunarodnim krivičnim tribunalima, što je na kraju rezultiralo skraćenim postupkom MKS o priznanju krivice – hibridnim modelom koji uključuje karakteristike iz sistema građanskog prava i običajnog prava, predstavljajući kompromis anglosaksonske i evropske pravne tradicije. Ovaj rad takođe pokazuje da je u MKS upotreba pregovaranja o priznanju krivice došla do bezizlazne situacije, prvenstveno zbog dva faktora: njegove izuzetno ograničene primene – koja se do sada odražava samo u jednom slučaju – i nejasnih normi u vezi s pravima optuženog, kao i dužinom postupka.

Ključne reči: MKS, Međunarodni krivični sud, međunarodni krivični postupak, Nirnberški procesi, tribunali Ujedinjenih nacija, priznanje krivice, međunarodno krivično pravo, uporedni krivični postupak.

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ORIGINAL SCIENTIFIC ARTICLE

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STRATEGIES FOR THE PREVENTION AND ERADICATION OF FEMICIDE: LEGAL, INSTITUTIONAL AND SOCIETAL DIMENSIONS, CHALLENGES AND PERSPECTIVES

***Abstract**: Femicide is commonly conceptualized and defined as the gender-based or gender-motivated killing of women. It is a global issue, prompting national states to implement legislative, policy and practical measures and actions to address it. The aim of the paper is to analyse current actions for preventing and suppressing femicide and explore some examples of good practice of state responses to this form of crime. The purpose is to underscore the necessity of recognizing femicide as a persistent issue, identify its characteristics and causes, and explore challenges and possible directions for developing effective preventive responses. Particular emphasize is put on femicide in the context of domestic and partner violence, as the most prevalent type of femicide, which occurs within the broader context of structural discrimination and violence against women.*

Key words: Femicide, Feminicide, Gender-Motivated Killing of Women, Domestic Violence, Intimate Partner Violence, Europe.

1. Introduction

Femicide, defined as a specific form of homicide in which the victims are women and which occurs within the context of structural and other forms of gender-based discrimination, represents a phenomenon with a distinct gender dimension. It has become an increasingly prominent issue

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globally as well as in Europe, with increasing interest in addressing it over the past decade, focusing on the development of effective mechanisms for its measurement, monitoring, and prevention.

Approximately 51,100 women and girls were killed by their intimate partners or other family members around the world in 2023, indicating that 60% of almost 85,000 women and girls killed intentionally during the observed year were actually murdered by their intimate partners or other family members (fathers, mothers, brothers, uncles, etc.).[1] In other words, worldwide an average of 140 women and girls lost their lives every day at the hands of their partner or a close relative (most often male). Thus, it appears that the most dangerous place for a woman regarding homicidal victimization is the private sphere and her home, and the perpetrators are those closest to them. The 2023 data shows that, globally, a woman is six times more likely than a man to be the victim of her intimate partner/family member.[2] Africa recorded the highest rates of intimate partner and family-related femicide, followed by the Americas, and Oceania. The peculiarity is that in Europe and the Americas, most women killed in the domestic sphere (64% and 58%, respectively) were victims of intimate partners, while elsewhere, family members were the primary perpetrators.[3]

In Europe, an average decrease in the number of murders in intimate partner/family relationships (by 21%) compared to 2010 has been observed, with differences in certain regions and an unchanged or even worse situation in some countries in Western and Southern Europe, especially following the outbreak of the COVID-19 pandemic in 2020.[4] However, data related to the situation in the Western Balkans show stable rates and grave problems in state response, while Serbia is emphasized as one of the countries burdened with a femicidal crisis, with many cases of femicide in which the perpetrators already had a history of criminal behaviour related to (domestic) violence or illegal possession of firearms.[5]

1 UNODC, UN Women, 2024, *Femicides in 2023, Global estimates of intimate partner/family member femicides*, Vienna, United Nations Office on Drugs and Crime, p. 11.

2 Male homicide victims killed by intimate partner or family member account for 11.8% of cases, while the share of female victims in the same context is 60.2 % (*Ibid*., p. 8).

3 *Ibid*., p. 12.

4 UNODC, UN Women, 2023, *Gender-related killing of women and girls ("femicide/feminicide"): Global estimates of female intimate partner/family-related homicides*, Vienna, United Nations Office on Drugs and Crime, pp. 3–4.

5 Sent, L., 2023, Femicide in Western Balkans, *European Forum for Democracy and Solidarity*, 14 August, (https://europeanforum.net/femicide-in-the-western-balkans/, 1. 9. 2025).

Considering the aforementioned data, it is logical that in Europe research is focused on the murders of women in intimate partner relationships, murders committed by male partners, and that legislative measures are being taken in order to find the most appropriate responses to this particular type of extreme manifestation of violence against women.

Indeed, the offender – a male intimate partner – most often punishes "his" wife/partner or takes revenge on her for (often fabricated) infidelity, breakup of the relationship, her unwillingness to obey and submit to his control, thus undermining his authority and masculinity, but also for socially valued/justified reasons that are fatal for the woman, such as romantic love, tradition, and honour. The femicide usually occurs at the end of a horrible continuum of the gender-based violence, the most extreme manifestation of it, as the phenomenon with the same roots deeply ingrained in patriarchy and hegemonic masculinity. Therefore, tackling the societal and cultural factors and deconstruction of the stereotypes about gender roles and different social expectations from men and women in order to achieve equal opportunities and gender equality is indisputably the most important part of every anti-femicide policy, although the most demanding one. This is why, despite the efforts of the so-called "civilized" societies to eradicate different femicidal practices, femicide is still present in all around the world: in those more patriarchal regions, with higher tolerance for violence and discrimination in general, it has a more open expression.[6] In other words, a universal peculiarity of femicide is the contribution of a society to its universality and survival, if not through encouragement and support, then through inadequate response and failure to prevent gender-based violence and femicidal victimization. Besides the most recognizable form of femicide occurring in the private sphere, gender-motivated killing of women also occurs in the public domain (by a known or unknown perpetrator), usually in the contexts related to sexual services, human trafficking, wartime events, and even witch hunting in some parts of the world,[7] which corroborates the abovementioned common roots of gender-based violence and femicide. Consequently, under-

6 For more on comparative research on the legal status of women in some countries of the Global South, and the feminist battles to reform them, see Afkhami, M., Ertürk, Y., Mayer, A. E., (eds.), 2019, *Feminist Advocacy, Family Law and Violence Against Women: International Perspectives*, London and New York, Routledge.

7 For more on different forms of femicide, see Corradi, C., 2021, *Femicide, its causes and recent trends: What do we know?*, EP/EXPO/DROI/FWC/2019-01/LOT6/1/C/12, Brussels, European Parliament, pp. 6–7; European Institute for Gender Equality (EIGE), 2023, *Improving Legal Responses to counter femicide in the European Union: Perspectives from victims and professionals*, Luxembourg, Publications Office of the European Union, p. 7.

standing the context in which the killing of a woman is considered as femicide is of utmost importance in creating an adequate, i.e., effective, sensitive and efficient social response to this problem.

Assuming this as the starting point, the aim of the paper is to analyse the current efforts in European and non-European countries to recognize, prevent and suppress femicide, primarily at the legislative and policy level, and to briefly address the state of affairs in Serbia in order to identify the most significant gaps compared to the international and European legal requirements and recommendations, and provide possible ways, or at least food for thought on the possible ways to address them.

2. Recognizing Femicide: From the Feminist to the International Legal Approach

The first documented use of the term "femicide" was in the 1801 book *A Satirical View of London at the Commencement of the Nineteenth Century*, by John Corry, referring to the killing of a woman[8] (regardless of motivation or other circumstances). The term femicide was first used in the modern era by feminist scholar Professor Diana Russell in 1976, in the proceedings of the First International Tribunal on Crimes against Women in Brussels.[9] Her aim was to draw attention to the phenomenon with a clear gender dimension and a global scope, where patriarchy is the same or similar denominator differently manifested in different cultures. The introduction of the term "*femicide*" was thus seen as a crucial first step toward reducing the killing of women worldwide. The concept was revived in 1992 with the publication of the book *Femicide: The Politics of Woman Killing*, though it remained largely confined to activist and academic circles.[10] In defining femicide in this work, the emphasis was placed on misogynistic motives and on men as perpetrators. Thus, femicide was initially defined simply as the killing of women by men because they are women, as they "are and should be" subordinated/owed by men, because they are devaluated on the basis of the patriarchal subordination, or as misogynistic killings of women by men.

8 Canadian Femicide Observatory for Justice and Accountability, History of the Term Femicide, *Canadian Femicide Observatory for Justice and Accountability*, (https://femicideincanada.ca/what-is-femicide/history/, 20. 9. 2025).

9 See also Shulman, A., 2010, The Rise of Femicide, *The New Republic*, 29 December, (https://newrepublic.com/article/80556/femicide-guatemala-decree-22, 12. 9. 2025).

10 Radford, J., Russell, D. E. H., 1992, *Femicide: The Politics of Woman Killing*, New York, Twayne.

At the beginning of the 2000s, the concept of femicide was revitalized and expanded by feminist activists in Latin America, who demanded that their states take action to counter violence against women, whose lethal outcomes represented the most visible and extreme manifestations. During this period, the term "*feminicidio*" (feminicide) emerged, coined by the prominent Mexican politician and feminist Marcela Lagarde y de Los Ríos, who emphasized the need to condemn both the patriarchal society and the state that had tolerated violence against women. The revival of the concept in Mexico was prompted by the horrifying mass murders of women in the city of Ciudad Juárez – known as the "city of dead women"[11] – where, according to Amnesty International data, approximately 370 women were killed over a ten-year period (starting in 1993), with at least a third of them subjected to sexual violence; nevertheless, the authorities failed to take adequate measures to investigate and punish these crimes.[12]

This phenomenon attracted international attention and shed new light on the problem of femicide: the inactivity of the state and its neglect or tolerance of violence against women, even when it results in death. Indeed, femicide can be considered a crime of the state, which acts as an accomplice or silent observer: even if not approving, it tolerates violence against women even in its most extreme form. Therefore, a key feature of femicide is the contribution of society and the state to its persistence through inadequate responses and failure to prevent victimization and react given that femicides are not "isolated incidents which arise suddenly and unexpectedly, but are the ultimate act of violence which is experienced in a continuum of violence against women."[13]

The "femicidal crisis" in Latin American countries also drew European attention to and interest in phenomenon, as reflected in several key documents. These include resolutions of the Parliamentary Assembly of the Council of Europe, notably one from 2005,[14] which suggested the

11 Following the visit of the Special Rapporteur to Mexico in 2002, the Inter-American Commission on Human Rights adopted conclusions and recommendations regarding the issue of the "dead women of Juárez". See ICHR, The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003, (http://www.cidh.oas.org/annualrep/2002eng/chap.vi.juarez.htm, 12. 9. 2025).

12 Amnesty International, 2005, Mexico: Justice fails in Ciudad Juárez and the city of Chihuahua, *Amnesty International*, 27 February, (https://web.archive.org/web/20120303095740/http://www.amnestyusa.org/node/55339, 12. 9. 2025).

13 Sixth Conference on Femicide/Feminicide, 2013, *Report*, 23 January, (https://eu.boell.org/sites/default/files/uploads/2013/11/feminicide_conference_report_bi_regional_eu-celac_dialogue_en.pdf, 1. 9. 2025), p. 2.

14 Council of Europe Parliamentary Assembly, Resolution 1454(2005)Disappearance and murder of a great number of women and girls in Mexico.

possibility of introducing the concept of femicide into European criminal law, and another from 2009,[15] dedicated specifically to feminicide. Additionally, the European Parliament adopted a resolution in 2007 addressing the killings of women in Central America and Mexico and the role of the European Union in combating this phenomenon.[16] These resolutions highlight the existence of femicide in European countries and recommend that states exert influence on immigrant communities to abandon practices involving violence against women and femicide. They also emphasize that states aspiring to European Union membership must demonstrate respect for the human rights of women and take measures to protect women from violence and femicide. Furthermore, the resolutions call for harsher penalties for gender-based violence against women, including feminicide.

The recommendations addressed to the Committee of Ministers of the Council of Europe highlight the need for the establishment of a group/observatory for collecting data on violence against women, particularly femicide, in European countries, in order to identify gaps in the protection of women and take measures to address them.[17]

In 2013, the United Nations General Assembly adopted Resolution 68/191, expressing concern over the high rates of femicide, and encouraging member states to apply the principle of due diligence in strengthening their criminal justice responses to this crime. Three years later, the Special Rapporteur on Violence against Women launched the Femicide Watch initiative, aimed at collecting national-level data on femicide to monitor and compare the phenomenon globally and to develop appropriate, evidence-based responses. Within the framework of the United Nations, the so-called Vienna Declaration on Femicide provides a definition of femicide, and its various forms, establishing a foundational framework that continues to inform contemporary understanding of the phenomenon.[18]

15 Council of Europe Parliamentary Assembly, Resolution 1654(2009)Feminicides.

16 European Parliament Resolution on the Murders of Women (feminicides) in Central America and Mexico and the Role of the EU in fighting this Phenomenon (2007/2025(INI)).

17 Council of Europe Parliamentary Assembly, Recommendation 1861(2009)Feminicides.

18 Femicide is the killing of women and girls because of their gender, which can take the following forms: (1) the killing of a woman as a result of intimate partner violence; (2) torture and misogynistic killing of women; (3) killing in the name of "honor"; (4) targeted killings in the context of armed conflicts; (5) dowry-related murders; (6) killing on the grounds of sexual orientation or gender identity; (7) killing Aboriginal or indigenous women because of their gender; (8) female infanticide or gender-based foeticide; (9) death caused by female genital mutilation; (10) killing on charges of "witchcraft" (witch hunts); and (11) other femicides in the context of organized crime, trafficking in others, trafficking in human beings or arms trafficking (UN,

The adoption of the concept of femicide in international legal documents, along with the aforementioned recommendations, has prompted increased vigilance among national governments and particularly non-governmental organizations. Consequently, data on femicide is being collected rapidly, and governments are facing increasing pressure to engage more actively in protecting women from violence. This is particularly important in light of the adoption of legally binding documents at the European level, which represent a culmination of efforts aimed at achieving one of the United Nations 2030 Agenda for Sustainable Development Goals: gender equality through the prevention and elimination of violence against women.[19] These legally binding documents include: the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention, adopted in 2011)[20] and Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.[21]

The Istanbul Convention does not explicitly mention femicide, but it does contain a number of significant recommendations and requirements concerning the prevention of violence against women. Directive2024/1385 (which reflects the EU's commitment to ensuring gender equality and protecting human rights) explicitly mentions femicide in one instance, when stating that, in addition to the offences addressed by the Directive itself, violence against women must also include acts provided for in national legislations, such as femicide (along with other criminal offences, such as rape and sexual harassment, sexual abuse, stalking, early marriage, forced abortion, forced sterilization and different forms of cyber violence, including online sexual harassment and cyber bullying).[22] Although the Directive does not define femicide itself, it undoubtedly leaves this to the Member States, and even indirectly encourages them to criminalize femicide.

Some perspectives suggest that the concept of femicide should not be limited to misogynistic or sexist killings, but should encompass the murder

Economic and Social Council, Vienna Declaration on Femicide, E/CN.15/2013/NGO/1).

19 UN General Assembly, 2015, Transforming our world: The 2030 Agenda for Sustainable Development, A/RES/70/1.

20 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS 210, 11 May 2011.

21 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence*, OJ L*, 2024/1385, 24 May 2024.

22 *Ibid*., p. 2.

of women regardless of the perpetrator's motives or status.[23] This approach reflects a return to the original interpretation of the term from 1801 and represents the depoliticization of the feminist understanding of femicide. However, conceptualizing femicide as a category of killings characterized by gender-based motivation is more appropriate, given the nature of the phenomenon, its main characteristics, and the need to develop targeted policies for its eradication. Therefore, femicide should be understood as a category located within the broader context of discrimination based on gender/patriarchy combined with discrimination based on sex, class, race, age, (dis)ability, rather than merely as the murder of a woman without consideration of the circumstances/context in which the crime occurs. Furthermore, civilizational clashes between traditionalism and emancipatory tendencies also represent an additional source of gender-based violence and femicide (honour crime has its roots precisely there).

3. National Responses to Femicide and Current Challenges

The first (criminal) legal responses to femicide emerged in Latin American countries in connection with the previously pointed out femicidal cases. Consequently, specific criminal provisions regarding femicide, as well as specialized state bodies, have been established. In Mexico, for instance, the General Law on Women's Access to a Life Free from Violence was adopted, defining the concept of feminicide, while feminicide itself has been criminalized since 27 July 2011. In 2004, the Special Prosecutor for Violence Against Women was appointed.[24] In 2007, Costa Rica introduced new criminal offences related to violence against women, including femicide, while in 2008 Guatemala adopted the Law against Femicide and Other Forms of Violence against Women.[25] Nevertheless, the results of these efforts have been limited, and femicide rates in these countries remain alarmingly high. In 2020, official national statistics registered 948

23 Mršević, Z., Femicide as the criminal law deed: *pro et contra*, in: Pavlović, Z., Stevanović, I., (eds.), 2024, *The Right to Life and Body Integrity*, Belgrade, Institute of Criminological and Sociological Research / Novi Sad, Vojvodina Bar Association.

24 Amnesty International, 2004, Mexico: Ending the brutal cycle of violence against women in Ciudad Juárez and the city of Chihuahua, Amnesty International, (https://www.amnesty.org/en/wp-content/uploads/2021/09/amr410112004en.pdf, 25. 8. 2025), p. 7.

25 In the same year, Guatemala recorded the highest number of murders of women (722). See *Guatemala's Femicide Law: Progress against Impunity*, The Guatemala Human Rights Commission/USA, (http://www.ghrc-usa.org/Publications/Femicide_Law_ProgressAgainstImpunity.pdf, 3. 9. 2025), p. 2.

femicides in Mexico (approximately 2.5 per day), whereas, grass roots associations reported 11 femicides per day.[26] This clearly indicates that "declarative" efforts, despite the existence of specialized state mechanisms, are insufficient, since the root of the problem obviously does not lie in the normative framework or its shortcomings, but rather in the comprehensive understanding and acknowledgment of the issue, as well as the willingness and capacity of society and the state to address it effectively.[27]

In European legislation, despite the recommendations of the European Institute for Gender Equality (EIGE) to introduce femicide as a distinct criminal offence,[28] several countries have taken measures similar to those implemented in Latin America. The most common response to femicide in Europe is the application of the qualification of aggravated murder when the act is committed by a partner or family member,[29] or this circumstance is considered as an aggravating factor during sentencing in murder cases. This approach aligns with the Istanbul Convention,[30] which does not explicitly recognize the concept of femicide, but provides for a broad interpretation of the concept of violence that encompasses femicide (Article 3(a)). The Istanbul Convention requires member states to diligently assess the risk of a fatal outcome in cases of violence and to ensure support and protection for victims (Article 51(1)). Risk assessment must be conducted both during investigations and when applying protective measures, with particular attention to whether the perpetrator possesses or has access to a firearm (Article 51(2)), in order to prevent fatal outcomes.

In Europe, national criminal legislations do not explicitly name femicide, although there is a strong argument that using this specific term would help make the problem more visible and compel institutions to respond appropriately. The relevant criminal offences in which femicide could be identified are generally gender-neutral and are most often associated with murder occurring within the context of domestic violence. The countries that have amended their criminal legislation by

26 Corradi, C., 2021, p. 21.

27 Jovanović, S., Femicide/Feminicide in Criminal Law: Do we need a new criminal offence?, in: Pavlović, Z., Stevanović, I., 2024, pp. 535–163.

28 EIGE, 2023, p. 11.

29 Spinelli, B., 2011, *Femicide and Feminicide in Europe: Gender-motivated Killings of Women as a Result of Intimate Partner Violence*, expert paper, (https://femicide-watch.org/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Ffemicide-watch.org%2Fsites%2Fdefault%2Ffiles%2F2021-10%2FSPINELLI%2520%25282011%2529%2520FEMICIDE%2520AND%2520FEMINICIDE%2520IN%2520EUROPE%2520%25281%2529.pdf, 25. 8. 2025), p. 42.

30 Article 46 of the Istanbul Convention.

adopting the concept of femicide are: Malta, Cyprus, Croatia, and North Macedonia.[31]

The concept of femicide was introduced into Maltese criminal law in 2022; it is foreseen that a homicide can be considered a femicide if a woman is killed as a result of domestic violence, honour killings, misogynistic intentions, religious practices such as genital mutilation, and sexual abuse.[32] A similar method was used in Cypriot criminal law,[33] but Maltese law has a wider scope, thus raising the question of unconstitutional provisions that make the murder of a woman by any family member an aggravated murder irrespective of motive or other circumstances. Maltese law also made one more radical exception to criminal law: it outlaws the possibility of an accused pleading temporary insanity as a mitigating factor, thus making femicide a radical exception among homicides.[34]

In Croatia, the concept of femicide was introduced through amendments to the Criminal Code in 2024.[35] Article 111a introduced a new criminal offence: aggravated murder of a female person (as a gender-based murder). The penalty is the harshest one – minimum is ten years of imprisonment, maximum: long-term imprisonment.[36] When determining the criminal offence, consideration is given to whether the act was committed against a close person, a person whom the perpetrator has previously abused, a vulnerable person, a person who is in a subordinate or dependent relationship, or whether the act was committed in circumstances of sexual violence or due to a relationship that places women in an unequal position, or if there are other circumstances indicating that it con-

31 In July 2025 Italy's Senate unanimously passed a bill making femicide a standalone crime punishable by life imprisonment. Peretti, A., 2025, Italian Senate approves bill targeting killings of women, *Euractive*, July 24, (https://www.euractiv.com/news/italian-senate-approves-bill-targeting-killings-of-women/, 4. 9. 2025).

32 Calleja, C., 2022, Making the femicide law work, *Times of Malta*, December 28, (https://timesofmalta.com/article/making-new-femicide-law-work.1003735, 2. 8. 2025).

33 Hazoue, E., 2022, Femicide made a distinct crime under new law, *Cyprus Mail*, July 7, (https://cyprus-mail.com/2022/07/07/femicide-made-a-distinct-crime-under-new-law/, 30. 8. 2025).

34 Borg, V. P., 2022, University of Malta report on femicide makes unconstitutional criminal law recommendations, (https://victorborg.com/femicide-report-malta-criminal-law-recommendations-human-right, 2. 8. 2025).

35 Zakon o izmjenama i dopunama Kaznenog zakona Republike Hrvatske, *Narodne novine*, No. 36/2024.

36 A long-term prison sentence cannot be shorter than 21 years nor longer than 40 years, and for cumulative offences, exceptionally, up to 50 years (Article 46 of the Criminal Code of the Republic of Croatia). Kazneni zakon Republike Hrvatske, *Narodne novine*, Nos. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, 36/24.

stitutes gender-based violence. This serious crime has no statute of limitations, nor does the enforcement of the sentence (Articles 81 and 83 of the Criminal Code). Additionally, in Article 87(32) of the Criminal Code of the Republic of Croatia, an authentic (thus binding) interpretation of gender-based violence against women is provided, defining it as violence that is directed at a woman because she is a woman or that disproportionately affects women. The same provision also stipulates that it is also considered as an aggravating circumstance, unless a harsher punishment is explicitly prescribed for it (Article 32).

Finally, the concept of femicide was introduced into the criminal legislation in the North Macedonia in 2023.[37] It stipulates that the murder of a woman and a girl under 18 years of age, when perpetrating gender-based violence, represents aggravated murder (Article 123 (2) of the Criminal Code). This criminal offence is punishable by a prison sentence of at least 10 years or life imprisonment. Article 122 of the Criminal Code provides the definition of gender-based violence against women, suggesting that it is "violence directed against women because of their membership of the female gender, that leads or may lead to physical, sexual, psychical or economic injury or suffering of women, including direct and indirect threats and intimidation of such acts, coercion or arbitrary deprivation of liberty, regardless of whether they occur in the public or private life".[38] It is noteworthy that this new form of aggravated murder exists along previously defined forms, including taking another person's life in a cruel or insidious manner; while performing domestic violence, or the murder of a woman whom is known to be pregnant or taking the life of a child.

Although femicide is not widely recognized as a criminal offence within the European legal framework, and even approaches with radical elements – such as the Maltese model – faces criticism, significant efforts are being made across Europe to prevent femicide. These efforts, however, are primarily focused on the prevention of intimate partner and domestic violence, operating under the assumption that reducing these forms of violence will also lead to a decrease in femicide rates.

Due to the multidimensional and heterogeneous nature of femicide, one of the major challenges in developing effective responses is the collection of data based on standardized criteria, allowing for the phenomenon of femicide to be accurately measured, monitored, and compared across countries and contexts. In this regard, suitable criteria have been

37 Gaber-Damjanovska, N., Gajdova, G., 2023, *Femicide in the Republic of North Macedonia: The state of affairs, the legal framework and the judicial practice (2018–2022)*, London, The AIRE Centre (Advice on Individual Rights in Europe), pp. 17–18.

38 *Ibid*.

established at the UN level, and the next step is perceived as establishing special national mechanisms (observatories) to collect and analyse data on femicide, which would provide a basis for evaluating and improving specific prevention and intervention measures, including the implementation of relevant legal provisions.[39]

3.1. EXAMPLES OF GOOD PRACTICE

Several countries, such as Spain, Scotland, Georgia, England, and Wales, can serve as examples of good practice in implementing measures and actions on legislative, institutional and/or practical levels to effectively address, prevent and combat violence against women and femicide. These measures and actions mainly refer to: strengthening legal protection of women from violence (e.g., harsher punishments for offenders, imposing protective measures for victims, simplified evidentiary procedure, etc.); specialization of institutions/units and/or professionals acting in cases of violence against women, including femicide; improving the cooperation and coordination of activities of different stakeholders in cases of violence against women (multi-agency approach); and collecting, sharing, and publishing data on cases of violence against women, relevant for developing evidence-based practices in responding to violence against women and preventing femicide, and raising public awareness.

Spain serves as a notable example in Europe for preventing and combating violence against women, including femicide, due to its comprehensive approach to the issue. This approach was established through Organic Law 1/2004 on comprehensive measures to protect against gender-based violence. In the same year, a public prosecutor specializing in cases of violence against women was appointed. Spain is also the only European country that has special courts for cases of violence against women (*Juzgados de Violencia contra la Mujer*), which handle both criminal cases and related civil matters. Moreover, professionals involved in these cases, including police and judiciary personnel, are specialized (both in terms of expertise and affinity) for dealing with gender-based violence cases.

39 At his point it is worth mentioning the European Observatory on Femicide (EOF), which represents a research and advocacy initiative for the prevention of gender-related killings of women. The EOF's work is based in two thematic issues: creating a Europe-wide data collection system to measure and raise awareness about the extent of femicide, and to provide background information for better intervention and prevention, and conducting Europe-wide femicide reviews to identify gaps in response to violence against women. The EOF forms a network of country research groups in Europe and Israel (as an EU cooperating state), (https://eof.cut.ac.cy/?repeat=w3tc, 5. 9. 2025). The role of the research groups is to work with the EOF on collecting and analysing data on femicide.

However, when it comes to specialization of professionals and adherence to certain protocols, there are still inconsistencies and differences across Spain,[40] so the response to gender-based violence is still not uniform.

In accordance with Spanish criminal law provisions, the perpetrator of femicide is liable for murder and the penalty is harsher if the offence is committed against a spouse, former spouse, partner, former partner, or a particularly vulnerable person (regardless of gender-based motivation). Spanish Organic Law 1/2015 of 30 March 2015, has strengthened the protection of victims of gender-based violence by stipulating that gender-based motivation must constitute an aggravating circumstance. Thus, this law offers better protection in all cases of gender-based violence, which goes beyond cases of intimate partner/family violence against women. Furthermore, in 2015, the Supreme Court of Spain clarified that this provision must be applied in all cases where the victim is a woman and the act is motivated by a man's desire to demonstrate superiority, or when it involves an attempt to control and dominate a woman.[41]

It is believed that specialization in the police, prosecution, and judiciary has yielded good results, given the number of reports or cases that appeared before specialized courts, as well as the increase in victims' trust in institutions, and vice versa – considering that a conviction can be reached based solely on the victim's testimony. Additionally, the number of convictions has significantly increased even in cases of "first time" violence (77% of cases end in conviction) compared to the previous period, when initial threats, coercion, or abuse mostly went unpunished.[42] Victims receive a judicial response (regarding the protective measure) within 72 hours, and there is also a special protocol on coordinated cooperation between the police and the judiciary, aimed at preventing secondary victimization of the victim in contact with state authorities, such as repeating statements or medical examinations. Important measures also include: a universal form that the victim fills out when requesting a protective measure from the police or the court; a central register of issued measures/sentences in a given case, accessible to professionals working to prevent gender-based violence, and databases where police risk assessments are stored and are easily accessed by courts.[43]

40 EIGE, 2023, p. 27

41 *Ibid*., p. 31.

42 Montalbán Huertas, I., 2012, Access to Justice of Victims of Gender-Based Violence. Spain, (https://www.ohchr.org/sites/default/files/documents/HRBodies/CEDAW/AccesstoJustice/SpanishGeneralCouncilForTheJudiciary.pdf, 1. 9. 2025), pp. 1–3.

43 *Ibid*., p. 7.

In Scotland, a gender-neutral definition of domestic violence is used, but the state's Equally Safe strategy recognizes the gendered nature of the violence (as a form of violence against women and girls) and recommends a multi-agency approach to and reviews of intimate partner violence cases, including murders.[44]The importance of coordinated cooperation is embodied in the Joint Protocol on Domestic Violence between the police and the prosecution, which clearly defines a strict policy of encouraging arrests. Within the Scottish police, there are specialized units that take appropriate measures to ensure the safety and well-being of the victim, provide information about support available through other agencies, and conduct additional risk assessments to maximize the victim's safety. In cases where the victim is exposed to a high risk of harm, units refer the case to a multi-agency risk assessment conference (MARAC), which involves multiple stakeholders. A special (police) team for domestic violence operates at the national level, focusing particularly on "serial perpetrators/abusers" and complex cases. This, proactive police unit conducts in-depth investigations of prior offences, including the offender's past intimate relationships, in order to build comprehensive and well-substantiated cases. Moreover, when proving the existence of a criminal act, particular emphasis is placed on the broader context, potentially comprising behaviours that may not individually constitute criminal offences or appear overtly threatening or harmful, but which, when viewed as a continuous pattern, reveals what has been termed the "golden thread" of coercive control underlying the perpetrator's conduct. In such instances, the cumulative behaviour is recognized as constituting the offence of domestic violence.

It is also important to note that the Scottish Government publishes data on domestic violence convictions, relevant government policies (such as the Equally Safe strategy), as well as research findings related to this issue, while sentencing statements for intimate partner homicides are made available on the Scottish judiciary's website for a period of time.[45] This practice represents a commendable example of actions that contribute to raising awareness, both among the general population and within professional circles. Similarly, the Scottish police publishes links on their website to awareness-raising campaigns ("Don't be that Guy") and information about the Domestic Violence Disclosure Scheme (DVDS) ("Clare's Law")

44 *Equally Safe – Scotland's strategy for preventing and eradicating violence against women and girls*, 2018, Scottish Government (https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2018/04/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/documents/00534791-pdf/00534791-pdf/govscot%3Adocument/00534791.pdf, 10. 9. 2025).

45 McPherson, R., 2022, Reflecting on Legal Responses to Intimate Partner Femicide in Scotland, *Violence Against Women*, Vol. 29, No. 3–4.

which gives people the right to know if a current or ex-partner has any history of violence or abuse.[46]

Georgia also serves as a good example of implementing international legal recommendations on femicide, particularly in terms of monitoring and understanding the phenomenon, which are essential prerequisites for developing adequate responses. In 2016, Georgia established Femicide Watch, a special body within the office of the Ombudsman, for collecting data on femicide.[47] According to the Deputy Ombudsman of Georgia, the collected data and the identified issues/problems have led to advancements in the work of state agencies in the field of combating violence against women, as practices are being improved and lessons learned from previously identified shortcomings.[48]The Domestic Homicide Reviews in England and Wales, established in 2011, are another example of good practice: they provide useful information on all forms of partner killings and are used for risk assessment.[49] These examples prove the relevance of evidence-based development of policies and enhancement of practice in responding to violence against women, primarily domestic and intimate partner violence, in order to prevent femicide.

3.2. A SNAPSHOT OF THE CURRENT SITUATION IN SERBIA

Data on femicide is not officially collected in Serbia, e.g., by the Statistical Office of the Republic of Serbia (although progress has been made when it comes to the criminal offence of domestic violence), nor do judicial authorities specifically record circumstances related to the motivation or the context in which the murder of a woman occurred (primarily the relationship between the perpetrator and the victim).[50] Instead of being collected by an official statistical agency, such data is systematically gathered by non-governmental organizations, primarily based on media reports.

46 On the Scottish model, see Domestic Abuse Act 2018 (https://www.legislation.gov.uk/asp/2018/5/contents, 5. 9. 2025); Crown Office and Procurator Fiscal Service, (https://www.copfs.gov.uk, 5. 9. 2025); Don't be that Guy, (https://www.scotland.police.uk/what-s-happening/campaigns/2024/don-t-be-that-guy, 5. 9. 2025).

47 UNODC, UN Women, 2022, *Gender-related killing of women and girls ("femicide/feminicide"): Global estimates of gender-related killings of women and girls in the private sphere in 2021*, Vienna, United Nations Office on Drugs and Crime, p. 27.

48 UN Women, 2023, *Countries across Europe take first steps to address femicide*, UN Women, 4 May, (https://eca.unwomen.org/en/stories/news/2023/05/countries-across-europe-take-first-steps-to-address-femicide, 2. 9. 2025).

49 Chopra, J. *et al.*, 2022, Risk factors for intimate partner homicide in England and Wales, *Health & Social Care in the Community*, Vol. 30, No. 5, pp. 3086–3095.

50 This data can be obtained from the police, but even the police do not publish this data, nor are they obliged to systematize it and make it publicly available.

Data from the Femicide Memorial database[51], which is managed by a women's non-governmental organization, indicate that between 2014 and 2023, a total of 297 femicides were committed in Serbia, of which 288 cases (97%) involved women and girls killed within a family or intimate partner context.[52] Reports from the "Žene protiv nasilja" (Women against violence Network – today the Alliance of women NGSs "Women against violence Network") suggest that since 2010, at least 30 women were killed annually on average in the context of intimate partner/family violence, and every third woman had previously reported violence to some state authority.[53] Apart from the media reports, a significant sources of data on femicide are studies on judicial practices for certain time periods and areas.[54]

Available data indicates that even in cases where victims sought protection from state authorities, adequate and timely assistance was not provided. It has also been established that firearms (often legally owned) are frequently used in the commission of these crimes.[55] This raises important concerns regarding the effectiveness of firearms control and the accessibility of weapons, as well as the need to incorporate a gender perspective into firearms policy.[56] In assessing the safety risks associated with permit applicants owing weapons (including cases of permit renewal), family circumstances and the opinion of family members or intimate partners (including former partners) should be taken into account.

When it comes to criminal legislation, similarly to most European countries, Serbia does not recognize the specific criminal offence of

51 The Femicide Memorial database is available at https://www.womenngo.org.rs/en/femicide-memorial.

52 Ćopić, S., Criminological and victimological characteristics of femicide in Serbia and social response, in: Macanović, N., Petrović, J., Jovanić, G., (eds.), 2025, *Proceedings from the Conference "Women in Modern Society: Challenges and Opportunities"*, Banja Luka, Centar modernih znanja, pp. 96–107.

53 Mreža Žene protiv nasilja, n.d., *Femicid u Srbiji* (Femicide in Serbia), (http://www.zeneprotivnasilja.net/femicid-u-srbiji, 2. 9. 2025).

54 Simeunović-Patić, B., 2003, *Ubistva u Beogradu: Kriminološka studija*, Belgrade, Vojnoizdavački zavod; Simeunović-Patić, B., Jovanović, S., 2013, *Žene žrtve ubistva u partnerskom odnosu*, Belgrade, Institut za kriminološka i sociološka istraživanja; Konstantinović-Vilić, S., Petrušić, N., Beker, K., 2021, *Pokušaj femicide i femicid u Srbiji*, Pančevo, FemPlatz; Beker, K., 2023, *Stop Femicide: Regional Report – Social and Institutional Responses to Femicide in Albania, Montenegro and Serbia*, Belgrade, UN Women.

55 Ćopić, S., 2025, pp. 100–101.

56 Ćopić, S., Dokmanović, M., 2023, Odgovor države na zloupotrebu vatrenog oružja u porodičnom kontekstu u Srbiji: Politike, efekti i izazovi, *Zbornik Instituta za kriminološka i sociološka istraživanja*, Vol. 42, Nos. 2–3, pp. 41–59.

femicide or an offence that emphasizes the gender dimension. Neither femicide nor gender-based violence is defined as a concept in current public policy and other documents.[57] At the time of writing this paper, Serbia's Criminal Code was undergoing amendment. Nevertheless, the current draft of the amendments does not include a proposal to classify femicide as a distinct criminal offence. However, Serbia's criminal legislation is indirectly and partially aligned with international legal recommendations concerning intimate partner/family gender-motivated homicide, owing to the fact that gender-neutral criminalization provides protection to all family members who were previously abused by the perpetrator (it is a form of aggravated murder under Article 114(1) item 10 of the Criminal Code (CC).[58] Additionally, the criminal offence of domestic violence takes the most severe form when it results in the death of a family member, but the fatal consequence must be encompassed by the perpetrator's negligence (Article 194(4)CC). The prescribed punishment for this form of domestic violence was raised in 2019; as a result, the minimum punishment is now the same as in the case of homicide (Article 113 CC), and if the victim is a minor, the minimum is the same as in the case of aggravated homicide.[59]The latest legislative intervention, which introduced a harsher punishment for this type of offence, shows (at least declaratively) interest in the issue, as a state response to the criticism about the inadequate reaction in femicide cases. On the other hand, one might say that it is always the easiest to increase the punishment and make amendments to the CC (which the Serbian legislator does almost every year, and very often with motivation and reasoning that are linked to penal populism).[60] However, direct non-alignment with European requirements still exists regarding the interpretation of the constitutive element of the crime – a family member, both in cases of homicide and the most severe form of domestic violence. Namely,

57 The absence of a definition of gender-based violence against women is noted in the Strategy on Preventing and Combating Violence against Women and Domestic Violence for the 2021–2025 period, *Službeni glasnik RS*, No. 47/2021, p. 15.

58 Krivični zakonik (Criminal Code), *Službeni glasnik Republike Srbije*, Nos. 85/2005, 88/2005 – ispravka, 107/2005 – ispravka 72/2009, 111/2009, 121/2012, 104/ 2013, 108/2014, 94/2016, 35/2019, 94/2024.

59 Zakon o izmenama i dopunama Krivičnog zakonika, *Službeni glasnik RS*, No. 35/2019.

60 About penal populism and the CC amendments in the sphere of the offences against life and bodily integrity, see Jovanović, S., Criminal Law Protection of Life in Serbia: Necessity or Penal Populism?, in Pavlović, Z., (ed.), 2021, *Human Rights Protection: Right to Life*, Novi Sad, Provincial Protector of Citizens – Ombudsman / Belgrade, Institute of Criminological and Sociological Research, pp. 147–163.

according to the binding, authentic interpretation of the legislator (Article 112(28)CC), former spouses (who do not have a common child) will be considered family members only if they live in the same household, whereas former common-law spouses (without a common child) are not considered as family members, even though it is well known that the end of a partnership does not necessarily mean the cessation of violence, and that separation is one of the risk factors for the escalation (or occurrence) of violence, including femicide. On the other hand, the Istanbul Convention envisages broader circle of possible perpetrators and victims (Art. 3b), emphasizing that "the same household" must not be a condition for enhanced protection. The same is provided for in the EU Directive on Combating Violence against Women and Domestic Violence.

The murder of a pregnant woman is also classified as a form of aggravated homicide (Article 114(1) item 9 CC), which is directly relevant to the discussion of femicide. Similarly, homicide committed out of reckless revenge or other base motives (Article 114(1) item 5 CC) may also be applicable in cases of femicide. The Serbian Criminal Code also provides for other appropriate incriminations that can be applied in cases of violence against women with a lethal outcome, but they are also gender-neutral (except for female genital mutilation, Article 121a CC), and the death of the victim must be encompassed by the perpetrator's negligence (e.g., trafficking in human beings – Article 388 (5) CC; stalking – Article 138a(3) CC; female genital mutilation – Article 121a(4)CC).

The punishment for aggravated homicide ranges from a minimum of ten years to a maximum of twenty years of imprisonment, with life imprisonment also being a possible sentence. For the aforementioned criminal offences resulting in death as a serious consequence, the prescribed prison sentence is likewise between ten and twenty years. In the case of female genital mutilation, the punishment ranges from two to twelve years of imprisonment. This provision, along with certain aspects of the offence description (particularly the form of the offence outlined in Article 121a (2) CC) has been subject to criticism, as it may reflect a misunderstanding of the phenomenon: female genital mutilation is not part of Serbian tradition or culture, although cases may emerge due to migration.[61]

In addition to the absence of the specific criminal offence of femicide (despite proposals to introduce it to the criminal legislation), [62] the implementation of existing legal provisions is hindered by numerous challenges,

61 On other criminal offences related to the concept of femicide and problems in their implementation, see Jovanović, S., Femicide/Feminicide in Criminal Law: Do we need a new criminal offence?, in: Pavlović, Z., Stevanović, I., 2024, pp. 535–163.

62 See Beker, K., 2023.

resulting in inadequate protection for women against gender-based violence. The primary issue, aside from shortcomings in the legal definitions of offences, is undoubtedly the insufficient understanding of the phenomenon of gender-based violence and femicide, coupled with a lack of genuine commitment to addressing the problem. Cases of (aggravated) homicide under Article 114(1) item 5 CC, are also rare in practice in the context of femicide. Motives such as jealousy or the desire to possess and control a partner are not considered as "base motives", even though research indicates that these are among the most common motives for committing femicide.[63] Furthermore, there have been no cases in which femicides have been treated as "hate crimes".[64] Judicial practice continues to rely on disputed mitigating circumstances – which are prohibited under the Istanbul Convention – related to marital or family status, including whether the perpetrator and the victim were married or divorced, the fact that a marital union has been dissolved, the age of the perpetrator, and the number of children.[65]

Serbia's approach to improving the protection of women from violence – and potentially from femicide – can be further illustrated by reviewing criminal offences such as stalking, sexual harassment, female genital mutilation, and forced marriage, which are in (in)compliance with the requirements of the Istanbul Convention. Some of them have serious shortcomings, indicating a declarative approach to the process of aligning domestic legislation with international legal requirements regarding the protection of women from violence.[66] GREVIO (Group of Experts on Action against Violence against Women and Domestic Violence) also criticizes Serbian legal provisions concerning sexual violence and the shortages of services for providing assistance and support to victims.[67]

63 Simeunović-Patić, B., Jovanović, S., 2017, Intimnopartnerski umori v Srbiji: Pojavne značilnosti, dejavniki tveganja in spolne (ne)simetrije, *Revija za kriminalistiko in kriminologijo*, Vol. 68, No.1, p. 33; Beker, K., 2023, p. 54.

64 Mršević, Z., Security as a Prerequisite of Freedom – (Not)Efficiency of Criminal Law Protection, in: Pavlović, Z., (ed.), 2017, *Freedom, Security: The Right to Privacy*, Novi Sad, Provincial Protector of Citizens – Ombudsman / Belgrade, Institute of Criminological and Sociological Research, p. 202; Kolaković-Bojović, M., Đukanović, A., 2023, *Zločini mržnje u Republici Srbiji*, Belgrade, Institut za kriminološka i sociološka istraživanja, p. 104.

65 Beker, K., 2023, pp. 55–56.

66 Jovanović, S., Vujičić, N., Requirements of the Istanbul Convention in Domestic Criminal Law and Court Practice, in: Popović, D. V., Kunda, I., Meškić, Z., Omerović, E., (eds.), 2022, *Balkan Yearbook of European and International Law 2021*, Cham, Springer, pp. 213–238.

67 GREVIO, 2020, *Baseline Evaluation Report on Legislative and other Measures giving Effect to the Provisions of the Council of Europe Convention on Preventing and Com-*

In addition to criminal protection, the Law on Prevention of Domestic Violence[68] was adopted in 2016 with the aim of ensuring effective prevention of domestic violence and the prompt, timely, and effective protection and support for victims. This should be achieved through an integrated, multisectoral, and human rights-based approach to the prevention, prosecution, and protection of women victims of domestic violence, but also other criminal offences, most of which fall under the category of gender-based violence.[69] Nevertheless, as some data suggests, the preventive measures outlined in this legal act are not effectively applied in preventing femicide.[70] The functioning of the groups for coordination and cooperation, composed of representatives of the police, prosecution and social welfare centres, is also flawed, despite their intended purpose of providing a timely, coordinated, and above all individualized response in cases of domestic violence and other forms of violence against women, as defined in Article 4 of the Istanbul Convention. These groups are expected to ensure victim safety and conduct adequate risk assessments, yet in practice, these objectives are often not fully realized.[71]

To conclude, we may argue that by acting in the above-described manner, the state risks being brought before the European Court of Human Rights, for violating the principle of due diligence in the prevention, investigation, and prosecution of violence against women. Having in mind the current legislative situation in Serbia, and penal populism on the scene, introducing femicide as a separate criminal offence would certainly be a step forward at the declarative level (such as previous legal interventions have done), but the precise and clear conceptualization of the offence is necessary in order to make it applicable in practice. Undoubtedly, it would be the shorter path to achieving some positive effects, to make phenomenon more visible and condemned, and to make professionals implement existing (and applicable) legal provisions, but changing the mind of both the professional and lay communities is the most important and the most challenging task, as more legal provisions does not necessarily mean more justice and protection for the victims.

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bating Violence against Women and Domestic Violence (Istanbul Convention): Serbia, Strasbourg, Council of Europe, pp. 21–22.

68 Zakon o sprečavanju nasilja u porodici, *Službeni glasnik RS*, Nos. 94/2016, 10/2023.

69 Ćopić, S., 2019, Razvoj zakonodavnog okvira za zaštitu žena žrtava nasilja u Srbiji, *Temida*, Vol. 22, No. 2.

70 Beker, K., 2023, p. 58.

71 *Ibid*.; GREVIO, 2020, pp. 52–53.

4. Concluding Remarks

The killing of women, justified by beliefs in the inferiority of their existence, and in the supremacy of the male gender and its perceived "natural" right to determine a woman's fate and even her life, is an age-old phenomenon. At its core, femicide represents the gender-motivated killing of a woman, which is deeply rooted in patriarchal conceptions of gender roles, systemic discrimination, and violence, compounded by the complicity of the state, which, even if not approving, often tolerates such violence through inadequate responses, thereby perpetuating it. Despite the efforts of contemporary societies to eradicate this practice and to ensure gender equality, it remains deeply entrenched and resistant to various measures designed to protect women from gender-based violence and femicide as its most extreme manifestation. Femicide, as a relatively recent concept, adopted in the European policy discourse and even in legislation, has contributed to making this form of crime more visible, distinguishing it from other types of homicide, and calling for targeted action.

The Istanbul Convention and EU Directive2024/1385, as well as EIGE research and recommendations, provide a solid foundation for the development of national policies and legislation aimed at combating and eradicating femicide. A crucial initial step would be the adoption of the concept of femicide in public discourse and policymaking, as well as its potential incorporation into criminal law – an issue that requires further evidence-based exploration and discussion within professional circles. However, what remains essential is a genuine understanding of the phenomenon itself and the political and societal willingness to confront it decisively. Understanding the underlying factors that contribute to violence against women in family and intimate partner settings, including femicide, is crucial, particularly bearing in mind that this violence stems from deeply rooted social and gender norms that perpetuate inequality and discrimination, ultimately influencing the status of women in society.[72] To address this issue, ongoing efforts for preventing lethal outcomes are essential for building the capacities of professionals within relevant institutions for coordinated action, proper implementation of legal provisions, and timely and effective responses to cases of domestic and other forms of violence against women. It is also vital to foster changes in societal attitudes toward gender roles, challenge and eliminate gender stereotypes, and promote a culture of zero tolerance for violence against

72 UNODC, 2019, *Global Study on Homicide 2019*, Vienna, United Nations Office on Drugs and Crime.

women. In addition, collecting, sharing and publishing data on violence against women in general and femicide in particular is important for evidence-based policy development, as well as for raising awareness of the negative impact of violence against women and the available preventive strategies and support mechanisms.

One of the possible solutions could be introducing femicide as a separate criminal offence, e.g., as a new form of aggravated murder, which might assist in making this phenomenon more visible, but could also achieve social condemnation. Consequently, this would mean admitting the lack of capacity of the state and society to prevent femicidal victimization and adequately implement other existing preventive mechanisms, prior to criminal law activation (as criminal law is meant to be *ultima ratio*), as well as to implement existing criminal legal provisions that envisage other offences, which could successfully "cover" femicidal practice, followed by adequate sentencing. New criminal offence could be justified by same reasons as was the case with the introduction of the domestic violence criminal offence in 2002: sufficiently adequate offences had existed previously, but there had not been enough understanding and sensitivity to apply them in cases of domestic violence. Even today, some shortages in this area still exist, thus showing that legal responses are just one piece of the puzzle of culture – which is changing slowly.

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STRATEGIJE ZA PREVENCIJU I ISKORENJIVANJE FEMICIDA: PRAVNE, INSTITUCIONALNE I DRUŠTVENE DIMENZIJE, IZAZOVI I PERSPEKTIVE

Slađana Jovanović

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APSTRAKT

Femicid se najčešće konceptualizuje i definiše kao rodno zasnovano ili rodno motivisano ubistvo žena. To je globalni problem, zbog čega mnoge države sprovode zakonodavne, političke i praktične mere i akcije u cilju njegove prevencije i suzbijanja. Cilj rada je da analizira aktuelne napore u borbi protiv femicida, kao i da predstavi primere dobre prakse u odgovoru pojedinih država na ovaj oblik kriminaliteta. Svrha rada je da istakne neophodnost prepoznavanja femicida kao upornog problema, identifikuje njegove karakteristike i uzroke, te razmotri potencijalne pravce za razvoj efikasnih mera prevencije. Poseban akcenat stavljen je na femicid u kontekstu nasilja u porodici ili partnerskim odnosima, s obzirom na to da je reč o najrasprostranjenijem obliku femicida, koji se dešava u širem kontekstu strukturne diskriminacije i nasilja prema ženama.

Ključne reči: femicid, feminicid, rodno motivisano ubistvo žena, porodično nasilje, partnersko nasilje, Evropa.

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ORIGINAL SCIENTIFIC ARTICLE

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THE CONSTITUTIONAL COURT OF CROATIA AND THE CONCEPT OF INHERENT POWERS

Abstract: *The article examines the Croatian Constitutional Court's interpretive approach to the existence of its own "inherent" powers and their relationship to the powers enumerated in the Constitution. In this context, we analyze the relevant case law of the Constitutional Court through several key questions: does the Court exercise its "inherent" powers through the concept of a descriptive or autonomous norm, does this result in significant changes in the Court's procedures, does the Court apply measures defined by the Constitution, and does this significantly disrupt the constitutional balance of competences and powers. The findings show that the Court applies the concept of the autonomous norm, thereby significantly altering both its procedures and the measures it is authorized to impose. We conclude that such an approach by the Court significantly undermines the principle of the balance of powers as envisaged in the Constitution.*

Key words: Constitutional Court of the Republic of Croatia, Constitutional Adjudication, Constitutional Interpretation, Inherent Powers, Enumerated Powers, Separation of Powers.

1. Introduction

The Constitutional Court of the Republic of Croatia is a Kelsenian[1] constitutional court whose status and powers are regulated by the Constitu-

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1 Kelsen, H., Who Ought to Be the Guardian of the Constitution?, in: Vinx, L., (ed. and trans.), 2015, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge, Cambridge University Press, pp. 174–221. See also Kelsen, H., 1942, Judicial Review of Legislation: A Comparative Study of the

tion of the Republic of Croatia[2] and the Constitutional Act on the Constitutional Court of the Republic of Croatia[3] (CACC), which is equivalent to the Constitution in terms of its legal force.

Article 125 of the Constitution, as a *lex generalis*, stipulates that the Constitutional Court has the power to conduct constitutional review, as well as other "ancillary powers".[4] The procedural avenues of using these powers are further elaborated in detail in the CACC. For example, the CACC provides that the control of the constitutionality of programs and activities of political parties procedurally is contingent on the request submitted by specifically designated actors[5] and that the control of constitutionality of a citizen-initiated referendum question is initiated at the request of the Parliament.[6]

However, Article 2 (1) CACC, which describes the basic constitutional position and functions of the Constitutional Court, has proven to be instrumental in the Court's expansive reading of its own powers, which has led to the circumvention of procedural limitations prescribed in the CACC. Article 2 (1) of the CACC stipulates that the Constitutional Court "shall guarantee compliance with and application of the Constitution of the Republic of Croatia and shall base its work on provisions of the

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Austrian and the American Constitution, *The Journal of Politics*, Vol. 4, No. 2, pp. 183–200.

2 The consolidated text of the Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, Nos. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14, edited and translated by the Constitutional Court, (https://www.usud.hr/en/the-constitution, 30. 9. 2025).

3 The consolidated text of the Constitutional Act on the Constitutional Court of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, No. 49/02 of 3 May 2002, (https://www.usud.hr/en/constitutional-act, 30. 9. 2025).

4 Ginsburg, T., Elkins, Z., 2009, Ancillary Powers of Constitutional Courts, *Texas Law Review*, Vol. 87, No. 7, pp. 1431–1462. These "ancillary powers" include the Constitutional Court's power to decide on constitutional complaints; to monitor compliance with the Constitution and laws and to report to the Croatian Parliament on detected violations thereof; to decide on jurisdictional disputes between the legislative, executive, and judicial branches; to decide on the impeachment of the President of the Republic; to monitor compliance of the programs and activities of political parties with the Constitution (with the possibility of banning noncompliant political parties); to monitor the constitutionality and legality of elections and referenda; to resolve electoral disputes falling outside the jurisdiction of the courts; and to perform other duties specified by the Constitution. See Article 125 of the Constitution.

5 Article 86 CACC stipulates that the request to ban the work of a political party or its section may be submitted "by the President of the Republic of Croatia, the Croatian Parliament, the Government of the Republic of Croatia, the Supreme Court of the Republic of Croatia, the body authorized for registration of the parties and the Attorney General of the Republic of Croatia".

6 Article 95 (1) CACC.

Constitution of the Republic of Croatia and the CACC."[7] By relying on Article 2 (1) CACC, the Constitutional Court has developed a body of case law in which it has constructed a concept of "general constitutional control"[8] (GCC), which enabled it to base its actions beyond its enumerated powers or even beyond its implied powers, which are constructed on the basis of enumerated powers.[9] This approach to interpreting the

7 We have identified similar provisions that describe the basic functions and tasks of constitutional courts in certain Central and Eastern European states. See Article 11 (6) of the Constitution of Montenegro ("Constitutionality and legality shall be protected by the Constitutional Court."), (https://www.constituteproject.org/constitution/Montenegro_2013, 4. 11. 2025); Article 1 (1) of the Constitutional Court Act that regulates Slovenian Constitutional Court ("The Constitutional Court is the highest body of the judicial power for the protection of constitutionality, legality, human rights and fundamental freedoms."), (https://www.us-rs.si/en/legal-basis/statutes, 4. 11. 2025); Article 2 (1) of the Law of 24 October 2018 on the Constitutional Court of the Slovak Republic ("The Constitutional Court is an independent judicial authority charged with the protection of constitutionality."), (https://codices.coe.int/codices/documents/law/C3723E53-4F16-4D4D-848B-08DC0D38DFC5, 4. 11. 2025); Article 1 (1) of the Law No. 47/1992 – On the Organisation and Operation of the Constitutional Court that regulates the Constitutional Court of Romania ("The Constitutional Court is the guarantor of the supremacy of the Constitution."), (https://www.ccr.ro/en/legal-basis/, 4. 11. 2025); Article 24 (1) of the Fundamental Law of Hungary ("The Constitutional Court shall be the principal organ for the protection of the Fundamental Law."), (https://www.constituteproject.org/constitution/Hungary_2016, 4. 11. 2025). These comparative examples demonstrate that the issue of interpreting a provision that describes the basic functions of a constitutional court, as a basis for the construction of its independent powers that go well beyond its enumerated and implied powers, could be relevant for other legal orders as well.

8 Also known as general control powers and general controlling powers. See, respectively, Gardašević, Đ., 2016, Constitutional Interpretations of Direct Democracy in Croatia, *Iustinianus Primus Law Review*, Vol. 7, No. 1, pp. 15–16; and Barić, S., 2016, The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU, *Analitika – Center for Social Research*, Working Paper 6/2016, p. 24.

9 For the relationship between enumerated and implied powers in United States (US) law, see Constitution Annotated, *ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers*, (https://constitution.congress.gov/browse/essay/artI-S1-3-3/ALDE_00013292/, 30. 9. 2025). See also *McCulloh v. Maryland, 17 U.S. 316 (1819)* in which the US Supreme Court held that the Congress has the power to establish a federal bank because this power is "necessary and proper" for exercising the enumerated congressional power to tax and spend. In the context of Croatia, an implied power of the Constitutional Court would be, for example, the power to control the compliance of laws with international treaties that are part of the Croatian legal order, as implied by the power of constitutional review of laws, having in mind the fact that international treaties that "have been concluded and ratified in accordance with the Constitution, which have been published and which have entered into force shall be a component of the domestic legal order of the Republic of Croatia and shall have

Constitutional Court's own powers resembles the theory of inherent powers,[10] which is well known and criticized in comparative law[11] due to its likelihood to jeopardize the rule of law,[12] checks and balances,[13] democratic legitimacy,[14] and the overall idea of a written constitution and limited powers.[15]

Notwithstanding the growing importance and consequential character of this case law, the concept and the use of GCC in Croatia has not yet been subjected to thorough academic analysis. Therefore, in this paper we aim to critically assess the case law on the Constitutional Court's use of GCC in order to demonstrate how the expansive reading of Article 2 (1) CACC threatens the basic idea rooted in the concept of the rule

primacy over domestic law" (Article 134 of the Constitution), meaning that control of compliance of laws with international treaties amounts to effective enforcement of the hierarchy of positive sources of law. See Constitutional Court, U-I-745/1999, 8 November 2000.

10 Also known as "prerogative, residual, inherent, autonomous, general, unilateral", and "non-statutory powers" (Cohn, M., 2015, Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context, *The International and Comparative Law Quarterly*, Vol. 64, No. 1, p. 69), or "plenary", "exclusive" and "extra-constitutional powers" (Fisher, L., 2010, The Unitary Executive and Inherent Executive Power, *University of Pennsylvania Journal of Constitutional Law*, Vol. 12, No. 2, p. 571). Originally developed in the context of the debates on the extent of executive power in US law, inherent powers, unlike enumerated and implied powers, relate to those powers that cannot be traced to a constitutional provision that contains a specific power. On the contrary, inherent powers are based on a vague categorical grant of power due to their (alleged) inextricable connection to the basic nature of the institution in question. See Fisher, L., 2007, Invoking Inherent Powers: A Primer, *Presidential Studies Quarterly*, Vol. 37, No. 1, pp. 1–2. For differences between the notions of implied powers and inherent powers in the strong sense, see Kinkopf, N., 2007, Inherent Presidential Power and Constitutional Structure, *Presidential Studies Quarterly*, Vol. 37, No. 1, pp. 37–38.

11 See Fisher, L., 2007, pp. 1–22; Cohn, M., 2015, pp. 65–102; Casey, C., 2017, Underexplored Corners: Inherent Executive Power in the Irish Constitutional Order, *Dublin University Law Journal*, Vol. 40, No. 1, pp. 1–36; Martinez, J. S., 2006, Inherent Executive Power: A Comparative Perspective, *The Yale Law Journal*, Vol. 115, No. 9, pp. 2480–2511; Chemerinsky, E., 1983, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, *Southern California Law Review*, Vol. 56, No. 1, pp. 863–911. For Croatian literature, see Gardašević, Đ., Dioba vlasti u Ustavu Sjedinjenih Američkih Država, in: Kostadinov, B., (ed.), 2022, *Poredbeno ustavno pravo – dioba vlasti*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, pp. 16–26. The literature we list here relates to inherent powers of the executive branch of government.

12 Fisher, L., 2010, p. 591.

13 Kinkopf, N., 2007, p. 48.

14 Cohn, M., 2015, pp. 68–69.

15 Martinez, J. S., 2006, pp. 2510–2511; Kinkopf, N., 2007, p. 39.

of law and of a written constitution according to which state institutions should base its proceedings, as well as its substantive decisions, on legal bases that are prescribed by law.[16] In other words, we will scrutinize the potential of Article 2 (1) CACC to be used as a fruitful "repository"[17] of independent powers that transcend the textual and purposive limits of the Constitution.

In that respect, we put forth three main claims. First, there are two possible approaches to interpreting Article 2 (1) CACC: the descriptive norm approach and the autonomous norm approach, the latter being the approach according to which Article 2 (1) is a source of independent powers of the Court. Second, the Constitutional Court has used Article 2 (1) CACC as an autonomous legal norm. Third, we claim that the autonomous norm approach to Article 2 (1) has serious negative implications for the balance of powers in Croatian legal order.

The paper is structured as follows. First, we will give an outline of relevant case law by describing factual and legal problems that arose in cases in which the Constitutional Court developed and used the concept of GCC. Second, we will provide a detailed structural analysis of GCC as it has been used in examined cases. More precisely, after explaining the factual scenarios that triggered the activation of GCC (the question of "serious threats"), we will first develop a methodological framework for analysis, which will then be applied to the relevant case law. In our analysis, we will identify two possible approaches to interpreting Article 2 (1) CACC: the descriptive norm approach and the autonomous norm approach. The issue relating to whether the Court in a certain case used descriptive norm approach or the autonomous norm approach to Article 2 (1) CACC will be called the "basic issue". In order to address the basic issue, we will look at which specific procedural grounds the Court formally invoked in the introductory part of its acts (the "technical issue"); we will examine whether the Court somehow affected the procedure it was formally supposed to follow (the "procedural issue"); we will detect whether the Court substantively imposed the measure it was entitled to impose (the "substantive issue"); and we will assess whether the Court expanded its own zone of authority at the detriment of exclusive competences and powers of other constitutional actors (the "spillover issue"). Finally, we will offer concluding remarks in which we will synthesize the dangers that the GCC concept poses for the balance of powers in Croatian constitutional law.

16 Compare Martinez, J. S., 2006, pp. 2510–2511; Kinkopf, N., 2007, pp. 47–48.

17 See Cohn, M., 2015, p. 83.

2. An Outline of the Case Law on the Development and the Use of GCC

In the following section we will examine the cases in which the Court developed and used the concept of its GCC. The cases are the following: the *Referendum* case,[18] the *10 April Street* case,[19] the *Milanović* cases,[20] and the *Judges' Mandates* case,[21] as well as its aftermath in the *Ruling on the Report* case.[22]

2.1. THE *REFERENDUM* CASE: UNLEASHING THE CONCEPT OF UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS AS AN AVENUE OF PROTECTING CROATIAN CONSTITUTIONAL IDENTITY

The genesis of the concept of GCC can be traced back to the 2013 Statement of the Constitutional Court[23] (the *Referendum* case) issued in relation to the "Marriage Referendum" – the first successful national citizen-initiated referendum that intended to, and eventually succeeded in, amending the Constitution so that it would include a heterosexual definition of marriage that had previously already been present in the Family Act.[24] The Court found the Parliament's decision to call a national referendum[25] to be a convenient opportunity to present several constitutional stances that touch upon the state of Croatian referendum law, both in general and in relation to the specific "Marriage Referendum", as well

18 Constitutional Court, Statement on the Popular Constitutional Referendum on the Definition of Marriage, SuS-1/2013, 14 November 2013.

19 Constitutional Court, U-II-6111/2013, 10 October 2017.

20 Constitutional Court, Warning related to the Statement of the President of the Republic Mr. Zoran Milanović about his intention to run as a candidate on the elections for Croatian Parliament called by the decision of the President of the Republic of Croatia from 15 March 2024, U-VII-1263/2024, 18 March 2024 (*Milanović I*); and Constitutional Court, Communication and Warning to Participants in the Elections Held on 17 April 2024, U-VII-1263/2024-II, 19 April 2024 (*Milanović II*).

21 Constitutional Court, Report on the failure to elect ten judges to the Constitutional Court of the Republic of Croatia, U-X-5162/2024, 6 December 2024.

22 Constitutional Court, U-II-804/2025, 8 July 2025.

23 Constitutional Court, SuS-1/2013, 14 November 2013.

24 For a detailed legal analysis of the 2013 referendum (including its substantive aspects), see Horvat Vuković, A., Referendum narodne inicijative 2013 – Ustavni identitet kao osnova ustavnosudskog aktivizma, in: Podolnjak, R., Smerdel, B., (eds.), 2014, *Referendum narodne inicijative u Hrvatskoj i Sloveniji: Ustavnopravno uređenje, iskustva i perspektive*, Zagreb, Hrvatska udruga za ustavno pravo, pp. 166–169.

25 *Official Gazette of the Republic of Croatia*, No. 134, 9 November 2013.

as to develop a brand new understanding of the nature of its own powers, which would eventually introduce the doctrine of unconstitutional constitutional amendments in Croatian law.[26]

In order to better explain how the concept of the Court's GCC was "announced" (if not also de facto fully activated) in the area of control of constitutionality of referendum, for the first time in the *Referendum* case, it is first necessary to examine Article 95 (1) CACC. This article states that "[a]t the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 86, paragraphs 1–3, of the Constitution of the Republic of Croatia for calling a referendum have been met."

It follows from the text of Article 95 (1) CACC that the Court's control of the constitutionality of the citizen-initiated referendum question is contingent on the parliamentary request. In other words, the parliamentary request is the procedural requirement that activates the Court's competence to rule on the issue.

However, in the 2013 Statement[27] the Court self-activated its jurisdiction to control constitutionality of the referendum question by invoking its GCC. This way, the Court developed an independent ground for review that is not limited by a special provision that regulates in detail the control of constitutionality of referendums (Article 95 (1) CACC), at the same time limiting it to exceptional circumstances that relate to undermining Croatian constitutional identity.[28]

This invocation of the concept of the GCC was developed and articulated by the Court as follows: "On the basis of Article 125.9 of the Constitution and Articles 2 (1) and 87.2 [CACC], the Constitutional Court possesses the general constitutional duty to guarantee respect for the Constitution and to supervise constitutionality of a state referendum, right until the formal end of the referendum procedure. Accordingly, after the Croatian Parliament decides on calling a referendum on the basis of a popular constitutional initiative, without before acting upon the Article 95 (1) CACC, the Constitutional Court does not lose its general control

26 The Statement is analyzed in detail in Gardašević, Đ., 2016, pp. 13–18.

27 The legal basis for issuing this Statement remains unclear. See *infra* 3.3.1.

28 For previous invocation of Croatian constitutional identity, see Constitutional Court, U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011, and U-I-994/2011, 29 July 2011. See also Kostadinov, B., Ustavni identitet, in: Bačić, A., (ed.), 2011, *Dvadeseta obljetnica Ustava Republike Hrvatske*, Zagreb, Hrvatska akademija znanosti i umjetnosti, pp. 305–337.

powers over constitutionality of such a referendum. However, taking into account the constitution-making power of the Croatian Parliament as the highest law-making and representative body in the State, the Constitutional Court assesses that it can use general control powers in such a situation only exceptionally, when it determines such a formal or substantial unconstitutionality of a referendum question, or such a grave procedural error which threatens to undermine the structural features of the Croatian constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). Primary protection of these values does not exclude the power of the constitution-maker to expressly exclude some other issues from the range of permitted referendum questions."[29]

The Court has thus de facto "relaxed" the procedural requirement of receiving "a request from the Croatian Parliament" from Article 95 (1) CACC by relying on GCC, which is presented as a self-standing ground[30] for control of constitutionality of the referendum process. Therefore, the Court's GCC in principle exists independently of the *lex specialis* that is Article 95 (1) CACC.

However, being aware of the fact that a "power grab" of this kind goes "*ultra et extra* of the text of the Constitution and the CACC",[31] the Court qualified its use by relying on the concept of "structural features of the Croatian constitutional state", designating its GCC as an exceptional, *ultima ratio* avenue of protecting Croatian "constitutional identity" from its erosion by unconstitutional constitutional amendments – this time in the area of control of citizen-initiated referendums for amending the Constitution.[32]

On the merits, the Court expressed the need to uphold the Parliament's Decision, which was adopted with more than two-thirds of the votes.[33] Even though the Court found that there were no present indications to use its GCC and examine the constitutionality of the referendum question – relying also on the fact that the heterosexual definition of marriage was found in the Family Law Act, which would bar it from examining

29 Constitutional Court, SuS-1/2013, 14 November 2013, pp. 2–3. Translation taken from Gardašević, Đ., 2016, pp. 15–16.

30 This was confirmed in Constitutional Court, U-VIIR-164/2014, 13 January 2014, para. 10 ("In the 14 November 2013 Statement the [Court] has established that it has, outside of and independently of Article 95 [CACC], general control powers during the entire referendum process."), translated by authors.

31 Horvat Vuković, A., 2014, p. 154, translated by authors.

32 Gardašević, Đ., 2016, p. 17.

33 Constitutional Court, SuS-1/2013, 14 November 2013, p. 11.

the constitutionality of that piece of legislation extra-procedurally[34] – it conducted a de facto control of constitutionality presented as "informal dicta".[35] The Court relied on international, European and constitutional guarantees that apply to same-sex life unions, concluding that "a potential amendment of the Constitution with the [heterosexual definition of marriage] cannot in any way influence the further development of the legislative framework of [heterosexual] extramarital union and same-sex union in line with the constitutional requirement to guarantee respect and legal protection for everyone's private and family life, and human dignity."[36] Having in mind these considerations, the Court concluded that the proposed referendum question was not unconstitutional.

The precedential character of the Statement is evident, especially in regard to the invocation of Article 2 (1) CACC expressing a general position of the Court in the Croatian constitutional system, explicitly stating that the Court bases its work on the provisions of the Constitution and the CACC. This, however, may indicate that this legal basis is more of a "restrictive" rather than "expansive" tool for interpreting the limits of constitutional adjudication in Croatia.[37]

In the remainder of this section it will be shown that the 2013 Statement unleashed a far-reaching concept that would later spill over into other areas of constitutional adjudication, incrementally redefining the scope of the Court's powers and further relaxing certain procedural requirements for activating its jurisdiction. Regarding the subsequent case law on control of constitutionality of referendums, the Court once again did not intervene *proprio motu* because in all future instances the Parliament had requested control of constitutionality of the proposed referendum questions.[38]

34 *Ibid*., p. 8.

35 Gardašević, Đ., 2016, p. 14.

36 Constitutional Court, SuS-1/2013, 14 November 2013, p. 12, translated by authors. For additional well-argued criticism of the Court's treatment of the substantive issues in this case, see Horvat Vuković, A., 2014, pp. 166–169.

37 Thus, such a restrictive approach to the interpretation of Article 2 (1) conforms with the descriptive norm approach that we describe *infra*. On the other hand, one of the possible explanations for using the expansive approach in case law was the Court's motivation to construct its "self-defense" strategy, in order to strengthen its position towards other branches of power in Croatia. Specifically, it is possible that the Court expanded the reach of its powers to contain the control of substantive constitutionality of constitutional amendments (even beyond the control of constitutionality of a citizen-initiated referendum question that aims to amend the Constitution) as a response to certain statements made by politicians and other public actors at the time, which called for abolishing the Court as an institution (Gardašević, Đ., 2016, p. 33).

38 Constitutional Court, U-VIIR-4640/2014, 12 August 2014 (referendum on the Cyrillic script); U-VIIR-7346/2014, 10 December 2014 (referendum on the election

2.2. THE *10 APRIL STREET* CASE: CONTROL OF THE CONSTITUTIONALITY AND LEGALITY OF "GENERAL ACTS" OF LOCAL UNITS THAT THREATEN CROATIAN CONSTITUTIONAL IDENTITY

The second instance of invoking GCC was related to the expansion of powers of the Constitutional Court at the detriment of the High Administrative Court (HAC), and contrary to the statutory provisions on objective administrative dispute.[39] In addition, the invocation of the concept has once again been entangled with the doctrine of Croatian constitutional identity.

In particular, in the *10 April Street* case[40] the Court bypassed an explicit provision of Article 3 (2) of the Administrative Dispute Resolution Act[41] which established the competence of the HAC to review the legality of general acts of bodies of units of local and regional self-government (local units).[42] On its merits, the case concerned a request for a constitutionality review of a "general act" of a local unit submitted to the Constitutional Court by the Government in 2013. The "general act" was a local decision (Decision on changing street names in Slatinski Drenovac) on naming streets in Slatinski Drenovac in the municipality of Čačinci, which was disputed because local authorities named one of the streets honoring the WWII-era Ustashe fascist movement.

The procedural dilemma was the following. In 2010, the concept of an objective administrative dispute was introduced in the Administrative

system); U-VIIR-1158/2015, 21 April 2015 (referendum on monetization of Croatia's highways); U-VIIR-1159/2015, 8 April 2015 (referendum on outsourcing); U-VIIR-2180/2022, 16 May 2022; and U-VIIR-2181/2022, 16 May 2022 (the COVID-19 referendums). For a detailed overview and criticism of some of these cases, see Horvat Vuković, A., 2016, Ustavni sud Republike Hrvatske i referendumi narodne inicijative 2013. – 2015.: Analiza i prijedlozi, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 37, No. 2, pp. 805–835. It is interesting to point out that the Court did reference its GCC in Constitutional Court, U-VIIR-343/2020, 19 May 2020 (referendum on retirement age), para. 4, at the request of the parliamentary Committee on the Constitution, Standing Orders and Political System, which asked for guidance in case when the necessary number of signatures has been collected by the citizen initiative, but the Parliament has since adopted legislative measures that were the subject matter of the proposed referendum question.

39 On objective administrative dispute in Croatian law, see Omejec, J., Banić, S., 2012, Diferencijacija propisa i općih akata u budućoj praksi Ustavnog suda i Upravnog suda u povodu Zakona o upravnim sporovima (2010), *Zbornik radova Pravnog fakulteta u Splitu*, Vol. 49, No. 2, pp. 309–324.

40 Constitutional Court, U-II-6111/2013, 10 October 2017.

41 *Official Gazette of the Republic of Croatia*, No. 20/10.

42 On competence of the HAC, see Omejec, J., Banić, S., 2012, p. 316 ff.

Dispute Resolution Act, prescribing that the HAC is competent to review legality of "general acts" of, inter alia, local units.[43] Up until 2012, when the Act came into force, the Constitutional Court has reviewed certain "general acts" that could have been subsumed under the definition of "other regulations" from Article 125.2 of the Constitution (including certain general acts of local units) because no other body had the competence to decide on these issues.[44] According to its case law that followed the introduction of the objective administrative dispute, in the transitional period of 1 January 2012 until February 2014, the Constitutional Court would have referred the submitted proposals which relate to control of legality of general acts to the HAC. After the transitional period had expired, the Constitutional Court would have rejected the proposal.[45]

Notwithstanding the described regime and conflicting previous case law, the Court did not refer the case to the HAC[46] nor did it reject the case due to competence issues but instead relied on Article 2 (1) CACC and decided that it "imposes a positive obligation [for the Court] to conduct general constitutional control in case when it judges that the commitment to democracy embodied in the Constitution is at stake, i.e., when fundamental values of a democratic state based on the rule of law and human rights protection, are endangered".[47] After invoking the concept of GCC, the Court limited it to "situations in which the Government requests a constitutionality review of general acts of local units on the basis of Article 35.4 CACC in relation to Article 80 of the [Law on Local and Regional Self-Government], and which requests consideration of questions important for the identity of the Croatian constitutional state".[48] After establishing the described procedural framework, the Court examined the case on its substance and nullified[49] the relevant article of the Decision on changing street names in Slatinski Drenovac, clarifying that naming a street after the date related to the WWII fascist movement represented

43 Omejec, J., Banić, S., 2012, pp. 316–317.

44 See *ibid*., pp. 313–314.

45 See Constitutional Court, U-II-5157/2005, 5 March 2012, and the dissenting opinion of Judge Šumanović, in Constitutional Court, U-II-6111/2013, 10 October 2017, para. 2.2. See also Constitutional Court, U-II-6111/2013, 10 October 2017, para. 9.

46 The Government's request was referred to the Court in 2013, in the period when the Court still referred wrongly submitted requests to the HAC. Judge Šumanović also emphasises that, under relevant Croatian laws, the Government is only allowed to request a control of constitutionality of statutes of local units, and not of its general acts. See the dissenting opinion of Judge Šumanović, in Constitutional Court, U-II-6111/2013, 10 October 2017, para. 2.1.

47 Constitutional Court, U-II-6111/2013, 10 October 2017, para. 10.1.

48 *Ibid*., para. 11.

49 *Ibid*., I.

"the annulment of the rights and freedoms guaranteed by the Constitution within the framework of a democratic state based on the rule of law".[50]

The dissenting opinion of Judge Šumanović harshly criticized both the procedural and the substantive aspects of the decision. In regard to the procedural aspect, which is relevant for this article, Judge Šumanović rejected the concept of GCC and described it as "an usurpation" of competence from ordinary courts which are entitled to review the legality of general acts of local units.[51] He emphasized that Article 2 (1) CACC has "no jurisdictional character" because it regulates the constitutional position ("role and tasks") of the Court in a general manner.[52] In other words, unlike Article 125 of the Constitution which is a legal basis for competence, Article 2 (1) CACC is not a provision that contains a specific power.[53] In addition, Judge Šumanović claimed that the concept of GCC does not stem from the intentions of the constitution-maker because the CACC explicitly regulates powers of "specific constitutional control" (such as control of constitutionality of programs and activities of political parties and control of constitutionality and legality of referendums) which would be "superfluous" if there existed a concept of general control.[54] It should also be noted that Judge Šumanović distinguished the use of GCC in the present case and its use in the *Referendum* case on the grounds that the *Referendum* case relates to special control powers of the Court, which are enumerated in Article 125.9 of the Constitution.[55]

This case illustrates how the concept of GCC extends to other areas of Croatian constitutional law as a tool of strengthening the Court's position and maneuvering space. In particular, it shows the Court's willingness to put aside provisions that regulate the jurisdiction of administrative courts, as well as its established previous case law, in order to intervene when it deems it appropriate – once again employing the doctrine of Croatian constitutional identity as a benchmark for expansion of its own powers.

2.3. THE *MILANOVIĆ* CASES: EXTRA-PROCEDURAL CONTROL OF THE CONSTITUTIONALITY AND LEGALITY OF ELECTIONS

The third instance of reliance on GCC has manifested in the second of the two "*Milanović* cases", and those cases are in fact two self-initiated

50 *Ibid*., para. 20.

51 Dissenting opinion of Judge Šumanović, in Constitutional Court, U-II-6111/2013, 10 October 2017, para. 1.

52 *Ibid*.

53 *Ibid*., para. 2.4.

54 *Ibid*.

55 *Ibid*.

distinct acts of the Court: the Warning related to the Statement of the President of the Republic Mr. Zoran Milanović about his intention to run as a candidate in the elections for Croatian Parliament called by the decision of the President of the Republic of Croatia from 15 March 2024 (*Milanović I*),[56] and the Communication and Warning to Participants in the Elections Held on 17 April 2024 (*Milanović II*).[57]

The warning in *Milanović I* was provoked by a statement given at a press conference by Zoran Milanović, the incumbent President of the Republic, in which he expressed his intention to run for office in parliamentary elections as an independent member of the opposition coalition led by the Social Democratic Party (SDP).[58] President Milanović emphasized that he would resign from the position of the President of the Republic only after the (potential) electoral "victory", adding that he would be the SDP's "candidate for the position of the Prime Minister" regardless of whether he was formally listed as a candidate in the parliamentary elections.[59] The Constitutional Court reacted *proprio motu* by relying on provisions that regulate its role in control of constitutionality of elections,[60] holding on the substance that being a candidate or acting as a candidate in parliamentary elections is "incompatible with the constitutional position of the President of the Republic and the principle of separation of powers" found in Article 4 of the Constitution.[61] If the holder of the office of the President of the Republic intended to be a candidate on parliamentary elections or to be pointed out as a candidate, he should immediately resign.[62] The Court announced that it would strictly monitor the electoral process and, in case of unconstitutional behavior of actors in that process, it would use its powers which included the power to annul certain electoral activities.[63] Finally, the Court warned both President Milanović and the SDP to "cease and desist" from unconstitutional activities, while also demanding that the State Electoral Commission of the Republic of Croatia (SEC) ensure that the electoral

56 Constitutional Court, U-VII-1263/2024, 18 March 2024.

57 Constitutional Court, U-VII-1263/2024-II, 19 April 2024.

58 Constitutional Court, U-VII-1263/2024, 18 March 2024, para. 1.

59 *Ibid*.

60 Article 125.9 of the Constitution, Article 87.1 CACC, and Article 96 (1) of the Law on the Election of Members of the Croatian Parliament, *Official Gazette of the Republic of Croatia*, Nos. 116/99, 109/00, 53/03, 69/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, 19/15, 104/15, 98/19 (Law on the Election of Members of the Croatian Parliament).

61 Constitutional Court, U-VII-1263/2024, 18 March 2024, para. 4.

62 *Ibid*., para. 5.

63 *Ibid*., para. 6.

process is conducted in line with relevant legal requirements, including this opinion expressed by the Court.[64]

The dissenting opinion of three judges[65] offered a more nuanced and better argued analysis of the pending constitutional controversy, in essence agreeing that the President of the Republic cannot be a candidate in parliamentary elections as long as they still remain in the function. However, the dissenting judges heavily criticized certain important procedural aspects of the *Milanović I* warning, including the fact that the Court chose the form of a "warning" in order to circumvent important procedural guarantees for resolving constitutional controversies required by the Constitution and the CACC.[66] In other words, the Court decided on "interests and rights of participants in the electoral process", which is a decision on the merits that required the form of a decision.[67] To briefly summarize this point of the dissenting opinion, we should examine the text of Article 89 CACC which reads as follows: "When the Constitutional Court ascertains that the participants in the elections act contrary to the Constitution and the law, it shall inform the public over the media, if needed warn the competent bodies, and in case of violation which influenced or might have influenced the results of the elections, shall annul all or separate electoral activities and decisions, which preceded such violation." The dissenting judges analyzed this provision and concluded that the decision that amounts to ascertaining that the participants in the elections act contrary to the Constitution should not be delivered in the form of a warning. Rather, the Court should have delivered a decision with all the necessary procedural guarantees that are encompassed by this form of the Court's act (the structure of the act should include, inter alia, both the operative part and the arguments, while the part which includes instructions to the SEC should have been delivered in the form of a ruling).[68] Only after the decision on the merits is given the Court may decide to inform the public and the competent bodies about the assessed unconstitutionality and the appropriate measures needed to rectify it.[69]

The dissenting judges also pointed out that the case in question dealt with the SDP's freedom of (political) expression[70] and the freedom

64 *Ibid*., para. 7.

65 Dissenting opinion of judges Abramović, Kušan and Selanec in case U-VII-1263/2024, 18 March 2024.

66 *Ibid*., pp. 2–3.

67 *Ibid*., p. 3.

68 *Ibid*., pp. 2–3.

69 *Ibid*., p. 2.

70 Article 38 of the Constitution.

of political action,[71] which were restricted in an unprincipled manner because the claim that the SDP's actions were contrary to the Constitution had not been substantiated.[72] In this aspect, the dissenters claimed that the majority of the Court denied the SDP the right to a fair trial.[73]

It was necessary to examine the most striking aspects of the constitutional controversy that was addressed in *Milanović I* in order to fully grasp the magnitude of the Court's involvement in the political process and the (inadequate) procedural avenue that was chosen for intervening. The story continued when the Court disproportionately intervened in the political process after the parliamentary elections were held on 17 April 2024, this time openly invoking its GCC.

In *Milanović II*, in a self-initiated[74] Communication and Warning that was issued after the disputed parliamentary elections were held, the Court concluded that President Milanović's behavior disqualified him as a (potential) candidate to be entrusted with the mandate to form the Government or to become the Prime Minister of the future Government.[75] This time, the Court relied both on its powers of control of the electoral process and its GCC.[76] On substance, the Court held that President Milanović's aforementioned statements, which were given during the election campaign without his resignation from the position of the President of the Republic somehow "contaminated" the electoral process[77] which, in the Court's opinion, meant that President Milanović could not be proposed as the person designated with the task to form the Government even if he resigned from the position.[78] In particular, the Court

71 Article 6 of the Constitution.

72 Dissenting opinion of judges Abramović, Kušan and Selanec in case U-VII-1623/2024, 18 March 2024, pp. 4–5.

73 Article 29 of the Constitution. Dissenting opinion of judges Abramović, Kušan and Selanec in case U-VII-1623/2024, 18 March 2024, pp. 4–5.

74 Just like in *Milanović I*, the *proprio motu* activation of the Court's jurisdiction is very problematic, considering that Article 88 CACC specifically prescribes the exhaustive list of applicants in cases of review of the constitutionality of elections. According to Article 88 CACC, the specified applicants in such cases are "political parties, candidates, not less than 100 voters or not less than 5 percent of voters of the constituency in which the elections are held". See also Articles 96–100 of the Law on the Election of the Members of the Croatian Parliament.

75 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, paras. 6–7.

76 The GCC are referenced both in the introductory part of the act and in para. 7.

77 However, in *Milanović II* the Court in fact did not carry out a control of constitutionality of the election process because it was concerned with the appointment of the Prime Minister-designate. This procedure is, by its definition, a post-election activity which necessarily depends on the results of the already conducted elections and thus falls outside of the notion of the election process.

78 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, para. 7.

concluded that President Milanović had not respected the instruction given in *Milanović I* because he had persistently acted as a participant in the elections, thereby acting contrary to Article 5 (2) of the Constitution as well as endangering the rule of law and democratic multiparty system of Croatia.[79] In other words, the past actions of President Milanović disqualified him from becoming a Prime Minister *pro futuro*, regardless of whether he resigned or not.[80] Somewhat contradictorily[81], the Court emphasized that it did not question the will of the electorate expressed in the parliamentary elections that were held on 17 April 2024,[82] but it warned all the participants of the said elections to be fully aware that the President of the Republic cannot be in the same time entrusted with a mandate to form the Government.[83] In this sense, the Court stated that "[a]ny other interpretation undermines the democratic multiparty parliamentary constitutional order and the rule of law."[84]

The outline of the dissenting opinion, authored by the same judges who dissented in *Milanović I*, was the following: (I) there were no constitutional impediments for Zoran Milanović to become the next Prime Minister if he would resign from the position of the President of the Republic, (II) any potential violation of the Constitution by the President in the dischargement of his duties is regulated by Article 105 of the Constitution, which prescribes a detailed procedure that could result in a sanction of relieving the holder of the office of their duty (not prohibiting them from being appointed as Prime Minister!), and (III) the *Milanović II* case constituted a "threat" to the new convocation of the Parliament that was "deeply unconstitutional" because it restricted the elected representatives in their right to decide on who should (not) be the next Prime Minister.[85]

The *Milanović* cases opened a plethora of constitutional problems, which ranged from defining the general constitutional role of the President to the repeated expansion of the concept of the Court's GCC and the limits of its self-initiated jurisdiction. Both the procedural and the substantive issues of the said cases were dealt with laconically, with the Court once again bypassing important procedural limitations and safeguards.

79 *Ibid*., para. 6.

80 *Ibid*., paras. 6–8.

81 As the dissenting judges point out in para. I. See Constitutional opinion in case U-VII-1263/2024-II, 19 April 2024 (Dissenting opinion of judges Abramović, Kušan and Selanec in *Milanović II*).

82 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, para. 8.

83 *Ibid*., para. 7.

84 *Ibid*.

85 The dissenting opinion of judges Abramović, Kušan and Selanec in *Milanović II*.

2.4. THE *JUDGES' MANDATES* CASE AND ITS AFTERMATH: SELF-EXTENDING THE TERMS OF OFFICE WHEN THE DYSFUNCTIONAL POLITICAL PROCESS THREATENS THE EXISTENCE OF A FUNCTIONAL CONSTITUTIONAL COURT

Finally, the Court invoked its GCC on 6 December 2024 in the highly controversial Report on the failure to elect ten judges to the Constitutional Court of the Republic of Croatia (Report), with ten out of thirteen judges of the Court deciding that the Constitution grants them the right to preserve the (endangered) functionality of the Court by continuing their mandates even after their expiry, (only) in the case that the Parliament fails to elect new judges in the constitutionally prescribed period, pending the election of new judges (*Judges' Mandates* case).[86] The majority of judges found that the exceptional circumstances of the ongoing dysfunctional political process of electing ten new judges to the Court allowed them to read into the Constitution the possibility of self-extension of their own terms of office, notwithstanding the clear text of Article 122 (1) of the Constitution which provides no such solution. Article 122 (1) of the Constitution stipulates that "the term of office of a Constitutional Court [judge] shall be eight years and shall be extended by up to six months in exceptional cases, where, upon the expiry of an incumbent's term of office, a new justice has not been elected or has not assumed office." Due to the two-thirds parliamentary majority requirement for electing judges to the Court,[87] which requires the ruling party and the opposition to reach a consensus on the candidates, the 2024 election process in the Parliament was slowed down and postponed until the very last week of the constitutionally mandated period for election, opening the possibility for the entire process to be deadlocked. The failure to elect ten judges to the Court in the prescribed period would result in the functional paralysis of the Court, which would be left without the majority of its members.[88] The chain of events that followed in the week of 2 December 2024 led to one of the most curious developments in Croatian constitutional law, which deserves a more detailed examination.

On 7 June 2024, the eight-year term of office expired for ten of the thirteen judges[89] of the Court who were elected on 7 June 2016. Considering

86 Constitutional Court, Report U-X-5162/2024, 6 December 2024.

87 Article 122 of the Constitution.

88 See Constitutional Court, Report U-X-5162/2024, 6 December 2024, paras. 5 and 7 (explaining that the Court with only three judges would not be able to conduct abstract constitutional review, decide on constitutional complaints on the merits, or control the constitutionality of the (then upcoming) presidential elections).

89 The reason why ten out of thirteen judges ended their terms simultaneously traces back to the period of between 2007 and 2015 when certain vacancies on the Court

that the Parliament did not issue a public call for election of new judges in time, the terms of office of the ten expiring judges were extended (up to six months) according to Article 122 (1) of the Constitution, with the final date for electing new judges being 7 December 2024.[90] On 4 December, in a session of the Committee on the Constitution, Standing Orders and Political System, the parliamentary majority and the opposition reached a consensus on the final list of candidates to be elected, scheduling the final vote for 6 December. However, the opposition simultaneously filed a motion of censure against the Government, and when it became clear that the vote of confidence would take place on the same day as the vote for electing members to the Court, the opposition refused to participate in the latter vote, causing further postponement of election for 7 December. The prevailing view of the public (and the majority of the Court)[91] was that the terms of office of ten judges who had originally been elected on 7 June 2016, with a 6 months extension, would expire by the end of 6 December, making 7 December at 00:00 the moment when the Court would be left without the majority necessary for performing most of its functions.[92] After it had become clear that the Parliament would not vote on the election of new judges on 6 December, the Court held a session on the same day, resulting in the infamous Report concluding that Parliamentary failure to elect new judges in time resulted in "exceptional circumstances, factual impossibility for the Constitutional Court to function, i.e., [in] severe impairment of the highest values of the constitutional order – democracy based on the rule of law and human rights protection" which required the majority of the Court's judges to decide that the Court would continue to function in its current composition up until the election of new judges.[93] The Court also

had not been filled in due time, which led the Court to function without the full number of its members, and at one point the number of judges had dropped to ten sitting judges. See Antić, T., 2015, Postupak i uvjeti za izbor sudaca Ustavnog suda Republike Hrvatske, *Pravni vjesnik*, Vol. 31, No. 1, p. 49.

90 There are conflicting interpretations as to whether the last day of office for the ten judges whose terms were expiring was 6 or 7 of December, considering that the ten judges had been elected on 7 June 2016. The majority of judges understood that the terms were to expire at 00:00 on 7 December, while the dissenting judges Abramović, Kušan and Selanec claimed that the terms of office would expire at the end of 7 December. See Written response of judges Abramović, Kušan and Selanec in relation to Constitutional Court, Report U-X-5162/2024, 13 December 2024 (Dissenting opinion of judges Abramović, Kušan and Selanec in U-X-5162/2024), pp. 17–18.

91 See Constitutional Court, Report U-X-5162/2024, 6 December 2024.

92 *Ibid*., paras. 5 and 7.

93 *Ibid*., paras. 7–8. The Court also invoked the Opinion on certain questions relating to the functioning of the Constitutional Court of Bosnia and Herzegovina, adopted by the Venice Commission at its 138th Plenary Session (Venice, 15–16 March 2024), Opinion CDL-AD(2024)002-e, Venice, 18 March 2024, about the competences of the

emphasized that it would refrain from ruling on substantive cases until 11 December and called upon the Parliament to elect new judges promptly.[94] Moreover, it decided that the Report would not be made public or delivered to the Parliament if the new judges were elected on the session scheduled for 7 December.[95] In the end, new judges were elected to the Court on 7 December.

The legal existence of the "Schrodinger's"[96] report was therefore unaddressed until the Court, in its new composition, later held that it is legally void.[97] However, it is fair to say that the unprecedented nature of the Report, which self-extended the terms of office for ten out of thirteen judges, cannot be overstated because it overstretched the methods of constitutional interpretation beyond its (textual) limits and further shook the (already) fragile public image of the Court.

Regarding the question of powers, which is the focus of this article, the Court stated that the legal bases for issuing the Report are Article 125.5 of the Constitution (the Court "shall monitor compliance with the Constitution and laws and shall report to the Croatian Parliament on detected violations thereof") and Article 104 (1) CACC ("The Constitutional Court shall monitor the execution of constitutionality and legality and report to the Croatian Parliament about any kind of unconstitutionality and illegality it has observed").[98] Furthermore, the Court invoked Article 2 (1) CACC and repeated its established formula, holding that "it imposes a positive obligation [for the Court] to conduct [GCC] in case when it judges that the commitment to democracy embodied in the Constitution is at stake, i.e., when fundamental values of a democratic state, based on the rule of law and human rights protection, are endangered."[99] The Court

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Constitutional court of Bosnia and Herzegovina. The dissenting judges offered argumentation on why this Opinion was inapplicable in the Croatian situation. See the dissenting opinion of judges Abramović, Kušan and Selanec, in Constitutional Court, U-X-5162/2024, 13 December 2024, pp. 13–15.

94 Constitutional Court, Report U-X-5162/2024, 6 December 2024, para. 9.

95 *Ibid*., para. 10. Article 104 (3) CACC clearly emphasizes that the report "shall be delivered in written form to the Speaker of the Croatian Parliament, who shall so inform the Croatian Parliament".

96 See Constitutional Court, U-II-804/2025, 8 July 2025, para. 7. Put simply, Schrodinger's cat is a thought experiment in quantum physics in which a cat that is sealed in a box is simultaneously both alive and dead until observed. See Matthias, M., Schrodinger's Cat, in: *Britannica* (https://www.britannica.com/science/Schrodingers-cat, 30. 9. 2025).

97 Constitutional Court, U-II-804/2025, 8 July 2025, para. 7.

98 The introductory part of Constitutional Court, Report U-X-5162/2024, 6 December 2024.

99 Constitutional Court, Report U-X-5162/2024, para. 1, translated by authors.

further clarified that it may "use its [GCC] only exceptionally, when it establishes such instance that threatens to undermine the structural features of the Croatian constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution). The circumstances have to be exceptional, the threat real, and other means ineffective."[100] In support of the self-extension of judicial mandates, the Court also invoked Article 31 (5) CACC ("The Constitutional Court may determine the manner in which its decision, respective its ruling shall be executed.") which is inapplicable in this instance because the Report is neither a decision nor a ruling. In any event, Article 104 CACC clearly prescribes that the report on unconstitutionalities and illegalities observed by the Court are to be delivered to the Parliament, leaving aside any doubt as to which institution should exclusively act upon the Report in the present case.

In a nutshell, the "dissenting opinion" of judges Abramović, Kušan and Selanec has offered several lines of criticism of the Report, arguing that the majority does not properly understand the role of the Court in Croatian constitutional architecture[101] and that they did not grasp the *telos* of Article 122 of the Constitution, which relates to protecting the independence and impartiality of the Court.[102] In relation to the question of the (dis)proportionality[103] of the self-extension of the terms of office of the sitting judges, the dissenting judges have concluded that a situation in which the actors in the political process have failed to elect judges to the Court in due time should be resolved in the same democratic political arena, through the activation of the mechanisms of checks and balances that are built into the structure of Croatian political process.[104]

As previously mentioned, the legal epilogue of the self-extension of terms of office came in July 2025, in the *Ruling on the Report*, when the renewed composition of the Court rejected the request for review of constitutionality of the Report that had been submitted by thirty-four Members of Croatian Parliament, on the basis of lacking competence to review an act of that kind.[105] The Members of Parliament who requested the review

100 *Ibid*.

101 Written statement of judges Abramović, Kušan and Selanec in U-X-5162/2024, 13 December 2024, pp. 20–25. The dissenting judges specifically explain how the Court is not the superior guarantor of the separation of powers in Croatia but just one of the (important!) constitutional actors, fully immersed in the interplay of different mechanisms of checks and balances.

102 *Ibid*., pp. 11–13.

103 *Ibid*., p. 16 ff.

104 *Ibid*., pp. 5–6, 25.

105 Constitutional Court, U-II-804/2025, 8 July 2025.

of constitutionality claimed that several articles of the Constitution (including Article 125) and Article 3 CACC (regulating that the work of the Court shall be public) were breached by the self-extension of the terms of office for the sitting judges of the Court.[106] The case opened many intriguing questions, including whether it is possible for the Court to control the constitutionality of its own acts[107] and whether the judges who participated in the authoring of the Report should have recused themselves from deciding in the case.[108] To put it briefly, the majority opinion held that the Report cannot be understood as the "other regulation" referred to in Article 125.2 of the Constitution[109] because it does not fulfil the well-established criteria of having abstract and general qualities,[110] also mentioning that it makes no sense for the Court to control the constitutionality of its own acts.[111] Therefore, the Court now shielded itself from fully entering into the merits of the case[112] by invoking Article 125 of the Constitution,

106 *Ibid*., para. 2.

107 We agree that the Court cannot review the constitutionality of its own acts directly. Rather, the Court is fully competent to change its standing case law once future cases, which come before it in a procedurally sound manner (e.g., by way of requests for control of constitutionality of certain statutory provisions), present an opportunity to depart from past conclusions and offer different constitutional interpretations due to strong legal argumentation.

108 Seven out of thirteen judges of the current composition of the Court were sitting judges who took part in the authoring of the Report (regardless of whether they supported it or not). Judges Abramović, Kušan and Selanec recused themselves from deciding in the case, while judges Šeparović, Arlović, Šumanović and Mlinarić thought that there were no grounds for recusal. See concurring opinion of judges Šeparović, Arlović, Šumanović and Mlinarić, in Constitutional Court, U-II-804/2025, 8 July 2025. See also the dissenting opinion of judges Bezbradica Jelavić and Marochini Zrinski, in Constitutional Court, U-II-804/2025, 8 July 2025.

109 Stipulating that the Court "shall decide on the compliance of other regulations with the Constitution and laws".

110 Constitutional Court, U-II-804/2025, para. 7. The Court emphasized that the Report is an internal act of the Court, which regulates legal relations of judges of the Constitutional Court, instead of having *erga omnes* effects (as if self-extension of terms of office of judges of the Constitutional Court is an internal affair of the Court) and which, in the same time, is not legally binding because it has never been delivered to the Parliament, meaning that it is legally nonexistent. The Court thus rejected the claim of the Members of Parliament who implied that the Report has qualities of a "Schrodinger's cat" because of its uncertain legal nature (para. 7). However, the whole paragraph is contradictory because it first analyzes the legal nature of the Report to establish that it cannot be subsumed under the category of "other regulation", and eventually concluding that it is legally nonexistent.

111 Constitutional Court, U-II-804/2025, para. 7.

112 See also dissenting opinion of Judge Kostadinov, in Constitutional Court U-II-804/2025, 8 July 2025, where she emphasizes that the majority opinion did not adequately respond to the separation of powers questions, which were posed in the case, nor to the question of legal nature of the Report (para. 1).

a provision that had been so easily stretched by creative methods of interpretation in previous case law.

Leaving all miscellaneous questions aside, the most relevant part of the *Ruling on the Report* for the concept of GCC concerns the stance expressed in the majority opinion, according to which Article 2 (1) CACC represents a "defining norm that clarifies the constitutional position of the Constitutional Court posited by the Constitution."[113] The majority opinion further states that "it is accepted in legal theory that the enumeration of [the Court's] powers is exhaustive because it cannot be expanded by interpretation."[114] The constitution-maker "has opted to protect certain constitutional values by constitutional adjudication" in order to respect legal certainty, meaning that, in turn, constitutional adjudication cannot touch upon certain questions that have been left outside of the Court's jurisdiction even though it might be prudent for the Court to address them.[115] The opinion concludes that the Court has no competence to adjudicate contrary to Article 125 of the Constitution, and the power to change this regime is vested in the democratic constitution-maker, not the Court itself.[116]

This interpretation of the Court's powers may seem like a positive step forward and an indication of a principled curtailment of the use of GCC, but it effectively stays silent on the case law which developed and used this dubious concept to circumvent the limits of the constitutional text related to the Court's powers and competences. It therefore seems much more realistic to conclude that the Court again utilized the "pick and choose" approach to the theory of its own powers, which apparently depends on the instrumentalities of the moment and practical considerations. The newly presented "self-restraint" thus just adds to the confusion about the limits of the Court's powers – instead of resolving it.

3. Structural Analysis of GCC

After we previously described the factual and legal problems in the relevant case law, we will here first deal with the qualification of facts that provoked the action of the Court in cases in which it used its GCC. Then we will present the methodology according to which we will analyze the case law. Finally, applying the presented methodology, we will more thoroughly analyze the case law in order to detect the way in which the Court interpreted the meaning of the GCC.

113 Constitutional Court, U-II-804/2025, 8 July 2025, para. 8, translated by authors.

114 *Ibid*., para. 8.1.

115 *Ibid*.

116 *Ibid*., para. 8.2.

3.1. ACTIVATING GCC: THE PROBLEM OF A "SERIOUS THREAT"

The first issue we deal with relates to the qualification of the factual situations that led to the activation of the Court's GCC. It is, therefore, a matter of focusing on the events that triggered the aforementioned cases. The concrete question in this context is: are there any specific characteristics that define the cases in which the Court used its GCC?

In the *Referendum* case, the Court emphasized that it could act on its own initiative and block a referendum by using its GCC only exceptionally, "when it determines such a formal or substantial unconstitutionality of a referendum question, or such a grave procedural error which threatens to undermine the structural features of the Croatian constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (articles 1 and 3 of the Constitution)."[117] Apart from this general standing, the Court in this case also offered an additional and rather important explanation of its own review powers and the good they serve to protect. Referring to the opinion of the Venice Commission in the Hungarian case,[118] the Constitutional Court concluded that it could also block such referendum initiatives that lead to "the unacceptable systematic 'constitutionalisation' of legislation in a democratic society" because such an "approach of shielding ordinary law from constitutional review", if it is a systematic one, can result "in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution."[119] To this, also quoting the Venice Commission's opinion, the Court added that "the reduction (...) and, in some cases, complete removal ('constitutionalised' matters) of the competence of the Constitutional Court to control ordinary legislation according to the standards of the Fundamental Law results in an infringement of democratic checks and balances and the separation of powers."[120] It concluded that its foregoing expressed standings "are general in nature and relate to all amendments to the constitution, regardless of whether they are undertaken by Parliament or by a citizens' constitutional referendum."[121]

117 Constitutional Court, SuS-1/2013, 14 November 2013, pp. 2–3.

118 Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14–15 June 2013), Opinion 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013.

119 Constitutional Court, SuS-1/2013, 14 November 2013, p. 9, citing Opinion on the Fourth Amendment to the Fundamental Law of Hungary, adopted by the Venice Commission at its 95th Plenary Session (Venice, 14–15 June 2013), Opinion 720/2013, CDL-AD(2013)012, Strasbourg, 17 June 2013.

120 *Ibid*.

121 *Ibid*.

The Court actually therefore proclaimed that it had the power to decide on the constitutionality of constitutional amendments.

In the *10 April Street* case, the Court first pointed out that Article 2 (1) CACC "imposes a positive obligation [for the Court] to conduct general constitutional control in case when it judges that the commitment to democracy embodied in the Constitution is at stake, i.e., when fundamental values of a democratic state based on the rule of law and human rights protection, are endangered."[122] In striking down the contested decision on naming the streets in a municipality, the Court, quite rightly, decided that the decision was "in direct conflict with the rule of law, in such a way that it undermines the identity of the Croatian constitutional state to a degree that cannot be tolerated."[123] Due to the very specific facts of this particular case (the issue of naming streets after certain historical events), it is also worth stressing that, in its interpretation, the Court also took into account several other relevant elements. This way, the Court referred to the European Court of Human Rights' case of *Garaudy v. France*[124] and used the notion of "well-known historical truths", further explaining that negation or revision of "clearly established historical facts, such as the Holocaust", represents an abuse of rights from Article 17 of the European Convention on Human Rights, while also leading to "negation of basic values of the constitutional order of the Republic of Croatia."[125] By analogy, the Court stated that "nothing in the constitutional order may be interpreted as implying the right of anyone to engage in any activity or perform any act aimed at the destruction of any right or freedom guaranteed by the Constitution."[126] Moreover, the Court argued that structural constitutional principles – such as the rule of law, the principles of freedom, equality, national equality, peacemaking, and respect for human rights – "determine the structure and essence of the Croatian state" and that "the Republic of Croatia can only remain what it is if none of the structural constitutional principles are repealed or amended."[127] For the Court, the contested decision on naming a street after the date related to the WWII-era fascist movement represented "the annulment of the rights and freedoms guaranteed by the Constitution within the framework of a democratic state based on the rule of law."[128]

122 Constitutional Court, U-II-6111/2013, 10 October 2017, para. 10.1, translated by authors.

123 *Ibid*., para. 21.

124 ECtHR, *Garaudy v. France*, Application No. 65831/01, Decision of 24 June 2003.

125 Constitutional Court, U-II-6111/2013, 10 October 2017, paras. 17.1–18.

126 *Ibid*., para. 20.

127 *Ibid*., para. 19.1.

128 *Ibid*., para. 20.

In the *Milanović I* case, the Court warned that the decisions of all the participants in elections must conform to the "fundamental values of the Croatian constitutional state" and pointed that candidacy of the President of the Republic in the parliamentary elections or their presentation as a candidate for the Prime Minister or any other public or professional office, is incompatible with their constitutional position and powers and represents a breach of the principle of the separation of powers.[129] In the *Milanović II* case, the Court's assessment that the President took an active part in the campaign for parliamentary elections led it to conclude that this amounted to a breach of the duty to abide by the Constitution and the law and respect for the legal order of the Republic of Croatia, as well as to a violation of the rule of law and the democratic multi-party system as the highest values of the Constitution.[130]

Finally, in the *Judges' Mandates* case, the Constitutional Court extended its marriage referendum interpretation to a more general formulation, stating that it could use its GCC only exceptionally, and not only in reference to referendums, but also when it establishes such instance that "threatens to undermine the structural features of the Croatian constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia (Articles 1 and 3 of the Constitution)."[131] To this the Court added another general qualification, stressing that, in order to invoke its GCC, "[t]he circumstances have to be exceptional, the threat real, and other means ineffective."[132] Also in line with its general standings in this case, the Court argued that its duty to "guarantee compliance with and application of the Constitution" represented a "positive obligation [for the Court] to conduct [GCC] in case when it judges that the commitment to democracy embodied in the Constitution is at stake, i.e., when the fundamental values of a democratic state, based on the rule of law and human rights protection, are endangered."[133]

129 Constitutional Court, U-VII-1263/2024, 18 March 2024. In their interpretation, although leaving the space for some exceptions, the dissenters in this case also argued that the constitutional position of the President of the Republic, in principle, should prevent them from interfering with activities of political parties. The judges also stressed that this was their "principled position that ultimately serves to achieve and preserve the fundamental values of the constitutional order of the Republic of Croatia, such as, first and foremost, respect for human rights, freedom, equality of citizens, and multi-party democracy, but also peacemaking, social justice, and ultimately the rule of law" (p. 11).

130 Constitutional Court, U-VII-1263/2024-II, 19 April 2024.

131 Constitutional Court, Report U-X-5162/2024, 6 December 2024, para. 1, translated by authors.

132 *Ibid*.

133 *Ibid*.

Specifically, the Court found that the Parliament's failure to elect new judges in time resulted in the obstruction of the full and proper functioning of that Court, not only with regard to the forthcoming presidential elections, but also in relation to the Court's other competences.[134] In this regard, the Court determined that Parliament's failure in fact called into question "the basic functioning of a key constitutional body," which, in turn, represented a "severe impairment of the highest values of the constitutional order – democracy based on the rule of law and human rights protection."[135]

In this part, we tried to show that the common characteristic of all the analyzed cases is that the events that provoked them were interpreted by the Court as events of an extraordinary nature. More specifically, the Court defined all of these events as presenting a very serious threat to specific constitutionally protected values. From that point of view, it seems obvious that the Court needed to present such an interpretation of events, in order to justify its recourse to the exceptional powers contained in the concept of GCC.

3.2. METHODOLOGICAL APPROACH TO GCC

The problems that we address in this part relate to the Court's legal reaction to various sorts of (serious) threats it had discovered in its case law. Consequently, here we specifically try to identify the legal norms on the basis of which the Court acted in individual cases. Of course, the emphasis here is on Article 2 (1) CACC which the Court used to construct the concept of GCC. However, this was not always the only provision used by the Court in the cases under analysis. This fact complicates to a certain extent the view of the whole issue of the GCC and requires some methodological clarification.

In our analysis we offer two general interpretive approaches to Article 2 (1) CACC.[136]

134 *Ibid*., paras. 5 and 7.

135 *Ibid*., para. 7. In their response to the majority in this segment of the case, the dissenting judges argued that a blockade of the Constitutional Court due to the failure of the Parliament to elect new judges would not automatically amount to the blockade of the whole constitutional system. In their opinion, the constitutional framework contained enough elements to provide for alternatives to the Court's actions, primarily by guaranteeing various forms of control by ordinary courts. This part of the analysis goes beyond the aims of this paper, but noteworthy that the dissenters also needed to address the specific issue of a "serious threat", an element we deem extremely important for an overall analysis of the Constitutional Court's use of GCC.

136 See Gardašević, Đ., 2016, pp. 16–18.

The first approach treats Article 2 (1) as having merely an introductory and descriptive character, serving only to outline in general terms the jurisdiction and powers of the Constitutional Court. Under this view – which we call the "descriptive norm approach" – specific competences and powers of the Court are subsequently enumerated in specific provisions of the Constitution and the CACC, regulating particular cases that are within the jurisdiction of the Court. In other words, this approach means that the reliance on Article 2 (1) CACC can neither affect the procedure to be followed nor the substantive decision that the Court can impose, in a concrete case. Claims in support of this particular approach have been pursued first by some of the Court's dissenting judges, who on separate occasions either argued that Article 2 (1) CACC evidently was not an independent or separate jurisdictional norm of its own,[137] or warned that an extensive interpretation of GCC may have no limits.[138] The majority in the Court also took this interpretive approach to Article 2 (1) in the 8 July 2025 *Ruling on the Report*.[139]

The second interpretive approach to Article 2 (1), in contrast, leads to the understanding of Article 2 (1) as conferring an autonomous power to the Constitutional Court, the exercise of which is not necessarily linked to its enumerated procedural or substantive competences and powers. Under this view – which we call the "autonomous norm approach" – the Court could theoretically use Article 2 (1) CACC, either partially or even to its full extent: in the former scenario, to modify either the procedures it conducts or the substance of decisions it delivers, and in the latter scenario to possibly do both. In the following analysis we will show in greater detail the specific instances in which this particular interpretive approach to Article 2 (1) emerged.

These two possible interpretive approaches to Article 2 (1) CACC[140] form the basis of our research in this part. In other words, the basic

137 See the dissenting opinion of Judge Šumanović in the *10 April Street* case: U-II-6111/2013, 10 October 2017, para. 1.

138 Written statement of judges Abramović, Kušan and Selanec, in Constitutional Court, U-X-5162/2024, 13 December 2024, p. 12. See also Gardašević, Đ., 2016, pp. 16–18.

139 Constitutional Court, U-II-804/2025, 8 July 2025, para. 8.1. This fact alone could lead to the conclusion that the whole story on the Court's GCC is thus closed. However, we believe that there are enough reasons to think otherwise, as we will show below.

140 Compare to the US Supreme Court's approach in *District of Columbia v. Heller*. In that case, the majority opinion analyzed the text of the 2nd Amendment to the US Constitution, concluding that it consists of two distinct clauses: a prefatory clause (with an introductory purpose) and an operative clause, which is decisive for ascertaining the meaning of the whole provision. Furthermore, while the prefatory clause

question that we delve into is whether the Court used the descriptive norm approach or the autonomous norm approach in its case law. For the purposes of our analysis, we will call this issue the "basic issue".

In order to verify which of the two approaches the Court actually took, we will first look into the technicalities: we will first examine what specific procedural constitutional grounds the Court formally invoked in the introductory (formal) part of its acts, when dealing with a concrete case. This second issue we will call the "technical issue."

However, since this information may be misleading if read alone and without the whole context, in the following examination we will go into more detail. In that sense, what interests us here are two additional issues.

On the one hand, we will explore whether the Court, in its case law involving the use of GCC, somehow affected the procedure it was conducting. This means that we will look into whether the Court modified the procedure it was supposed to formally follow (because such a procedure stems from the formal grounds that the Court invoked in launching the procedure) or it in fact introduced some new procedure to solve a particular case. This third issue that we explore in this analysis we will call the "procedural issue".

On the other hand, we will try to detect whether the Court, in its case law involving the use of GCC, imposed a measure it was entitled to impose (because the measure is the prescribed result of the procedure that the Court formally initiated when taking on a particular case), or it invented an entirely new type of a measure. This fourth issue, which relates to the substantive outcome of a particular case, we will call the "substantive issue".

We suggest that these two additional questions may significantly contribute to the understanding of how the Court applied its GCC in specific cases. This way, it seems evident that if the Court uses the descriptive norm approach, then it should conduct only the procedures and impose the measures that are clearly and explicitly foreseen in those provisions of the Constitution and the CACC – different from Article 2 (1) – that define precisely those procedures and those measures. In other words, in this case the Court is not using its GCC as an autonomous source of competence and power, but is rather relying on its enumerated competences and powers to conduct specifically defined procedures and to impose specifically defined measures.

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does not "limit [the operative clause] grammatically", it does "[announce] a purpose" of the operative clause, which also has interpretive relevance (*District of Columbia v. Heller*, 554 U.S. 570 (2008), p. 577).

However, if the Court somehow modifies or changes its procedures and its measures, then it is actually using the autonomous norm approach. Such a conclusion also seems evident: the Court cannot change its procedures and its measures if it is relying on its specifically enumerated powers, precisely because the exact definitions of the procedures and of the measures bind the Court to follow specifically those procedures and to impose those measures.

Finally, as we will demonstrate, extensive interpretations of Article 2 (1) can have significant practical impacts on both the way in which the Constitutional Court operates (procedural issue) and the substance of the decisions it delivers (substantive issue). At the same time, such extensive interpretations may mean that the Court is expanding its own competences and powers, as well as that it is expanding them at the detriment of the exclusive competences and powers of other constitutional actors[141], namely: the Parliament, the President of the Republic, the courts, and other relevant subjects (applicants).[142] This fact triggers the fifth issue that we will explore in our analysis: is there concern for real spillovers of power in the observed patterns of the Constitutional Court's interpretations of its GCC? This fifth question we will call the "spillover issue".

We believe that the structure of the analysis used here may help the better understanding of the true nature of the Constitutional Court's use of GCC and the true strength of Article 2 (1). We also suggest that the true strength of Article 2 (1) depends precisely on real consequences that its application produces. These consequences should clearly be visible from the answers to the questions we are posing: is Article 2 (1) used as an autonomous or as a descriptive norm; is it used as a norm that affects the Court's enumerated procedures and measures; and is it used in a way that leads to the spillover of power?

In order to find the answers to these questions, we will revisit the relevant case law.

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141 See, e.g., Chemerinsky, E., 1987, A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases, *Southern California Law Review*, Vol. 60, No. 1, pp. 110–111.

142 The Croatian Constitutional Court introduced the concept of exclusive competences – notably of certain bodies of representative democracy – in its previous case law related to referendums, arguing, specifically, that there exist exclusive competences of the Government to propose the state budget and annual accounts, and the exclusive competence of the Parliament to pass the state budget. Most importantly for the purposes in question, from a purely interpretive point of view, the Court established that such exclusive competences may be defined either expressly or they may derive from the Constitution as a whole (Constitutional Court, U-VIIR-1159/2015, 8 April 2015).

3.3. ANALYSIS OF THE CASE LAW

Having in mind the analytical questions that we defined in the previous section, we now proceed to verify how the Court reacted to them in its case law.

3.3.1. The *Referendum* Case

In the *Referendum* case the Court did not formally specify the legal grounds for issuing its 2013 Statement (technical issue). By saying that the Court did not specify the legal grounds for issuing the said Statement we refer to the fact that such specification was not included into the introductory part of the Statement, which is a necessary part of the composition of the Court's decisions and rulings;[143] indeed, the Statement did not belong to either of those two categories. However, in order to clarify its authority to issue the Statement, the Court should have nevertheless specified under which constitutional provision it was acting, because it is primarily with this information that a proper conclusion could be made on what grounds the Court actually produced the Statement. In fact, the Court formally may issue special acts in order to interpret specific constitutional issues, but when it does so, the Court typically invokes the provisions that empower it to "monitor compliance with the Constitution and laws" and to "report to the Croatian Parliament about any kind of unconstitutionality and illegality it has observed."[144] Thus, the fact that the Court did not formally specify exactly those or any other provisions as the grounds for its action means that the action was substantively based on the Court's GCC. Such a baseline conclusion on the technical issue, however, is not enough to provide conclusive understanding of what really happened in this case and our analysis continues with the remaining four issues that we formulated above.

The "procedural issue" in this case may be observed from three perspectives. First, if we plausibly assume that the Court acted under its enumerated competence to "monitor compliance with the Constitution and laws", then the formal outcome of the Statement (substantive issue) should have been the Court's "report to the Croatian Parliament about any kind of unconstitutionality and illegality it has observed." This, however, was not the case, because the Statement itself resulted in more farfetched consequences. With this we pass on the second perspective of the "procedural issue".

143 Article 28 CACC.

144 Article 125.5 of the Constitution and Article 104 CACC.

Second, in the Statement the Court clearly stressed that it possessed the special power to initiate a review of constitutionality of referendums and it determined that this power emerged precisely from its GCC. This in fact means that the Court supplemented the review procedure in a way that indeed did not block the Parliament from initiating such proceedings on its own. However, by construing its own power to initiate a review – even without the proper motion by the Parliament to that end – the Court actually did make the power to initiate a constitutional review of a referendum question a nonexclusive power of the Parliament. And these facts clearly show not only that the Court, in its Statement, modified the procedure of review of constitutionality of referendums (procedural issue) but also that a spillover of power occurred – this time at the detriment of the Parliament (spillover issue).[145] Furthermore, it is worth reiterating that in this case the Court actually did carry out a review of the "Marriage Referendum" question, although it did so only de facto.

The third perspective of the "procedural issue" requires us to understand that the Court invented an entirely new procedure in its 2013 Statement on the Marriage Referendum, with no prior explicit counterpart in the text of the Constitution, i.e., the procedure for reviewing the constitutionality of constitutional amendments. With this, the Court also invented an entirely new power for itself: the power to annul unconstitutional constitutional amendments.[146] It seems obvious that by doing this the Court carried out three important things: it introduced a new procedure (procedural issue), it introduced a new measure (substantive issue), and it significantly affected the way that constitution-makers (the people

145 It is worth pointing out here that Article 95 (1) CACC seems to very precisely command that the power to initiate the said review is vested in the Parliament alone. In that sense, Article 95 (1) states: "At the request of the Croatian Parliament, the Constitutional Court shall, in the case when ten percent of the total number of voters in the Republic of Croatia request calling a referendum, establish whether the question of the referendum is in accordance with the Constitution and whether the requirements in Article 86, paragraphs 1–3, of the Constitution of the Republic of Croatia for calling a referendum have been met."

146 It should be noted that there are two possible interpretations of Article 95 (1) CACC. In the first version, Article 95 (1) allows, already on the level of textual interpretation, for a review of constitutional amendments but is limited to instances of citizen-initiated constitutional referendums. In the second version, the possibility of a review of constitutional amendments also exists but only upon its inclusion into the reading of Article 95 (1) through structural interpretation, as we have presented above. Depending on which of these two interpretive routes is taken, there emerge two possible answers to the question of whether, in this case, the Court modified the procedure and the measure to be imposed: under the first route, the procedure is merely supplemented and there is no new measure, while under the second, both the new procedure and the new measure are invented.

through referendums or the Parliament) may define what the constitution is (spillover issue).

Finally, bearing in mind everything stated in the context of the *Referendum* case, the conclusion is that all the described actions of the Court were based on its GCC and without an explicit reference to its other enumerated powers. This means that in this case the Court actually used the autonomous norm approach to its GCC (basic issue).[147]

3.3.2. The *10 April Street* Case

In the *April 10 Street* case the Court formally stated, even more explicitly than in the *Referendum* case, that it was conducting the proceedings based on its GCC alone (technical issue). This fact leads to the conclusion that the Court had adopted the autonomous norm approach (basic issue) in this case. The same conclusion stems from the procedural aspect of the case.

With respect to procedure, the Court exceptionally assumed jurisdiction over a matter that otherwise falls under the competence of the HAC. Moreover, in justifying this procedural switch, the Court emphasized that it did this precisely based on its GCC and argued that this was necessary because the case opened an issue "important for the identity of the Croatian constitutional state."[148] From this perspective it also follows that the GCC indeed was used as an autonomous norm that created a type of an exceptional procedure. In short, this means that the Court significantly altered the mode of proceedings (procedural issue) precisely based on the GCC. At the same time, this resulted in a transfer of authority in favor of the Constitutional Court, to the detriment of the HAC (spillover issue).

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147 It is worth mentioning that the *Referendum* case raises an additional important issue. In fact, the basic logic of the *Referendum* case (structurally) is the following: the review of constitutionality of referendums is initiated by the Parliament whereas the rest of the procedure is conducted by the Court; however, in exceptional circumstances, the Court may entirely take over the proceedings, conferring on itself the power to initiate them as well; consequently, this implies that the Court is the sole master of the whole procedure (both in its initiation and conducting). Therefore, the question emerges: could such a structural interpretation, by analogy, be applied to other types of cases in which formally the Court decides, but does not have the power to initiate the proceeding, e.g., the procedure of impeachment of the President of the Republic (Article 105 of the Constitution and Article 83 CACC); control of constitutionality of political parties (Articles 6 and 125.8 of the Constitution and Articles 85–86 CACC); and resolution of conflicts of competence between the legislative, executive and judicial branches (Article 125.6 of the Constitution and Articles 81–82 CACC). We believe that such a structural interpretation is unacceptable. See also Gardašević, Đ., 2016, p. 17.

148 Constitutional Court, U-II-6111/2013, 10 October 2017, para. 11.

The measure imposed by the Constitutional Court in this case consisted of the annulment of the decision of the local body, regarding the naming of streets. From a technical standpoint, in doing so the Constitutional Court did not substantively modify existing measures or define a new measure that it ordinarily lacks the power to impose (substantive issue), but it nevertheless extended the imposition of such a measure to matters beyond its specific jurisdiction.[149]

3.3.3. The *Milanović II* Case

In the *Milanović II* case,[150] the Court formally acted under its authority to review the constitutionality and legality of elections, which does belong to its enumerated competences.[151] In addition, this time the Court also expressly invoked its authority to act under the GCC (technical issue). This combination of the GCC and other constitutional and legal grounds for the Court to act may, but only at first glance, lead to conclusion that in this case the Court chose the descriptive norm approach (basic issue). However, it is necessary to also examine other aspects of the case in order to reach a proper conclusion on this issue.

The fact that in this case the Court formally invoked the procedure for reviewing the constitutionality and legality of elections means that it was required to follow exactly the procedural steps (procedural issue) and to impose the measures (substantive issue) that were explicitly defined in the specific provisions of the CACC regulating such reviews, and not in the general formulation of the GCC.

From the procedural point of view, this means that the Court could act only upon receiving a formal request from the explicitly defined applicants who were formally authorized to submit such a request to the Court.[152] Nevertheless, in this case the Court acted entirely on its own

149 In other words, despite claiming that its annulment of the contested decision by the local unit was based on the Court's express power to annul regulations (Article 55 (3) CACC), the fact is that this particular decision was not among the type of regulations that the Constitutional Court had a power to annul, as we explained previously in the description of the case.

150 We disregard the *Milanović I* case here because in it the Constitutional Court did not expressly invoke Article 2 (1) CACC as the ground for its action.

151 Article 125.9 of the Constitution, Article 87 (1) CACC, and Article 96 (1) of the Law on the Election of Members of the Croatian Parliament, *Official Gazette of the Republic of Croatia*, Nos. 116/99, 109/00, 53/03, 69/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, 19/15, 104/15, 98/19 (Law on the Election of Members of the Croatian Parliament).

152 According to Article 88 CACC, the specified applicants in such cases are "political parties, candidates, not less than 100 voters or not less than 5 percent of voters of the constituency in which the elections are held".

initiative, meaning not only that the Court modified the procedure (procedural issue), but also that the initiative to launch the proceedings was no longer the exclusive power of the authorized applicants, leading to the first spillover of powers in this case (spillover issue). In addition, the fact that the Court acted entirely on its own initiative means that it acted contrary to the specifications contained in the provisions defining the list of applicants,[153] as well as that it could "justify" such a course of action only on the basis of a norm separate from those provisions. Since the only separate norm that the Court invoked in this case was precisely the one mentioning its GCC, it follows that the Court took the autonomous norm approach.

In order to properly clarify the substantive outcome of the case (substantive issue), one should bear in mind three important aspects of this case.

First, the Court determined that by his active involvement in the election campaign and by not previously resigning from his actual post, the President of the Republic "put himself in the position of a participant in the parliamentary elections in the sense of Article 89 CACC."[154]

Second, based on its combined competence to review the constitutionality and legality of elections and its GCC[155], the Court determined that "by his statements and conduct, and without having previously resigned from the office of President of the Republic in accordance with the Warning of 18 March 2024, the President of the Republic has placed himself in a position where he can neither be designated as Prime Minister-designate for the formation of the future Government nor serve as Prime Minister."[156]

Third, the Court clearly emphasized that "regardless of the constitutionally and legally unacceptable conduct of the President of the Republic and his failure to comply with the Warning of 18 March 2024" the Court itself would not call into question "the will of the voters expressed" in the parliamentary elections "held on 17 April 2024".[157]

153 See Article 88 CACC.

154 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, para. 6, translated by authors.

155 Interestingly, it is precisely in this section of its Communication and Warning in the *Milanović II* case that the Court insisted that it acted on its combined authority to review the constitutionality and legality of elections, on the one hand, and on its GCC, on the other. This could lead to the wrong conclusion that the Court thus took the descriptive norm approach, however, as we show further, the Court's imposition of an entirely new sanction (ban) leads to the conclusion that the GCC was used as an autonomous norm.

156 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, para. 7, translated by authors. The Warning of 18 March 2024 refers to the Court's warning in the *Milanović I* case.

157 Constitutional Court, U-VII-1263/2024-II, 19 April 2024, para. 8, translated by authors.

Considering these three important aspects, it is possible to draw a precise conclusion regarding the substantive outcome of the *Milanović II* case.

The outright conclusion is that in this case the Court issued a specific ban, which it had no power to impose whatsoever; specifically, the imposed ban consisted of a prohibition for the President of the Republic to be appointed Prime Minister-designate by the parliamentary majority, formed upon the will of voters (which the Constitutional Court in no way disputed), even if he were to decide to resign from his current post of the President of the Republic prior to that potential appointment. All the sanctioning powers that the Court had at its disposal were explicitly prescribed in the CACC and the stated ban was clearly not one of them: the appointment of the Prime Minister-designate clearly falls outside of the legal definition of "electoral activities and decisions", which the Court can annul because it is per se a post-election procedure contingent on the results of the elections.[158]

Consequently, it is clear that from the substantive perspective the use of the GCC in this case resulted in the creation of an entirely new sanction that is not prescribed in the Croatian Constitution (substantive issue), that the creation of this sanction followed from the treatment of GCC as an autonomous norm (basic issue), and that eventually all this led to the second spillover in this case – because the Court unduly interfered with the Parliament's power to designate the future Prime Minister (spillover issue).

3.3.4. The *Judges' Mandates* Case

In the *Judges' Mandates* case, the Court formally stated in the introductory part of its Report that it acted based on its enumerated competence to "monitor compliance with the Constitution" and to "report to the Croatian Parliament on detected violations thereof".[159] At the same time, the Court's argumentation in the Report issued in this case also contains a

158 In this sense, Article 89 CACC prescribes: "When the Constitutional Court ascertains that the participants in the elections act contrary to the Constitution and the law, it shall inform the public over the media, if needed warn the competent bodies, and in case of violation which influenced or might have influenced the results of the elections, shall annul all or separate electoral activities and decisions, which preceded such violation." Furthermore, the Court's determination that, by his active participation in the election campaign and by not resigning in time, the President of the Republic "put himself in the position of a participant in the parliamentary elections in the sense of Article 89 CACC" (para. 6) was formally wrong: following the Court's Warning issued in the *Milanović I* case, the President was actually never listed as one of the candidates in the parliamentary elections.

159 Article 125.5 of the Constitution; Article 104 (1) CACC.

reference to the GCC, whereas in the part of the Report where the Court formally imposed its "measures", it also invoked a separate provision of the CACC, which empowers it to "determine the manner in which its decision, respective its ruling shall be executed".[160] Those facts require two clarifications.

First, the Court's intention to "monitor compliance with the Constitution and laws" and to "report to the Croatian Parliament on detected violations thereof" may have been justified as the proper course of action only in this aspect of the case where the Court detected the problem and required the Parliament "to fulfill without delay its constitutional obligation to elect ten judges of the Constitutional Court".[161] Had an additional recourse to the GCC been made only in reference to this aspect of the case, there would have been no real issue at stake, because the Court would have used its GCC only to supplement its specific power to "monitor and report". At the same time, that would also mean that the Court took the descriptive norm approach. However, considering both the procedure that the Court conducted and the real outcome of the case (the extension of the judges' mandates) it is clear that something else was on the table.

Second, the Court's invocation of its power to "determine the manner in which its decision, respective its ruling shall be executed" evidently leads to nowhere, since this is just one of procedural powers which, standing alone, cannot lead to the extension of the judges' mandates. In addition, as we have stated above, the Report is neither a decision nor a ruling, and Article 125.5 of the Constitution and Article 104 CACC clearly designate the Parliament as the institution with the power to act upon it. However, in that specific final part of the Report, where the Court imposed its "measures" (including the one to extend the judges' mandates), it explicitly invoked both the said power to "determine the manner in which its decision, respective its ruling shall be executed" (Article 31 (5) CACC) and its GCC, arguing, literally, that the extension of the judges' mandates was necessary because it was an essential precondition for the Court to perform its "basic purpose", i.e., to "guarantee the compliance with and application of the Constitution in all proceedings within its jurisdiction".[162]

160 Article 31 (5) CACC.

161 Constitutional Court, Report U-X-5162/2024, 6 December 2024, para. 8. Technically, in addition to extending the judges' mandates and calling on the Parliament to elect new judges without delay, in this case the Court also determined that it would "refrain from adopting substantive decisions and rulings within its jurisdiction until 11 December 2024". Report U-X-5162/2024, 6 December 2024, para. 9.

162 Constitutional Court, Report U-X-5162/2024, 6 December 2024, para. 8.

Therefore, from this point of view it is evident that, in "determining" that the judges' mandates are extended, the Court substantively relied only on its GCC and not on Article 31 (5) CACC. In other words, the invocation of the GCC was used by the Court as the proper ground for extending the judges' mandates. This leads to the conclusion that the Court took the autonomous norm approach (basic issue).

Since we believe that these clarifications properly solve the baseline technical issue, it remains to verify whether the Court in this case somehow altered the procedure (procedural issue) or came to produce an outcome it should not have produced (substantive issue).

According to the existing constitutional regulation, the only extension that is possible in the event that the Parliament does not elect new judges in time is the automatic extension of mandates of incumbent judges for a period of a maximum of six months.[163] In addition, the power to elect judges to the Court is vested exclusively in the Parliament.[164] This means that the only procedural solution to the situation in which new judges are not elected, even upon the expiry of an additional period of six months, is to wait until the Parliament performs its constitutional duty. Thus, from the procedural point of view, the decisive element in this scenario is the failure of the Parliament to perform its duty to elect new judges. Therefore, when the Court decided to extend the judges' mandates on its own, and when it did so on the basis of its GCC, the Court practically introduced an entirely new procedure that is initiated in the event the Parliament fails to elect new judges to the Court in time (procedural issue).

From the substantive point of view, the Court in this case actually extended the mandates of the incumbent judges beyond the maximum term of their office, which is strictly eight years and six months.[165] This means that the Court itself created a new constitutional norm which allows for additional extension of judges' mandates without any basis in the text of the Constitution (substantive issue).

Consequently, all of the above also means that in both the context of the procedure and in the context of the measure, the Court acted at the detriment of the Parliament's competences and powers (spillover issue). By doing all that based on its GCC, the Court evidently took the autonomous norm approach (basic issue).[166]

163 Article 122 of the Constitution.

164 *Ibid*.

165 *Ibid*.

166 The conclusion that Article 2 (1) CACC was used in this case as an autonomous norm is quite evident, even notwithstanding the fact that in its argumentation the Court twice stressed that securing the "compliance with and application of the

4. Conclusion

In this paper we have given a critical assessment of the Constitutional Court's employment of Article 2 (1) CACC as a tool for expanding its jurisdiction far beyond the textual and purposive limits of the Constitution and the CACC. In order to demonstrate the dangers of using Article 2 (1) CACC as a basis for inherent powers of the Court, we developed and applied the methodology for analyzing relevant case law, focusing on the underlying basic issue of whether the Court has understood Article 2 (1) CACC as a descriptive or as an autonomous norm in its case law. Taking into account other parameters needed to answer this question (the technical issue, the procedural issue, the substantive issue, and the spillover issue), we have concluded that the Court has relied on Article 2 (1) CACC as an autonomous source of independent GCC, in all of the considered cases. The results of the analysis are summarized in the table below.

Table 1

	Referendum Case	*10 April Street* Case	*Milanović II* Case	*Judges' Mandates* Case
BASIC ISSUE	Autonomous	Autonomous (except for the substantive issue)	Autonomous	Autonomous
TECHNICAL ISSUE	Legal basis not explicitly specified	Explicit reliance on GCC	GCC combined with control of elections	GCC combined with reporting on unconstitutionality

Constitution of the Republic of Croatia", which is the express wording of Article 2 (1) (GCC), was necessary precisely because of the Court's duty to conduct "all proceedings within its jurisdiction" in general. Constitutional Court, Report U-X-5162/2024, 6 December 2024, para. 8.

An alternative reading might lead to the conclusion that in this case the Court actually established a decisive link between Article 2 (1) and its other enumerated competences to conduct specific proceedings within its jurisdiction. This, in other words, would mean that Article 2 (1) has no autonomous meaning and that it merely serves as an introductory and descriptive norm for the Court's other competences or, at the most, as a complementary norm to justify the Court's procedural and substantive decisions in this case.

However, this alternative conclusion fails when one takes into account both the procedural and substantive outcomes of the case. In this sense, since the extension of the judges' mandates evidently cannot derive from the Court's other specific competences and since based on those specific competences the Court cannot change a constitutional norm defining the maximum term of office judges, Article 2 (1) remains the only candidate for the Court's approach. This means that in reality the Court in fact took the autonomous norm approach.

	Referendum Case	*10 April Street* Case	*Milanović II* Case	*Judges' Mandates* Case
PROCEDURAL ISSUE	1. Procedure modified (Article 95 (1) supplemented) 2. New procedure introduced (unconstitutional constitutional amendments)	New procedure introduced	Procedure modified	New procedure introduced
SUBSTANTIVE ISSUE	New measure introduced (unconstitutional constitutional amendments)	No new measure introduced (the imposition of a measure in matters outside the Court's jurisdiction)	New measure introduced	New measure introduced
SPILLOVER ISSUE	Occurred at the detriment of the Parliament	Occurred at the detriment of the HAC	1.) Occurred at the detriment of designated applicants 2.) Occurred at the detriment of the Parliament	Occurred at the detriment of the Parliament

It follows that the Court's use of its GCC seriously threatens the balance of powers in Croatia because of its spillover effects – the expansion of the Court's own zone of authority minimizes the constitutionally defined role of other constitutional actors, most notably the Parliament. Both the procedural and the substantive aspects of the Court's use of its GCC reveal a dangerous inclination of an "almighty Court" to undermine the role of other constitutional actors in the Croatian judicial and political processes, resulting in the dismantling of the checks and balances established by the Constitution. Furthermore, the Court's extra-procedural hyper-involvement[167] in politically hyper-sensitive cases, which results in poorly argued substantive outcomes that are not envisaged by the Constitution and the CACC[168], might seriously weaken its already fragile public image. The Court should base its proceedings as well as their substantive outcomes on clearly defined legal bases, having due regard to its own legal limitations, and grounding its own holdings in strong arguments. The Court should

167 Compare with Beširević, V., 2014, "Governing *without* judges": The politics of the Constitutional Court in Serbia, *International Journal of Constitutional Law*, Vol. 12, No. 4, pp. 954–979.

168 Legal interpretation should not go *contra legem*. Lenaerts, K., Gutiérrez-Fons, J. A., 2014, To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, *Columbia Journal of European Law*, Vol. 20, No. 2, p. 20.

also tame its overly grandiose self-perception and respect the positions of its constitutional interlocutors as a way of impeding the excessive concentration of power in one institution.[169]

As indicated above, in the *Ruling on the Report* case the majority of judges reversed the position on the nature of the Court's powers and emphasized the exhaustive nature of the Court's enumerated powers, signalizing a departure from the expansive reading of Article 2 (1) CACC.[170] However, one should not be too optimistic about this most recent development – it still remains to be seen whether the described case law on the use of GCC will remain as a dormant option to be reactivated in another "exceptional situation". We strongly urge against this prospective reactivation.

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169 As the Constitutional Court itself had said, "the principle of the separation of powers is one of the elements of the rule of law because it prevents the possibility of a concentration of powers and of political power in (only) one body". Constitutional Court, U-I-659/1994, 15 March 2000, para. 12, translated by authors.

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USTAVNI SUD REPUBLIKE HRVATSKE I KONCEPT INHERENTNIH OVLASTI

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Niko Jarak

APSTRAKT

U ovome članku istražujemo kako Ustavni sud Republike Hrvatske tumači postojanje vlastitih „inherentnih" ovlasti te njihov odnos prema ovlastima koje su mu enumerirane Ustavom. U tom smislu, relevantnu praksu Ustavnoga suda analiziramo kroz nekoliko bitnih pitanja: primjenjuje li Sud svoje „inherentne" ovlasti kroz koncept deskriptivne ili autonomne norme, dolazi li pritom do bitnih promjena u načinu postupanja Suda, primjenjuje li pritom Sud mjere predviđene Ustavom te dolazi li na taj način do bitnih poremećaja u ustavnoj podjeli nadležnosti i ovlasti. Rezultati istraživanja pokazuju da Sud primjenjuje koncept autonomne norme, čime bitno mijenja svoj način postupanja, kao i mjere koje je ovlašten izricati. Zaključujemo da takav pristup Suda bitno narušava načelo ravnoteže vlasti predviđeno Ustavom.

Ključne riječi: Ustavni sud Republike Hrvatske, ustavno sudovanje, tumačenje Ustava, inherentne ovlasti, enumerirane ovlasti, dioba vlasti.

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ORIGINAL SCIENTIFIC ARTICLE

*Maaike Geuens**

IS ACADEMIC FREEDOM IN BELGIUM AND THE NETHERLANDS UNDER DURESS?

***Abstract**: Academic freedom is considered a cornerstone of democratic higher education, yet its institutional foundations are becoming increasingly fragile. This article examines how financial austerity and ideological contestation interact to reshape academic freedom. It argues that formal constitutional and supranational safeguards coexist with subtle but cumulative mechanisms of erosion, including performance-based funding, managerial governance, politicized scrutiny of specific disciplines, and transnational ideological interference. While Belgium and the Netherlands still perform comparatively well in Europe, the convergence of budgetary constraints and ideological polarization generates chilling effects, self-censorship and strategic compliance. The article concludes that academic freedom cannot be assumed to be secure by default. It calls for renewed safeguards, combined with institutional cultures and international alliances that strengthen the structural resilience of academic freedom.*

Key words: Academic Freedom, University Autonomy, Education, Governance, Higher Education, Belgium, Netherlands.

1. Introduction

Academic freedom, long upheld as a foundational principle in liberal democracies, is facing renewed scrutiny and contestation across the globe.[1] The principle of academic freedom has served as a fundamental pillar of modern higher education since the establishment of the research university in the 19th century. This freedom encompasses the right of faculty to pursue research, teach, and express ideas without external

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1 Kinzelbach, K., Lindberg, S. I., Lott, L., Panaro, A. V., 2025, Academic Freedom Index Update 2025, Nürnberg, FAU Erlangen, (https://academic-freedom-index.net/research/Academic_Freedom_Index_Update_2025.pdf, 20. 11. 2025).

interference, while also protecting students' rights to learn and engage with diverse perspectives.[2] In recent years, even countries with strong higher education traditions, such as Belgium and the Netherlands, have witnessed intensifying pressure on scholars and institutions. These unprecedented challenges threaten the independence and integrity of higher education institutions. The pressure is not only financial but also ideological in nature. While academic freedom has always existed within political, social and economic contexts, the past decade has seen a reconfiguration of those contexts, wherein austerity measures, far-right populism, and transnational political agendas converge to redefine the university's role and autonomy.

Belgium and the Netherlands offer a compelling comparative lens: they are both small, affluent EU Member States with decentralized educational governance and strong historical commitments to academic autonomy. Yet they are not immune to the pressures reshaping global academia. Their respective higher education sectors are embedded in broader European policy dynamics and are increasingly exposed to international ideological currents, as seen most recently in the diplomatic and cultural interventions emanating from the United States. The United States provides a particularly stark example of how rapidly academic freedom can be undermined through coordinated political action, legal challenges, and social pressure campaigns. Since 2020, American universities have witnessed an alarming acceleration in legislative attempts to restrict research topics, mandate curriculum content, eliminate diversity programs, and influence faculty hiring practices.[3]

This article argues that ideological politicization, frequently combined with budgetary constraints, is undermining academic freedom in both subtle and overt ways. It explores how these recent trends interact with governance structures and erode university autonomy and freedom of inquiry. While Belgium and the Netherlands have not yet experienced authoritarian rollback akin to Hungary or Turkey, the cumulative effect

2 European Higher Education Area (EHEA), 2020, Rome Ministerial Communiqué, 19 November, (https://ehea.info/Upload/Rome_Ministerial_Communique.pdf); EHEA, 2020, Rome Ministerial Communiqué – Annex I. Statement on Academic Freedom, 19 November, (https://ehea.info/Upload/Rome_Ministerial_Communique_Annex_I.pdf); Karran, T., 2007, Academic Freedom in Europe: A Preliminary Comparative Analysis, *Higher Education Policy*, Vol. 20, No. 3, pp. 289–313.

3 Sachs, J. A., Young, J. C., 2024, America's Censored Classrooms 2024. Refining the Art of Censorship, *PEN America*, (https://pen.org/report/americas-censored-classrooms-2024, 20. 11. 2025).

of these challenges is no less concerning for the long-term health of democratic higher education.[4]

By examining policy developments, institutional responses, and theoretical frameworks, this article contributes to a more nuanced understanding of academic freedom as a situated and contested concept. It calls for a reimagining of academic governance structures that can resist illiberal encroachment while promoting inclusion, pluralism, and intellectual rigor. This research aims to identify early warning signs of academic freedom erosion and propose concrete measures to strengthen protection for scholarly independence.

2. Methodology and Sources

This study employs a qualitative, comparative policy analysis approach, drawing on both primary and secondary sources. The primary data consists of official policy documents, public statements by government ministers, press releases from universities and university associations, and media coverage from credible regional news outlets. These sources provide insights into recent incidents that have brought academic freedom into question, such as the dissemination of an ideologically charged questionnaire by the US Embassy in Belgium and ongoing public debates about the role of diversity, gender studies, and "woke" culture at Belgian and Dutch universities. Secondary data includes scientific literature on academic freedom, comparative education policy and higher education governance. These works offer theoretical grounding and comparative context for understanding how academic freedom is operationalized and contested across political systems.

The comparative method allows for a structured analysis of similarities and differences between the Belgian and Dutch cases. It also enables the identification of transnational patterns, particularly with respect to how global ideological trends – such as the exportation of anti-DEI (diversity, equity, and inclusion) rhetoric – find expression in national higher education systems. The methodology is interpretive and assumes that academic freedom is not a static legal norm but a dynamic site of struggle over meaning, values, and institutional boundaries.

4 Cankaya, E., Teoman Pamukcu, M., Les Académiques pour la paix en Turquie. Une étude sur les violations flagrantes de la liberté académique dans un pays candidat à l'adhésion à l'Union européenne, in: Frangville, V. *et al*., (ed.), 2021, *La liberté académique. Enjeux et menaces*, Brussels, Éditions de l'Université de Bruxelles, pp. 107–119.

The limitations of this study include the lack of direct interview data and the reliance on publicly available materials, which may not fully capture the internal deliberations of universities or the personal experiences of affected academics. However, the selected sources are sufficient to trace discursive shifts, policy decisions, and public controversies that have significant implications for academic freedom. The findings should therefore be understood as indicative rather than exhaustive.

Through this approach, the article aims to offer a theoretically robust and grounded account of the contemporary threats to academic freedom in Belgium and the Netherlands. It situates these threats within broader debates in education and contributes to the ongoing effort to conceptualize academic freedom as both a right and a responsibility within democratic societies, while reflecting on current challenges and attacks on academia.

3. Conceptualizing Academic Freedom

3.1. A MULTIDIMENSIONAL FRAMEWORK

Academic freedom, as conceptualized in contemporary scholarship, encompasses multiple interconnected dimensions that collectively ensure the independence of higher education institutions from external interference. It serves an individual and collective protection, but also imposes duties to nations.[5] Philip Altbach identifies four core components: freedom of research and publication, freedom of teaching and curriculum design, freedom of expression and extramural speech, and institutional autonomy in governance and resource allocation.[6] This multidimensional framework recognizes that threats to any single component can undermine the entire system of academic independence.[7]

For analytical purposes, this article distinguishes three interrelated dimensions of academic freedom. First, individual academic freedom concerns the rights of scholars and students to choose research questions, methods, and teaching content, and to express critical views within and beyond the institution. Second, institutional academic freedom or uni-

5 Vrielink, J. *et al*., 2023, Challenges to academic freedom as a fundamental right, League of European Research Universities (LERU), Advice Paper No. 31, April 2023, pp. 3, 14–28.

6 Altbach, P. G., 2001, Academic freedom: International realities and challenges, *Higher Education*, Vol. 41, Nos. 1–2, pp. 205–219; Vrielink, J. *et al*., 2023, p. 29. This was later affirmed by the European Court of Human Rights, see ECtHR, *Mustafa Erdoğan and others v. Turkey*, Nos. 346/04 and 39779/04, Judgment of 27 May 2014, paras. 40–41.

7 Vrielink, J. *et al*., 2023, p. 3; EHEA, 2020, p. 3.

versity autonomy refers to the capacity of higher education institutions to determine their internal governance, strategic priorities and external partnerships without undue interference from political and private actors. Third, a broader systemic dimension captures the regulatory, financial and cultural environment in which universities operate, including funding regimes, evaluation logics, and public discourse on the role of science. Attacks on academic freedom may target any one of these dimensions, but they typically operate through their interaction – for example when systemic funding pressures translate into institutional steering and, ultimately, into self-censorship at the individual level. This multidimensional understanding is crucial to situate the Belgian and Dutch developments discussed in the remainder of the article.

The theoretical foundation for academic freedom rests on both instrumental and intrinsic justifications. Instrumentally, academic freedom is defended as necessary for the advancement of knowledge, the training of critical thinkers, and the maintenance of democratic discourse. Intrinsically, it is viewed as a fundamental human right that protects the dignity and autonomy of scholars and students.[8] These dual justifications create a robust legal-philosophical foundation but also potential points of tension when academic freedom conflicts with other social values or political priorities.

Moreover, scholarship has emphasized the relational nature of academic freedom, highlighting how it depends on complex networks of institutional support, legal protection, professional norms, and social acceptance.[9] This relational understanding helps explain why academic freedom can be vulnerable even in countries with strong constitutional protections, as erosion often occurs through gradual changes in institutional culture, funding mechanisms, and social attitudes rather than direct legal prohibition.[10]

This normative fragmentation of the concept of academic freedom has significant implications. Without clear, binding, and enforceable definitions, academic freedom becomes vulnerable to reinterpretation by political actors, institutional managers, and even members of the public.[11]

8 Monard, E. *et al.*, 2023, Vrij onderzoek noodzakelijk voor maatschappelijke uitdagingen. Ruimte voor wetenschap op initiatief van de onderzoeker [Free academic research on societal challenges. Room for science on the initiative of the researcher], *KVAB Position Paper* 82, pp. 50–65.

9 Waele, L. de, 2025, Academische vrijheid is de zuurstof van een gezonde democratie [Free academic research provides the oxygen for a healthy democracy], *Knack*, 19 September, (https://www.knack.be/nieuws/belgie/onderwijs/academische-vrijheid-is-de-zuurstof-van-een-gezonde-democratie, 19. 9. 2025).

10 Karran, T., 2007, pp. 289–313.

11 This poses a significant challenge for the judicial protection as well, since the procedures could be misused by opponents of academic freedom, as is argued by Barbato, J.-C., La liberté académique dans l'ordre juridique de l'Union européenne, in: Mau-

It carries the risk of increasingly being framed not as a foundational principle but as a negotiable commodity, subject to policy priorities and cultural anxieties. The consequence is a weakening of the epistemic authority of academic institutions and a chilling effect on scholars engaged in critical, controversial, or minority-informed research.[12]

What is needed, therefore, is a renewed discourse on academic freedom – one that acknowledges both its individual and collective dimensions, situates it within democratic pluralism, and defends its institutional expression against encroaching managerialism and ideological backlash. Such a discourse must also include clarity on the limits of academic freedom, particularly when it intersects with public accountability and social responsibility. A mature understanding of academic freedom is not one that excludes political critique, but one that is resilient enough to accommodate it without succumbing to it.

3.2. EUROPEAN FRAMEWORK AND PROTECTION

At the European level, the situation is complex. Initiatives like the European Education Area and the Bologna Process include language about academic values but lack coercive mechanisms.[13] The European Research Area Framework has created additional protections by promoting mobility of researchers, open access to scientific publications, and international collaboration – but also freedom of scientific research.[14] In practice, enforcement relies on soft power tools such as university rankings, peer review, and reputational pressure – mechanisms that often exacerbate, rather than mitigate, the neoliberal pressures described above.

Article 13 of the Charter of Fundamental Rights of the European Union explicitly guarantees that "[t]he arts and scientific research shall be free of constraint" and that "academic freedom shall be respected".[15] This provision, which became legally binding with the Lisbon Treaty in 2009, establishes academic freedom as a fundamental right within EU law. The enforceability of said article, however, remains limited. The European Court of Justice has rarely adjudicated on academic freedom

bernard, C., Platon, S., Tinière, R., (eds.), 2025, *Les mutations de la protection de la liberté d'expression dans l'Union européenne*, Brussels, Bruylant, pp. 316–323.

12 Karran, T., 2007, pp. 289–290.

13 EHEA, 2020, p. 3.

14 See, for instance, Council Recommendation (EU) 2021/2122 of 26 November 2021 on a Pact for Research and Innovation in Europe, *OJ L*, 2 December 2021, recital 6.

15 Article 13 of the Charter of Fundamental Rights of the European Union, *OJ C*, 18 December 2000, 364/11.

directly, and there is no binding supranational framework obliging Member States to uphold minimum standards. In *Commission v. Hungary*, the Court found that Hungarian legislation restricting foreign-funded universities violated EU law on freedom of establishment and academic freedom and thereby referred to the ECtHR to elaborate on the components of academic freedom.[16] This was the first time the CJEU explicitly mentioned academic freedom.[17]

Read together with Article 2 TEU and Article 179 TFEU, Article 13 indicates that academic freedom forms part of the Union's constitutional identity as a research area grounded in free inquiry. However, the EU lacks a fully-fledged enforcement mechanism: the Charter applies only within the scope of EU law, infringement procedures are selective, and there is no dedicated monitoring instrument comparable to those in the fields of media freedom or the rule of law. As a result, EU-level guarantees are symbolically strong but legally and institutionally thin, especially in situations where domestic measures do not directly engage EU competences.

The European Convention on Human Rights does not contain a specific provision on academic freedom, yet the European Court of Human Rights has progressively read elements of it into Article 10 of the Convention.[18] Initially the Court referred to the term academic expression, rather than academic freedom.[19] In the *Sapan* case the Court firstly mentioned the notion of academic freedom.[20] It reiterated its importance, not just as a principle but also as underpinning democratic society, during subsequent judgments.[21] The ECtHR regularly applies various articles of the Convention to safeguard academic freedom and its various intrinsic elements.[22]

Taken together, the EU and Strasbourg frameworks create a floor rather than a ceiling for academic freedom. They provide important reference points for domestic debates, yet they do not prevent more diffuse forms of erosion that remain formally compatible with constitutional and Convention standards.

16 CJEU, case C-66/18, *European Commission v. Hungary*, Judgment of 6 October 2020, ECLI:EU:C:2020:792, paras. 222–228; Barbato, J.-C., 2025, pp. 304–316.

17 Vrielink, J. *et al*., 2023, p. 10.

18 ECtHR, *Başkaya and Okçuoğlu v. Tukey*, Nos. 23536/94 and 24408/94, Judgment of 8 July 1999 (GC), para. 44.

19 See, for instance, *Başkaya and Okçuoğlu v. Tukey*, para. 65.

20 ECtHR, *Sapan v. Turkey*, No. 44102/04, Judgement of 8 July 2010, para. 34

21 See, for instance, *Mustafa Erdoğan and others v. Turkey*, paras. 40–41.

22 Vrielink, J. *et al*., 2023, p. 11.

3.3. NATIONAL PROTECTION MECHANISMS

At first glance, both Belgium and the Netherlands appear to offer relatively robust constitutional guarantees for academic freedom. In the Dutch Constitution, Article 23 protects freedom of education, traditionally interpreted in relation to primary and secondary schooling but increasingly invoked in debates on academic research and higher education governance.[23] The Belgian Constitution, meanwhile, offers broader protection. Belgium's federal structure and constitutional provisions provide a relatively strong foundation for academic freedom, with Article 24 guaranteeing freedom of education and Article 19 protecting freedom of expression. It also safeguards institutional autonomy.[24] Although education and research are largely devolved competences, the main principles are similar in Flanders and Wallonia: both communities recognize university autonomy and the importance of scientific independence.[25]

These constitutional guarantees have clear advantages. They anchor academic freedom and university autonomy in the basic law, signal political commitment across government changes, and provide courts and academics with a normative benchmark against which to assess contested measures. Yet they also have important disadvantages in practice. First, neither constitution clearly distinguishes between the rights of individual scholars and the autonomy of institutions, making it difficult to determine who can invoke academic freedom against whom. Second, constitutional provisions are often framed in very general terms and rarely operationalized in ordinary legislation or sector-specific regulation. Third, courts have been cautious in reviewing funding and governance decisions in higher education, frequently treating them as matters of policy rather than rights.

These features help to explain why existing safeguards have so far failed to prevent more subtle forms of erosion. Funding reforms, such as the Dutch shift towards performance-based allocation and the Belgian emphasis on valorization and economic impact, formally respect institutional autonomy but, in practice, steer universities towards particular priorities.

23 Kosta, V., Ceran, O. M., 2025, Academic Freedom Monitor 2024: Overview of de jure academic freedom protection, Brussels: European Parliamentary Research Service (EPRS), Scientific Foresight Unit (STOA), (https://scholarlypublications.universiteitleiden.nl/handle/1887/4255191, 20. 11. 2025), pp. 37–39.

24 Kosta, V., Ceran, O. M., 2025, pp. 16–18.

25 CRef, 2025b, Stand up for academic freedom: not a privilege, but one of the keys for a free society Joint statement by the Rectors of the 10 Belgian universities, 7 July, (http://www.cref.be/communication/20250707_Academic%20freedom_statement.pdf, 7. 7. 2025).

Governance reforms that empower executive boards at the expense of collegial bodies may be justified in terms of efficiency but can weaken internal checks on politically or economically motivated decisions. In both countries, therefore, academic freedom is simultaneously strong on paper and vulnerable in practice: legal guarantees are necessary but not sufficient to address the cumulative effects of financial dependency, managerial logics, and ideological contestation.

Furthermore, constitutional protections often fail to account for the structural dependencies created by funding mechanisms, evaluation regimes, and bureaucratic governance. A university may be legally autonomous yet practically beholden to governmental performance contracts, third-party donors, and industry partnerships. The constitutional ideal of "freedom of inquiry" loses much of its substance when scholars must tailor research outputs to key performance indicators or navigate politically charged funding landscapes. This structural disconnect is particularly acute in disciplines with fewer opportunities for external valorization – such as philosophy, gender studies, or critical sociology – which are disproportionately vulnerable to defunding and de-legitimation.[26]

In spite of this relative lack of protection of academic freedom, the national mechanisms in combination with the provisions in the EU treaties and Charter, as well as the work of the ECtHR, do provide a minimum safeguard for academic freedom, albeit only when challenged before the courts.[27]

4. Mechanisms of Academic Freedom Erosion

4.1. HOLLOWING OUT ACADEMIC AUTONOMY

Over the past two decades, both Belgium and the Netherlands have witnessed sustained efforts to reform their higher education systems under the guise of fiscal responsibility, performance efficiency, and international competitiveness.[28] These reforms, mostly driven by principles of New Public Management (NPM), have often masked a deeper erosion of academic autonomy, particularly in relation to budgetary autonomy and the allocation of research funding. While governments claim to preserve

26 Roberts Lyer, K., 2025, Academic Freedom as a Human Right: Academic Freedom in Europe, *VerfBlog*, 17 October, (https://verfassungsblog.de/academic-freedom-humanright, 20. 11. 2025).

27 This is notwithstanding the international provisions, see Vrielink, J. *et al*., 2023, pp. 12–13.

28 Vrielink, J. *et al*., 2023, p. 3.

institutional freedom, in practice, funding regimes increasingly constrain academic priorities and research agendas.[29]

In the Netherlands, the HOAK memorandum (1985) marked the beginning of a managerial turn in higher education, promoting output-based financing and tighter alignment between universities and economic objectives.[30] More recently, the Van Rijn Committee (2019) proposed a reallocation of funds from the humanities and social sciences toward STEM disciplines, further amplifying tensions within academic communities.[31] The persistent underfunding of universities has reached such a critical point that university boards and staff unions have jointly protested against what they call the "structural hollowing out" of academic infrastructure.[32] Dutch universities now rely heavily on external project-based grants, which exacerbate job insecurity and privilege short-term measurable outputs over long-term academic exploration. Recent years have seen increasing political attention to Dutch universities, with controversies over colonial history research demonstrating political pressure on scholarly work.[33]

Flanders has faced a similar trajectory. While the region historically embraced pillarized governance and a degree of pluralistic autonomy in education, recent budget cuts have led to increased centralization and monitoring.[34] Universities are increasingly expected to function as innovation hubs for the Flemish economy, aligning research with economic roadmaps. The Flemish government now links funding to economic impact metrics

29 Antonowizc, D., Jongbloed, B., 2015, *University Governance Reforms in the Netherlands, Austria and Portugal: Lessons for Poland*, Warsaw, Ernst & Young, pp. 20–32; Meulemeester, J. L. de, Le financement des universités, de Humboldt au New Public Management: De quelques préconditions à la liberté académique, in: Frangville, V. *et al*., 2021, pp. 167–176.

30 Antonowizc, D., Jongbloed, B., 2015, pp. 24–25.

31 Adviescommissie Bekostiging Hoger Onderwijs en Onderzoek, 2019, Rapport. Wissels om. Naar een transparante en evenwichtige bekostiging en meer samenwerking in hoger onderwijs en onderzoek [Report. Changing tracks. Towards a transparent and balanced funding and cooperation of and within higher education and research], May, The Hague, Xerox/OBT (https://open.overheid.nl/documenten/ronl-97d77dbb-0c58-410f-8aa5-f80e1412b88a/pdf, May 2019), pp. 69–84.

32 Antonowizc, D., Jongbloed, B., 2015, pp. 20–32; Boeren, I., 2025, Sterft de academische vrijheid een stille dood? [Will academic freedom die a slow death?], *EOS*, (https://www.eoswetenschap.eu/algemeen/sterft-de-academische-vrijheid-een-stille-dood, 8. 7. 2025).

33 Kraak, H., 2021, Universiteiten beloofden dekolonisatie. Is er al iets bereikt, of zijn de effecten vooral ongewenst? [Universities promised decolonization. Has it been achieved or are the effects mostly unwanted?], *De Volkskrant*, 21 May, (https://www.volkskrant.nl/cs-b6651243, 21. 5. 2021).

34 Monard, E. *et al*., 2023, pp. 30–46.

and valorization strategies.[35] Such a move not only narrows the scope of academic inquiry but also devalues disciplines that do not yield immediate economic returns, notably the humanities and social sciences. The increasing emphasis on external funding, as well as when non-disclosure agreements have restricted publication practices, has created new potential conflicts between academic independence and economic imperatives. The same holds true for the Walloon and Brussels areas.[36]

The effects of these budgetary constraints are far-reaching. Scholars face growing administrative workloads, reduced job security (particularly among junior researchers), and limited time for independent research. Structural underfunding also exacerbates inequalities within academia, as institutions redirect limited resources toward flagship departments, often at the expense of less profitable or politically controversial fields.[37] The result is a shrinking space for critical reflection, interdisciplinary exploration, and long-form scholarship – all of which are essential to the vitality of academic freedom.[38]

The COVID-19 response revealed vulnerabilities, with faculty reporting informal pressure to moderate criticism of government policies.[39] Rising populist parties have increasingly criticized universities as sites of "left-wing indoctrination".[40] Aggressive university-industry collaboration strategies have created new dependencies that may compromise independence, particularly around fossil fuel partnerships affecting climate research.[41] Digital harassment has increased, with researchers studying

35 Vlaams Parlement, 2009, Decreet betreffende de organisatie en financiering van het wetenschaps– en innovatiebeleid, (https://codex.vlaanderen.be/Portals/Codex/documenten/1018085.html, 30. 4. 2009).

36 Parlement de la Communauté française, 2024, Déclaration the politique communautaire 2024–2029: Avoir le courage de changer pour que l'avenir s'éclaire, (https://archive.pfwb.be/1000000020d90cd, 16. 7. 2024), pp. 31–37.

37 Jonge Academie, 2025, Deze regering holt het wetenschapsbeleid uit. Opinie over wetenschapsbeleid en financiering [This government is hollowing out science policy. Opinion on science policy and funding], *De Standaard*, 14 October, (https://www.jongeacademie.be/artikel/opinie-uithollen-wetenschapsbeleid.html, 14. 10. 2025).

38 Royal Netherlands Academy of Arts and Sciences (KNAW), 2025, Academic freedom in the Netherlands: response to current threats, (https://www.knaw.nl/en/publications/academic-freedom-netherlands-response-current-threats), pp. 22–24, 29; Soeharno, J., 2023, En/En. Tegen ideologische begrenzing van academische vrijheid [And/And. Against an ideological limitation of academic freedom], *Filosofie&Praktijk*, Vol. 44, No. 1, p. 47.

39 Vandewalle, J. *et al*., 2025, Trust in Science and the Scientist, *KVAB Position Paper* 88b, pp. 18–24.

40 KNAW, 2025, pp. 18–24, 28–32.

41 Kuipers Munneke, P., 2023, Het slechte huwelijk tussen universiteit en fossiele industrie [The bad marriage between universities and fossil industry], NRC 5 April; KNAW, 2025, pp. 25–26.

far-right movements and conspiracy theories reporting death threats and coordinated campaigns.[42] Gender studies programs have faced organized social media campaigns.[43] Universities are voicing their concerns with regard to these recent developments.[44]

One of the most insidious consequences of the developments described above is the emergence of chilling effects and self-censorship among academics. These phenomena are difficult to measure empirically, yet recurrent survey data, anecdotal evidence and institutional reports from both countries suggest that they are far from marginal. In Flanders, studies on harassment and intimidation of scientists indicate that researchers working on migration, gender or climate policy increasingly receive threats and coordinated online abuse. Similar experiences are reported in the Brussels-Walloon area[45] and the Netherlands, particularly by scholars studying far-right movements or conspiracy theories. Such pressures do not always result in formal sanctions, but they can significantly alter researchers' behavior: some avoid particular topics, tone down public interventions, or decline media requests in order to minimize personal risk.

Chilling effects also operate through institutional and systemic channels. In an environment of structural underfunding and competitive project-based financing, early-career researchers in particular may strategically align their projects with perceived funding priorities or avoid contentious fields that might be seen as politically sensitive or insufficiently "valorisable". Senior academics may refrain from publicly criticizing university leadership or government policy, for fear of jeopardizing institutional relations or future funding opportunities. These forms of self-censorship rarely leave a paper trail, but they reveal how academic freedom can be eroded without formal legal restriction. The result is a gradual narrowing of the range of questions that are asked, the methods that are deployed, and the voices that are heard in public debate.

Thus, while universities may retain formal autonomy in law, the practical reality is one of financial dependence and strategic compliance. Budgetary mechanisms have become tools of indirect governance, steering academic behavior by means of economic incentives and constraints.

42 Verhaeghe, P.-P., 2023, *The academic intimidation and harassment of scientists at Flemish universities in Belgium*, Brussels, VUB, pp. 17–23.

43 For an overview, see Soeharno, J., 2023, pp. 32–47.

44 Universiteiten van Nederland, 2025, Statement on Academic Freedom – The Rectors of the Dutch Universities, 30 May, (https://www.universiteitenvannederland.nl/en/current/news/statement-on-academic-freedom-the-rectors-of-the-dutch-universities-2025, 30. 5. 2025).

45 Parijs, P. van, Liberté académique et ethos universitaire, in: Frangville, V. *et al*., 2021, pp. 55–57.

This financialization of higher education poses a fundamental threat to the ideal of the university as a space of critical, independent thought. In addition, self-censorship has become more present.[46]

4.2. TRANSNATIONAL INTERFERENCE: THE US EMBASSY INTERVENTION

The United States has experienced an unprecedented wave of legislative attacks on academic freedom since 2020, with state legislatures introducing over 300 bills designed to restrict teaching, research, and campus expression. Florida provides the most extreme example, with legislation that has eliminated tenure protections, mandated ideological surveys, and required prior approval for certain research topics.[47]

The systematic nature of attacks reflects the influence dedicated to reshaping higher education. These interferences were effectively framed as defending "intellectual diversity", demonstrating how attacks on academic freedom are often presented as efforts to enhance educational quality.[48] While the US Constitution does not protect academic freedom, it does refer to the freedom of speech in its First Amendment. Academic freedom has been recognized as an integral part since the 1940s.[49]

In early 2025, a diplomatic controversy unfolded in Belgium when Flemish universities received a questionnaire from the US Embassy.[50] The document probed institutional policies on diversity, gender studies, and the handling of so-called "gender ideology". While framed as a benign information-gathering exercise, the questionnaire's phrasing, targets, and geopolitical subtext sparked widespread backlash across academic and political communities.[51] Scholars and university rectors interpreted the move

46 Soeharno, J., 2023, pp. 44–48.

47 Mutua, A. *et al*., 2024, The War on Higher Education, *UCLA Law Review*, Vol. 72, No. 2, pp. 14–26. For an overview of legislation, see Sachs, J. A., Young, J. C., 2024.

48 Balme, S., 2025, Academic freedom: how to defend 'the very condition of a living democracy' in France and worldwide, *The Conversation*, 17 October, (https://theconversation.com/academic-freedom-how-to-defend-the-very-condition-of-a-living-democracy-in-france-and-worldwide-267689, 17. 10. 2025).

49 AAUP, 1940, 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, (https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/1940-statement-principles-academic, 20. 11. 2025); AAUP, 2023, Academic Freedom and the Law, (https://www.aaup.org/sites/default/files/Academic%20Freedom%20Outline%20for%20Website.pdf, 22. 2. 2023).

50 This article uses the US example, but this is not an isolated case of political interference in academia, as it is also the case for France, the UK, etc. See Barbato, J.-C., 2025, p. 303.

51 RTBF, 2025, Après des entreprises, des universités belges reçoivent un questionnaire de l'ambassade étasunienne sur leur politique de diversité [After companies, Belgian

as an ideologically motivated intrusion into domestic academic affairs, one that raised profound questions about sovereignty, academic freedom, and the politicization of transatlantic relations.[52] The Embassy's initiative must be contextualized within a broader ideological export from conservative US circles, particularly those critical of DEI (Diversity, Equity, and Inclusion) frameworks. In recent years, right-wing thinktanks and advocacy groups in the United States have aggressively challenged academic curricula related to gender, race, and colonial history, framing them as expressions of "wokeness" or cultural Marxism. This anti-DEI sentiment, once confined to domestic US politics, appears to be part of a global strategy to influence educational agendas abroad. The Embassy's questionnaire in Belgium, which included questions about the presence of gender studies programs and the institutional stance on "biological truth", is emblematic of this ideological export. It also inquired on the international links of the university, the risk management, and freedom of expression.

The Flemish response was swift. Several rectors publicly refused to answer the questionnaire, invoking both institutional autonomy and the principle of free scientific inquiry.[53] The Flemish Rectors' Conference issued a joint statement emphasizing that external diplomatic partners are welcome to engage in dialogue, but not to evaluate or prescribe the content of academic programs. The same sentiment was shared across the Brussels and Walloon communities, where ARES (Académie de Recherche et d'enseignement supérieur) published a similar statement.[54] Political reactions cut across party lines: while some actors downplayed the incident as a misunderstanding, others explicitly condemned it as inappropriate ideological interference. The episode generated extensive media coverage, which in turn prompted broader public debate on the vulnerability of universities to foreign influence and on the legitimacy of gender studies and diversity policies more generally. The impact of the intervention is thus ambivalent. On the one hand, the strong and coordinated response by universities and many politicians reaffirmed academic autonomy and clarified that external partners cannot unilaterally redefine the boundaries

universities receive a questionnaire on their diversity policy], 8 May, (https://www.rtbf.be/article/apres-des-entreprises-des-universites-belges-recoivent-un-questionnaire-de-l-ambassade-etasunienne-sur-leur-politique-de-diversite-11543935).

52 Allea, 2025, Allea Statement on Threats to Academic Freedom and International Research Collaboration in the United States, February, (https://allea.org/portfolio-item/allea-statement-on-threats-to-academic-freedom-and-international-research-collaboration-in-the-united-states, 20. 11. 2025).

53 Allea, 2025.

54 ARES, 2025, Les universités en action: adapter le soutien, renforcer l'intégration, défendre la liberté, June, (https://www.ares-ac.be/fr/les-universites-en-action-adapter-le-soutien-renforcer-l-integration-defendre-la-liberte, 3. 6. 2025).

of acceptable research or teaching. On the other hand, the questionnaire provided new rhetorical ammunition to domestic critics of "woke ideology" and reinforced the framing of gender studies and diversity policies as controversial, foreign-inspired projects. Even though no university altered its programs as a direct result of the questionnaire, the incident contributed to the already polarized discourse in which certain disciplines are constantly required to justify their existence.

More broadly, the US Embassy episode illustrates how academic freedom in small European states can be affected by transnational ideological currents. Interference no longer takes the form of overt censorship or political directives, but of "soft power" instruments such as surveys, partnerships and funding conditions that embed contested normative expectations. For Belgium and, by analogy, the Netherlands, this raises difficult questions about how to maintain open international collaboration while setting clear limits to ideologically motivated scrutiny. It also highlights the need for explicit institutional protocols to handle such incidents, including procedures for collective responses and transparency towards staff and students.[55]

Belgium's experience should serve as a cautionary tale for the Netherlands and other EU Member States.[56] It underscores the need for robust institutional protocols that safeguard against external ideological pressures, even from friendly nations. Academic freedom is not merely a national concern; it is a transnational imperative that demands coordinated defense in an era of escalating ideological contestation.

5. Comparative Dimensions: From Hungary to the Low Countries

The cases of Belgium and the Netherlands do not exist in isolation. Across Europe, academic freedom is increasingly being challenged by a mix of authoritarian, populist, and neoliberal logics. While the more extreme violations – such as those in Hungary, Poland, and Turkey – have

55 In a similar sense, see CRef, 2025a, *The universities of the Wallonia-Brussels Federation denounce the attacks on academic freedom in the United States*, Press release, 17 March, (https://www.uclouvain.be/system/files/uclouvain_assetmanager/groups/cms-editors-presse/cp-mars-2025/20250317_Communique%CC%81%20CRef_atteintes%20%C3%A0%20la%20libert%C3%A9%20acad%C3%A9mique%20aux%20Etats%20Unis_FR%20ENGL.pdf, 17. 3. 2025).

56 Though the effects are already visible, see, for instance, Belleman, B. *et al.*, 2025, Wetenschappers in heel Nederland geraakt door beleid Trump [Scientists in the whole of the Netherlands affected by Trump policy], *De Groene Amsterdammer*, May 14, (https://www.groene.nl/artikel/wetenschappers-in-heel-nederland-geraakt-door-beleid-trump, 14. 5. 2025).

received the most international attention, subtler forms of pressure are taking root in liberal democracies, albeit under different guises.[57] By placing Belgium and the Netherlands in a comparative perspective, we can better understand both the distinctiveness and the commonalities of academic freedom's erosion across contexts.

Hungary stands as a paradigmatic case. Since 2010, the Orbán government has systematically undermined academic institutions perceived as ideologically hostile, notably by expelling the Central European University (CEU) and curtailing gender studies programs. These actions were justified through nationalistic rhetoric and presented as acts of "cultural protection".[58] The Hungarian case has come to symbolize the weaponization of education policy for ideological control, showing how governments can use legal, budgetary, and symbolic tools to restrict academic autonomy.[59]

France offers a different, yet equally instructive, example. In recent years, French ministers have publicly attacked postcolonial and intersectional research as manifestations of "Islamo-leftism" or American-inspired identity politics. While these critiques have not translated into legal restrictions, they have contributed to a climate of suspicion and defensive self-censorship within universities.[60] Similar dynamics are playing out in the United Kingdom, where debates over "no-platforming", "cancel culture", and "free speech" zones have pitted academic freedom against institutional commitments to inclusion and equality.[61]

In Belgium political scrutiny is increasingly ideological. Certain university departments – especially those involved in gender studies, decolonization, or migration research – have become targets of suspicion, accused of promoting a "woke agenda" incompatible with traditional academic neutrality. While no formal bans have been issued, public statements and funding priorities subtly shape the intellectual climate.[62] The 2025 US Embassy questionnaire, examined earlier, only sharpened this dynamic by providing international validation to domestic critics.

57 European University Association (EUA), 2025, Europe must champion academic freedom and protect academics at risk, 20 June, (https://www.eua.eu/news/eua-news/europe-must-champion-academic-freedom-and-protect-academics-at-risk.html, 20. 6. 2025).

58 Margaritidis, C., Another One Bites the Dust. The Prospect of Academic Freedom in Illiberal Democracies and the Case of Hungary, in: Frangville, V. *et al*., 2021, pp. 189–198.

59 Roberts Lyer, K., 2025.

60 Balme, S., 2025.

61 Barbato, J.-C., 2025, p. 304.

62 CRef, 2025b.

Within this spectrum, Belgium and the Netherlands appear less extreme – but that should not lull observers into complacency. The Dutch case reflects the influence of neoliberal rationality: here, academic freedom is undermined not through direct censorship but through financialization, precarization, and audit cultures that favor measurable productivity over critical inquiry. University rankings, valorization matrices, and third-stream income targets have redefined academic success, with significant implications for what is researched, published, and taught.

Despite their differences, these cases converge in several key aspects. First, academic freedom is increasingly interpreted not as a collective institutional good but as an individual privilege subject to public and political oversight. Second, disciplines associated with social justice, critical theory, and historical redress are disproportionately targeted, revealing an ideological hierarchy in what counts as legitimate knowledge. Third, the erosion of academic freedom often occurs through informal or "soft" mechanisms – budgeting decisions, media campaigns, reputational threats – rather than overt legal constraints.[63]

Comparative analysis thus reveals a worrying trend: the pressures on academic freedom are becoming more varied, diffuse, and difficult to contest. There is limited jurisprudence so far to have robustly tested the protection currently in place. Liberal democracies may underestimate the cumulative effects of economic rationalization and ideological backlash. For Belgium and the Netherlands, recognizing their position within this broader European pattern is a necessary first step toward designing effective safeguards and cultivating solidarity across borders.

Analysis reveals common patterns including growing social media targeting of scholars, increasing politicization of funding, and organized campaigns against specific disciplines. Vulnerability factors include high dependence on external funding, weak faculty governance, and political polarization around higher education. Protective factors include strong constitutional frameworks – although mostly aimed at institutional protection – as well as robust professional organizations and international collaboration networks.

Early warning indicators include political rhetoric targeting universities, attempts to influence governance through appointments, changes prioritizing political criteria in funding, organized campaigns against faculty, self-censorship due to retaliation fears, recruitment difficulties in sensitive disciplines, and institutional reluctance to defend criticized faculty.

63 KNAW, 2025, pp. 1–40.

6. Toward Structural Resilience and Institutional Responsibility

If academic freedom in Belgium and the Netherlands is increasingly under pressure from both financial restructuring and ideological contestation, then a key question must follow: what can be done? Beyond documenting threats, comparative education must engage with the possibility of structural resilience. This entails not only legal safeguards but also cultural, institutional, and international mechanisms that reinforce academic autonomy and responsibility in democratic societies.

Universities should strengthen governance structures ensuring meaningful faculty participation, establish clear conflict-of-interest policies for funded research, develop comprehensive response protocols for external attacks on faculty, and create training programs on academic freedom principles. Where these participatory structures already exist, they should be more than mere symbolic. Legal protections should be strengthened through constitutional amendments providing more explicit protections, extended coverage for digital harassment, and stronger whistleblower protections. Both countries should actively leverage EU membership to strengthen protections through Charter of Fundamental Rights implementation and European Research Area participation. Professional organizations should develop stronger advocacy mechanisms including legal defense funds and public campaigns. Universities should improve communication with media and civil society about the importance of academic freedom. International collaboration can provide mutual support and shared resources.[64]

On the national level, several measures must be taken. First, national governance structures must be recalibrated to safeguard academic freedom as a public good. In both countries, university boards have increasingly assumed managerial roles aligned with political and economic agendas. A return to shared governance models – with meaningful representation of faculty, students, and civil society – could act as a buffer against politicized decision-making. Rectoral conferences should take a more assertive stance in defending collective autonomy and issuing coordinated responses to ideological threats, whether they emerge domestically or from abroad.

Second, funding systems require urgent reform. As demonstrated earlier, reliance on competitive project-based grants distorts academic priorities and amplifies structural inequalities. Governments should move

64 Balme, S., 2025.

toward baseline funding models that guarantee core academic functions (teaching, basic research, and disciplinary diversity) while maintaining some space for excellence-driven competition. Special attention should be given to protecting vulnerable disciplines that contribute disproportionately to public debate, critical reflection, and civic education, but are often underfunded due to their limited economic yield.

Third, academic institutions must take greater responsibility for cultivating internal cultures of openness, integrity, and pluralism. This includes developing clear internal policies on freedom of inquiry, whistleblower protections, and the handling of ideological disputes. Universities cannot merely react to political controversy; they must proactively build robust environments where diverse viewpoints can be expressed without fear of reputational or career-based retaliation. This also means acknowledging that academic freedom is not an excuse for unaccountable behavior but a relational value that must be exercised with scholarly responsibility and public transparency.

Fourth, international solidarity is crucial.[65] As ideological attacks become more globalized, so too must the response. European networks – such as the European University Association (EUA), Scholars at Risk (SAR), and the Magna Charta Observatory – should expand their monitoring and support functions. A pan-European observatory for academic freedom, modelled on existing frameworks for media freedom or human rights, could provide early warning, public visibility, and legal advocacy. Moreover, bilateral or multilateral pacts between universities across countries could function as protective alliances, offering refuge and professional pathways for scholars targeted by political repression.

Finally, the discourse surrounding academic freedom must be broadened; it is too often presented as a defensive value – something to be protected from external threats. While this is undoubtedly true, academic freedom is also a generative value: it enables innovation, fosters epistemic diversity, and serves the democratic function of holding power to account. By framing academic freedom as both a right and a responsibility – integral to the university's mission in society – institutions can resist the reductive logics of marketization and culture war alike.

Any call for stronger protection of academic freedom must take seriously the counterargument that public funding necessarily entails public accountability. In both Belgium and the Netherlands, governments are entitled – and indeed obliged – to set priorities in research and higher education policy, for example by promoting certain societal challenges or

65 Roberts Lyer, K., 2025.

by requiring transparency in the use of public funds. From this perspective, performance indicators, strategic roadmaps and thematic funding schemes can be defended as legitimate tools of democratic steering rather than as threats to academic freedom. The difficulty lies in identifying the point at which such steering ceases to reflect broad public objectives and begins to constrain the epistemic autonomy of disciplines or to marginalize politically sensitive fields. The analysis in this article suggests that the problem is not prioritization as such, but the combination of narrow, short-term performance logics with ideologically charged scrutiny of particular topics, which together create incentives for self-censorship and strategic compliance, which are incompatible with the long-term public value of independent scholarship.

In sum, structural resilience requires more than legislation. It demands institutional will, cultural adaptation, and international cooperation. If Belgium and the Netherlands are to preserve the critical capacities of their academic systems, they must act decisively – not only against current threats, but in anticipation of future ones.

7. Conclusion

Academic freedom in Belgium and the Netherlands is not in a state of collapse, but it is no longer a self-evident feature of their higher education systems. This article has shown how formal constitutional and supranational safeguards coexist with more diffuse but powerful mechanisms of erosion. In the Netherlands, long-term underfunding, competitive project-based financing and managerial governance have hollowed out the material and collegial conditions under which academic freedom can flourish. In Flanders and, to a lesser extent, Brussels and Wallonia, ideological scrutiny of specific disciplines and the politicization of diversity policies have placed universities at the center of broader culture wars. The 2025 US Embassy questionnaire illustrates how such internal dynamics can be amplified by transnational ideological interference.

Analytically, distinguishing between the individual, institutional and systemic dimensions of academic freedom helps to clarify why traditional legal approaches are only partially equipped to address these developments. Constitutional and treaty provisions remain important reference points and have been reinforced by emerging case law at the CJEU and ECtHR, yet they primarily address explicit legal restrictions and individual sanctions, while many of the current threats operate through funding regimes, governance reforms, digital harassment and reputational pressures, which encourage self-censorship rather than open confrontation.

The comparative perspective suggests that Belgium and the Netherlands still possess significant protective resources: strong legal frameworks, relatively autonomous universities, active professional associations, and dense international networks. The question is whether these resources will be mobilized proactively or only in response to acute crises. Strengthening structural resilience requires a combination of measures: more predictable baseline funding, governance arrangements that secure meaningful participation of academic staff and students, clear institutional protocols for responding to external attacks, and renewed public communication on the democratic value of independent scholarship.

Ultimately, the defense of academic freedom in the Low Countries cannot be delegated solely to the courts or university leaders. It depends on a broader societal consensus that recognizes universities as spaces where difficult questions can be posed without prior alignment to short-term political or economic agendas. In this sense, academic freedom is not merely a professional privilege, but a collective democratic achievement that demands continuous vigilance, contestation and care.

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DA LI JE AKADEMSKA SLOBODA U BELGIJI I HOLANDIJI POD PRITISKOM?

Maaike Geuens

APSTRAKT

Akademska sloboda se smatra kamenom temeljcem demokratskog visokog obrazovanja, ali njeni institucionalni temelji su sve krhkiji. Ovaj članak ispituje kako finansijska štednja i ideološka osporavanja međusobno deluju i preoblikuju akademsku slobodu. Tvrdi se da formalne ustavne i nadnacionalne zaštitne mere koegzistiraju sa suptilnim, ali kumulativnim mehanizmima erozije, uključujući finansiranje zasnovano na učinku, menadžersko upravljanje, politizovani nadzor određenih disciplina i transnacionalno ideološko mešanje. Dok Belgija i Holandija i dalje postižu relativno dobre rezultate u Evropi, konvergencija budžetskih ograničenja i ideološke polarizacije stvaraju zastrašujuće efekte, samocenzuru i stratešku usklađenost. Članak zaključuje da se ne može pretpostaviti da je akademska sloboda bezbedna po pravilu. Poziva se na obnovljene zaštitne mere, u kombinaciji s institucionalnim kulturama i međunarodnim savezima koji jačaju strukturnu otpornost akademske slobode.

Ključne reči: akademska sloboda, autonomija univerziteta, obrazovanje, upravljanje, visoko obrazovanje, Belgija, Holandija.

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ORIGINALNI NAUČNI ČLANAK

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

Drugi deo

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

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

5. Sadržina Opšteg zakona o univerzitetima

5.1. OSNOVNE ODREDBE

Opšti zakon o univerzitetima iz 1954. godine je u glavi prvoj sadržao „Osnovne odredbe", za razliku od, na primer, Drugog nacrta, koji je poči-

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njao „Opštim odredbama". Zakonodavac je, u nastojanju da uredi odnos univerziteta i fakulteta u njegovom sastavu, u članu 1. propisao:

> „Univerzitet je zajednica fakulteta kao naučnih i najviših nastavnih ustanova za određene struke odnosno grupe struka. Univerzitet se stara o unapređenju i usklađivanju nastave i naučnog rada i vrši poslove od zajedničkog interesa za fakultete."

Univerzitet i fakulteti su samostalne ustanove „zasnovane na načelima društvenog upravljanja" (član 2. stav 1). Ustavni zakon iz 1953. godine je naglasio princip društvenog upravljanja u oblasti prosvete, nauke, kulture i drugih društvenih službi. Jovan Đorđević je ovako opisao sadržinu sintagme „društveno upravljanje", jedne od novina kojima je jugoslovenski socijalizam trebalo da se razlikuje od sovjetskog „administrativnog socijalizma": „Ostvarivanje načela društvenog upravljanja na ovim područjima ima dvostruki značaj. Na osnovu tog načela prosvetne, naučne, kulturne i druge ustanove koje vrše društvene službe dobijaju nov položaj i nov mehanizam upravljanja. Ali na bazi ostvarivanja društvenog upravljanja menja se i struktura stare države putem postepenog smanjenja i odumiranja etatizma u oblasti prosvete, nauke i kulture. Društvenim upravljanjem u ovim oblastima tzv. državna prosvetna funkcija se u toj meri preobražava da postaje društvena, punije demokratska."[1] Društveno upravljanje je našlo svoj manifestan izraz u članovima univerzitetskog i fakultetskog saveta koje je imenovala republička narodna skupština „iz reda naučnih, stručnih i drugih javnih radnika" i u potvrdi statuta univerziteta i fakulteta od strane republičke narodne skupštine. Pored toga, društvena zajednica je trebalo da osigurava materijalna sredstva potrebna za rad univerziteta i fakulteta. Predračun prihoda i rashoda univerziteta i fakulteta je bio sastavni deo republičkog budžeta (član 10).

Član 2. stav 2. Opšteg zakona o univerzitetima je glasio: „Pitanje izvođenja nastave i naučnog rada u isključivom su delokrugu nastavno-naučnih kolektiva." Član 4. je zajemčio slobodu nastavnog i naučnog rada na univerzitetu. Ovo je trebalo da garantuje slobodu nastavnog i naučnog rada i time nastavno-naučnu autonomiju.

Univerzitet i fakulteti su imali nekoliko zadataka (član 3). Nastavni zadatak je bio da se uvođenjem studenata u teorijska i praktična znanja i metode naučnog rada dobijaju visokokvalifikovani stručnjaci. Naučni zadatak se sastojao u organizovanju naučnog rada – kako ličnog naučnog rada nastavnika tako i u podizanju naučnog i nastavnog podmlatka. Vaspitni zadatak je bio da „vaspitavaju studente kao svesne građane so-

1 Đorđević, J., 1954, O značaju i primeni saveznog Opšteg zakona o univerzitetima, u: *Opšti zakon o univerzitetima*, Beograd, Službeni list FNRJ, str. 5.

cijalističke zajednice". Iako današnjem čitaocu pojam svesnog građanina može izgledati veoma neodređen, u ono vreme on je imao svoju sadržinu i označavao je da ta osoba ima jasne predstave i znanja o društvenom i političkom uređenju zemlje, o istoriji i značaju stvaranja novog društva, njegovoj ulozi i odgovornosti, solidarnosti itd. Napokon, ističe se zadatak, koji bi se mogao nazvati razvojnim zadatkom univerziteta i fakulteta, da „svojim radom i saradnjom sa privrednim, kulturnim i ostalim društvenim ustanovama i organizacijama u zemlji, i međunarodnom naučnom i stručnom saradnjom unapređuju nauku i nastavu i pomažu privredni, kulturni i društveni razvitak zemlje".

Član 6. je propisao da univerzitet i fakulteti imaju svoje statute. Statut univerziteta sadržao bi odredbe o organizaciji, radu, ustanovama i administraciji univerziteta. Statuti fakulteta sadržali bi odredbe o organizaciji, radu, nastavnom planu i pravilima studija, kao i o ustanovama i administraciji fakulteta. Statute bi potvrđivala republička narodna skupština. Ustanova statuta je bila novina.[2] Pre rata je uredbe o univerzitetima i pojedinim fakultetima donosilo Ministarstvo prosvete. Sada je prepušteno univerzitetima i fakultetima da svoja unutrašnja pitanja samostalno regulišu i podnose na potvrdu republičkoj narodnoj skupštini. U postojećim okolnostima (jednopartijski sistem, ideološka država itd.) samostalno uređivanje odnosa kroz statute je bila velika tekovina u poređenju sa stanjem od 1945. do donošenja Opšteg zakona o univerzitetima. Stanje u zemljama socijalističkog lagera je ostalo nepromenjeno – vladao je sovjetski model u kome su univerzitet i visoko obrazovanje bili pod punom kontrolom partijske države. Pravo na donošenje vlastitih statuta ostalo je bitno obeležje autonomije univerziteta i fakulteta do današnjih dana.[3]

Član 8. stav 3. je propisao da su „univerzitet i fakulteti (...) pravna lica". Fakulteti su po prvi put dobili svojstvo pravnog lica. Zakon o Univerzitetu Kraljevine Srbije i Opšta uredba Univerziteta iz 1905. godine izričito su propisivali da je Univerzitet samostalno pravno lice, a da fakulteti nisu

2 Đorđević, J., 1954, O statutima fakulteta, *Univerzitetski vesnik – list Udruženja univerzitetskih nastavnika*, god. V, br. 97, 24. jun, str. 1, 3.

3 Npr. u Hrvatskoj: čl. 12, st. 3, toč. 2. Zakona o visokom obrazovanju i znanstvenoj djelatnosti, *Narodne novine*, br. 119/22; u Srbiji: čl. 6, st. 1, tač. 4. Zakona o visokom obrazovanju, *Službeni glasnik RS*, br. 88/17, ..., 19/25. Tokom proteklih više od sedam decenija jedino je kraće vreme u Srbiji Zakon o univerzitetu iz 1998. godine (*Službeni glasnik RS*, br. 20/98), kojim je suštinski bila ukinuta autonomija univerziteta, u čl. 130, st. 1, tač. 1. propisivao da statut fakulteta donosi upravni odbor koji je, u skladu sa čl. 128, st. 3, imenovala Vlada Republike Srbije. Analogno rešenje važilo je i za donošenje statuta univerziteta. Taj zakon je prestao da važi posle pada Miloševićevog režima, kada je 1. maja 2002. godine stupio na snagu novi Zakon o univerzitetu (*Službeni glasnik RS*, br. 21/02), kojim je fakultetima i univerzitetima vraćeno pravo da njihovi saveti donose statute.

pravna lica. Ako je neki legat ili poklon učinjen kojem od fakulteta, imalo se smatrati da je zaveštalac odnosno poklonodavac hteo poklon učiniti Univerzitetu, s tim što je ovaj bio obavezan da prihode od legata ili poklona upotrebi isključivo u korist dotičnog fakulteta.[4] Odredba da je univerzitet pravno lice, a da fakulteti koji čine sastavne delove univerziteta nisu pravna lica, bila je propisana i u Zakonu o univerzitetima od 28. juna 1930. i Opštoj uredbi univerziteta od 11. decembra 1931. godine.[5] Otuda su tek Opštim zakonom o univerzitetima iz 1954. godine fakulteti dobili svojstvo pravnog lica i ta se tekovina u nekim državama nastalim na teritoriji nekadašnje Jugoslavije održala do današnjeg dana.

Prilikom sastavljanja nacrta Opšteg zakona i njegovog pretresa javile su se dve koncepcije u pogledu na strukturu univerziteta. Jedna je bila za čvrsto jedinstvo univerziteta kao korporacije, druga je bila za univerzitet kao konfederaciju fakulteta. U tadašnjim percepcijama, i jedna i druga koncepcija, odnosno modeli imali su svoje prednosti i mane. Prednost prvog modela je očuvanje univerziteta kao zajedničke ustanove fakulteta koji ga čine, a mana je bujanje administracije na jednom mestu. Prednost drugog modela je u snaženju uloge fakulteta, svojevrsnoj decentralizaciji (u tim godinama podsticanoj i u nekim drugim sferama, poput ojačavanja komunalnog sistema), a mana slabljenje univerziteta kao jedinstvene akademske ustanove. Prethodno pomenuta dilema, obelodanjena u raspravi koja je vodila usvajanju Opšteg zakona o univerzitetima, ostala je da lebdi nad pojedinim univerzitetima na prostoru nekadašnje Jugoslavije i posle sedam decenija. Profesor Jovan Đorđević, pisac uvodne reči za službeno izdanje Opšteg zakona o univerzitetima iz 1954. godine, zapisao je: „Koncepcija koju je usvojio zakon nastoji da otkloni slabosti obe izložene koncepcije, usvajajući ono što su one sadržavale pozitivno."[6] Taj autor nije, međutim, uložio napor da ukaže na koji se način postiglo da obe visokoškolske ustanove poseduju svojstvo pravnog lica, a da pri tome ne dolazi do frikcija prilikom vršenja pravnog subjektiviteta. To će pitanje dobijati na značaju u meri u kojoj fakulteti budu dobijali pravo da ostvaruju sopstvene prihode (npr. od naknada koje uplaćuju studenti koji se ne finansiraju iz budžeta ili od prihoda po osnovu projekata ili prodaje usluga na tržištu). U prvoj deceniji XXI veka, kako su države sukcesori *ex*-Jugoslavije pristupale tzv. Bolonjskom procesu, iz Saveta Evrope, tela pod čijim je okriljem praćena primena toga procesa, kao i iz Evropske

4 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 177, 187, 190. Opšta uredba univerziteta iz 1931. godine propisivala je da se službena prepiska sa licima i vlastima van fakulteta vrši uvek preko rektorata.

5 *Ibid.*, str. 258, 277, 278, 279.

6 Đorđević, J., 1954a, str. 7.

asocijacije univerziteta, vršen je pritisak da se fakultetima oduzme pravni subjektivitet i formiraju snažni, centralizovani univerziteti. Neke republike su popustile, pa je tako u Crnoj Gori samo univerzitet pravno lice, dok fakulteti nemaju svojstvo pravnog lica.[7] U BiH je materija visokog obrazovanja uređena zakonima na subcentralnim nivoima. U entitetu Republika Srpska je Zakonom o visokom obrazovanju propisano da univerzitet ima svojstvo pravnog lica, a da ga članice univerziteta (fakulteti i dr.) nemaju.[8] U entitetu Federacija BiH ta je materija uređena kantonalnim zakonima, ali im je zajedničko da samo univerzitet ima status pravnog lica.[9] U slovenačkom Zakonu o visokom školstvu propisano je da je univerzitet pravno lice, dok članica univerziteta (fakultet) može nastupati u svoje ime i za svoj račun u pravnom prometu i s tim u vezi ostvarivati svoju pravnu i poslovnu sposobnost samo kada obavlja delatnost koja se odnosi na promet dobara i usluga na tržištu.[10] S druge strane, u Hrvatskoj, Severnoj Makedoniji i Srbiji fakultetski lobiji su bili uspešniji i oduprli su se bolonjskom aktivizmu. Savremeni hrvatski zakonodavac je jasan: „Sveučilište (koje je *per definitionem* pravno lice – *autori*) kao sastavnicu s pravnom osobnosti može osnovati fakultet ili umjetničku akademiju", mada „kao sastavnicu bez pravne osobnosti" može osnovati i „fakultet odnosno umjetničku akademiju bez pravne osobnosti".[11] Slično je postupljeno i u makedonskom Zakonu o visokom obrazovanju.[12] U važećem srpskom Zakonu o visokom obrazovanju propisano je da „fakultet, odnosno umetnička akademija, ima svojstvo pravnog lica ako ostvaruje najmanje tri akreditovana studijska programa";[13] drugim rečima, fakultet, odnosno umetnička akademija sa jednim ili dva akreditovana studijska programa ne mogu biti pravno lice. Oscilacije pokrenute pre 71 godinu odredbom člana 8. stav 3. Opšteg zakona o univerzitetu, kojom je propisano da su univerzitet i fakulteti pravna lica, registruju se, dakle, na akademskim seizmografima na *ex*-jugoslovenskom prostoru i u vremenu kada nastaje ovaj tekst.

7 Čl. 39. Zakona o visokom obrazovanju, *Službeni list Crne Gore*, br. 44/2014, ..., 125/23.

8 Čl. 30. i 47. Zakona o visokom obrazovanju, *Službeni glasnik Republike Srpske*, br. 67/20.

9 Npr. čl. 33. Zakona o visokom obrazovanju, *Službene novine Kantona Sarajevo*, br. 36/22.

10 Čl. 10. Zakona o visokem šolstvu, *Uradni list Republike Slovenije*, br. 32/2012, ..., 102/23.

11 Čl. 10, st. 2. i 3. Zakona o visokom obrazovanju i znanstvenoj djelatnosti.

12 Член 15. Закона на високото образование, *Службен весник на Рейублика Македонија*, бр. 82/18, ..., 58/24.

13 Čl. 57, st. 7. Zakona o visokom obrazovanju.

Među osnovnim odredbama su bile i: da svaki građanin ima pravo da se pod jednakim uslovima upiše na fakultet i da na njemu stiče akademske i naučne stepene (član 5); da univerzitetski i fakultetski organi donose svoje odluke javnim glasanjem, ako nije ovim zakonom drugačije određeno (član 7); da se univerziteti i fakulteti osnivaju i ukidaju zakonom i da svaki fakultet pripada jednom od univerziteta (član 8. st. 1–2); da univerziteti i fakulteti vrše svoja prava i dužnosti u saglasnosti sa Ustavom, zakonima i svojim statutima, a da nadzor nad zakonitošću njihovog rada vrši republičko izvršno veće (član 9).

5.2. NASTAVA I NAUČNI RAD

U Osnovnim odredbama je, da ponovimo još jedanput, zajemčena sloboda nastavnog i naučnog rada, a pitanje nastave i naučnog rada, uređeno u drugoj glavi Opšteg zakona o univerzitetima, predato je u isključivu nadležnost nastavno-naučnih kolektiva. U tadašnjim okolnostima ovo je bilo veoma značajno – otklonjeno je uplitanje državne administracije u ova osetljiva pitanja. Pri tome je proklamovano načelo transparentnog delovanja visokoškolskih ustanova: nastava i ispiti su javni (čl. 12). Osnovna funkcija fakulteta i univerziteta je nastavna, uporedo sa naučnom. Postoji redovna nastava za studente na fakultetima koja traje najmanje četiri, a najviše šest godina. Ali „na fakultetima se uvodi (i) nastava za usavršavanje, specijalizaciju i pripremu doktorata" (član 11). Opšti zakon nije definisao niti bliže odredio te posebne oblike nastave, prepuštajući to propisima republičkog zakona i statutima.

Iako je predvideo da će o doktoratu nauka biti donet poseban savezni zakon,[14] Opšti zakon o univerzitetima je izmenio dotadašnji sistem sticanja doktorata nauka, uspostavljen odredbama Zakona o sticanju naučnog stepena doktora nauka od 12. oktobra 1948. godine.[15] 1) Stepen doktora nauka daje univerzitet na osnovu odluke fakulteta, a ne više i akademija nauka.[16] 2) Uvedeno je polaganje usmenog ispita, što je svakako bilo u vezi

14 To je učinjeno Zakonom o doktoratu nauka od 20. juna 1955. godine (*Službeni list FNRJ*, br. 29/55).

15 *Službeni list FNRJ*, br. 89/48.

16 Prelaznim i završnim odredbama Opšteg zakona o univerzitetima iz 1954. godine je propisano da za disertacije koje se nalaze u radu, odobrene od fakulteta, odnosno akademije nauka do stupanja na snagu ovog zakona, važe za vreme od dve godine ranije doneti propisi. Po stupanju na snagu ovog zakona, akademije nauka ne mogu odobravati nove disertacije (čl. 62). Ovim je bio stavljen *ad acta* čl. 4. Zakona o sticanju naučnog stepena doktora nauka od 12. oktobra 1948. godine, koji je propisivao: „Pravo dodeljivanja naučnog stepena doktora nauka imaju fakulteti univerziteta i visokih škola kao i akademije nauka." Čl. 3. Zakona o doktoratu nauka od 20. juna

sa nastavom za pripremu doktorata. Izuzetno, fakultetska uprava je mogla, saglasno odredbama statuta, osloboditi od polaganja usmenog doktorskog ispita kandidata koji se duže bavio naučnim i stručnim radom. Položen usmeni doktorski ispit bio je prvi korak iza koga je sledila izrada i javna odbrana doktorskog rada, koji je morao biti samostalan naučni rad.[17]

Pojedini fakulteti su se mogli deliti na odseke. Radi organizovanja nastave i naučnog rada univerzitet i fakulteti imaju institute, zavode, katedre, seminare, klinike, ogledna dobra, laboratorije, kabinete i druge ustanove. Ove ustanove se osnivaju odlukom univerziteta ili fakulteta i moraju imati svoja pravila koja sadrže odredbe o zadacima, organizaciji i upravljanju (član 13). Navedene nastavne i naučne ustanove bi trebalo da omoguće da studenti, pored predavanja, posećuju vežbe, seminare, budu uključeni u praktičan ili eksperimentalni rad, da u manjim grupama rade na konkretnim problemima i tako da se upućuju u probleme nauke i struke. Na taj način se približava idealu univerzitetske nastave – da se ona zasniva na rezultatima naučnih istraživanja.

Nastava na fakultetima se imala izvoditi po nastavnim planovima i programima, a za svaki nastavni predmet utvrđuje se nastavni program. Obavezni nastavni predmeti utvrđuju se statutom fakulteta (član 14). Nastavni plan je „pravni izraz strukture nastave i on se pojavljuje u obliku skupa i vremenskog rasporeda nastavnih predmeta. Program je pregled sadržine i obima nastavnog predmeta".[18] Pitanje nastavnih planova i programa nije bilo samo jedno organizaciono-tehničko pitanje. Ono je imalo suštinski karakter. Zbog toga je jedno od najvažnijih pitanja fakultetskog statuta bilo utvrđivanje nastavnog plana, to jest koje će se discipline, u kom obimu i kojim redom izučavati na fakultetu. Od nastavnog plana, u prvom redu, zavisili su (i zavise) karakter fakulteta, fizionomija i stručni profil onih koji kao diplomirani studenti izlaze s fakulteta.[19]

Utvrđivanje programa pojedinog nastavnog predmeta nije bila laka stvar u vremenu kada se stvaralo novo društvo i koje je nosilo mnogo nepoznanica. Posle sovjetskog uticaja u razvoju tadašnje nastave i nauke došao je Treći plenum CK KPJ s kraja 1949. godine, koji je otvorio vrata

1955. godine odredbom „Doktorat nauka dodeljuje univerzitet na osnovu odluke fakulteta" ponovio je odredbu iz čl. 16, st. 1. Opšteg zakona o univerzitetima.

17 Odredbom čl. 27, st. 2. Zakona o doktoratu nauka iz 1955. godine bilo je propisano da se doktorat nauka može sticati po ranijim propisima (dakle, bez usmenog doktorskog ispita) ako se doktorska disertacija *preda* najdalje do 15. jula 1956. godine. Zakon je, dakle, bio neprecizan u određivanju prelaznog režima. O tom prelaznom režimu na Pravnom fakultetu Univerziteta u Beogradu vid. Popović, D., Mirković, Z. S., 2024, str. 927, 928.

18 Đorđević, J., 1954a, str. 29.

19 Popović, D., Mirković, Z. S., 2024, str. 769.

i prema zapadnim tokovima u nastavi i nauci. Ovo je svakako uticalo i na nesnalaženja i oklevanja. To je bio razlog da je Savet Univerziteta u Beogradu 15. aprila 1957. godine doneo Preporuku o izradi nastavnih programa, nastojeći da nekako približi ili uskladi postupke pripreme tih programa primenjivane na fakultetima u njegovom sastavu. U Preporuci je iskazano očekivanje da nastavni programi budu izrađeni i učinjeni dostupnim javnosti do početka školske 1957/58. godine. Uz puno uvažavanje uloge koju imaju katedre, odseci i druge organizacione jedinice fakulteta, Univerzitetski savet je sugerisao da se koristi saradnja stručnjaka i ustanova, kao i saradnja nastavnika istih predmeta sa raznih fakulteta. Očekivala se i saradnja studenata, a predloženo je i da se, u granicama raspoloživih sredstava i vremena, razmene iskustva sa srodnim visokoškolskim ustanovama iz ostalih delova FNRJ. Osim međufakultetskih savetovanja, veoma značajne bi bile međukatedarska i međupredmetna saradnja. Na kraju su date tri preporuke koje bi trebalo da doprinesu da se nastavni programi pojedinih predmeta, pored izražene specifičnosti koju zahteva priroda predmeta, celishodno uklope u celinu programa fakulteta, odnosno grupe ili odseka. Toga radi je trebalo težiti: (1) da se izbegne preopterećenost činjeničnog materijala (koja je obeležavala dotadašnje programe); (2) da savremenost nastave (tj. najnovija naučna dostignuća) bude u pogledu materijalne sadržine osnovni kriterijum u sastavljanju programa; (3) da naučna idejnost nastave treba da dođe do izraza i u nastavnim programima. Duh te preporuke mogao se zapaziti i u narednim godinama prilikom izrade novih nastavnih programa.[20]

Najzad, Opšti zakon o univerzitetima propisuje da student koji završi redovne studije na fakultetu dobija diplomu u kojoj se utvrđuje akademski stepen. Diplomu potpisuju rektor i dekan fakulteta. Akademski stepeni su se utvrđivali propisima SIV-a (član 15).

5.3. STUDENTI

Treća glava bila je posvećena studentima. Status studenta dobijao se upisom na jedan od fakulteta. Svako ko je završio potpunu srednju školu opšteg obrazovanja – bio građanin FNRJ ili stranac – imao je pravo da se pod jednakim uslovima upiše na fakultet. Oni koji su završili srednju stručnu ili učiteljsku školu imali su pravo da se upišu na odgovarajuće fakultete saglasno propisima SIV-a. Odlukom SIV-a od 10. jula 1954. godine, donetom po osnovu člana 17. stav 2. Opšteg zakona o univerzitetima, na pravni fakultet, na primer, mogli su se upisati i građani koji nisu za-

20 Državni arhiv Srbije, fond Univerzitet u Beogradu, Preporuka o izradi nastavnih programa od 15. aprila 1957, str. 71; Popović, D., Mirković, Z. S., 2024, str. 816.

vršili gimnaziju, već školu za unutrašnju upravu, višu školu Ministarstva unutrašnjih poslova, odnosno višu školu Udbe ili srednju upravnu školu, na ekonomski fakultet su se mogli upisati i građani koji su završili srednju ekonomsku školu, ekonomski večernji tehnikum, ekonomski odsek pomorske srednje škole ili ekonomski odsek železničkog tehnikuma itd.[21]

Na fakultete na kojima to dozvoljava način izvođenja nastave mogli su se upisivati vanredni studenti, saglasno propisima SIV-a. Vanredno studiranje je uvela Vlada FNRJ 8. decembra 1947. godine Uredbom o vanrednom studiranju na univerzitetima i visokim školama.[22] Pravo da se upišu kao vanredni studenti su imali oni koji su, pored neophodnih prethodnih školskih kvalifikacija, bili zaposleni u privredi, državnim i drugim nadleštvima, i zbog toga nisu mogli pohađati predavanja i biti redovni studenti.

Opštim zakonom o univerzitetima iz 1954. godine, u članu 18, bila su propisana prava i dužnosti studenata: pravo i dužnost posećivanja predavanja, seminara i vežbi, učestvovanja u svim drugim oblicima nastavnog rada i pravo polaganja ispita. Razrada prava i obaveza studenata ostavljena je prvenstveno statutima fakulteta. Studenti su bili dužni da se pridržavaju univerzitetskih i fakultetskih propisa i pravila i da čuvaju ugled studenata i univerziteta. Za njihovu povredu bi odgovarali pred disciplinskim sudovima za studente. Status studenta je prestajao diplomiranjem, ispisom sa fakulteta, osudom na kaznu strogog zatvora ili kaznu zatvora dužu od šest meseci, dok ta kazna traje, odlukom fakultetskog saveta u slučaju osude na kaznu ograničenja građanskih prava dok ta kazna traje. Za najteže povrede discipline zakon je mogao predvideti kaznu isključenja sa univerziteta.

Studenti su mogli osnivati stručna, kulturna i druga udruženja na fakultetu i univerzitetu. Pravila ovih udruženja morala su biti u saglasnosti sa Opštim zakonom o univerzitetima. Istorija studentskog organizovanja u posleratnoj Jugoslaviji započela je 20. januara 1946. godine, kada je, na inicijativu i pod rukovodstvom KPJ, osnovana Narodna studentska omladina (NSO), kao masovna politička organizacija studenata. Na čelu NSO u Srbiji bio je Univerzitetski komitet KPS. Odmah potom, 27. januara 1946. godine izvršeno je i biranje čelnika NSO na fakultetima. „Personalna unija" je obezbeđena na taj način što je čelnik KPJ na Univerzitetu i fakultetu bio istovremeno na čelu NSO Univerziteta, odnosno fakulteta. Time su rukovodeća uloga Partije i pomoćna (ili transmisiona) uloga NSO postale očigledne i nesumnjive. Zadatak NSO je bio „da vodi brigu o prosvećivanju, kulturnom i političkom uzdizanju i ekonomskom zbrinjavanju studenata, da podstiče studente da dobro uče, da učestvuju u odbrani zemlje,

21 Odluka o upisu svršenih učenika srednjih stručnih škola na fakultete, *Službeni list FNRJ*, br. 29/54.

22 *Službeni list FNRJ*, br. 107/47.

da se politički obrazuju". Ne sme se zaboraviti učešće studenata u obnovi i izgradnji zemlje, organizovanju masovnih kulturnih i sportskih manifestacija, u akcijama solidarnosti i dr.

Krajem 1948. NSO je preimenovana u Narodnu omladinu Jugoslavije (NOJ) na univerzitetima, a krajem 1951. godine u Savez studenata pojedinog univerziteta, odnosno u Fakultetski odbor Saveza studenata (FOSS) na pojedinom fakultetu.

Osim bavljenja studentskim pitanjima, studentska organizacija je imala zadatak da agitacijom i propagandom ideološki oblikuje studentsku omladinu u socijalističkom (komunističkom) duhu. Ta studentska organizacija je dobijala od Partije i posebne političke zadatke – do 1948. godine da se obračunava sa nepodobnim, „buržujskim" profesorima; tada je angažovana i u borbi protiv Informbiroa, a i kasnije je sve vreme služila Partiji.[23] U kojoj meri je studentska organizacija imala moć i bila svesna svoje moći – u službi transmisije naloga Partije – svedoči pismo Sekretarijata Centralnog odbora Saveza studenata Jugoslavije koje je 13. avgusta 1953. godine upućeno Odboru za prosvetu SIV-a i Sekretarijatu za zakonodavstvo i organizaciju SIV-a. U njemu su iznete primedbe na Treći nacrt opšteg zakona o univerzitetima i zatraženo je da se Savez studenata izuzme iz odredbe da pravila studentskih udruženja „moraju biti u saglasnosti sa Zakonom o univerzitetu i fakultetskim statutom", kako je stajalo u članu 30. Trećeg nacrta. To je obrazloženo na sledeći način: „SSJ postoji na osnovu Ustava i drugih postojećih zakona u našoj zemlji... To bi u praksi sprečavalo slobodan rad SSJ i dovodilo ga u zavisnost od dekana, saveta i njihovog tumačenja zakona. A da je takva opasnost očigledna pokazuje niz dosadašnjih primera, među kojima je nedavni, kada je dekan zagrebačkog Pravnog fakulteta dva puta uzastopce zabranjivao sastanak udruženja Saveza studenata, na čijem je dnevnom redu bila kritika jednog profesora." Ovo pismo je potpisao predsednik Centralnog odbora Saveza studenata Jugoslavije Miko Tripalo, docnije poznati jugoslovenski i hrvatski političar.[24]

Opšti zakon o univerzitetima je propisao da se „materijalno pomaganje studenata za studiranje (stipendije) uređuje posebnim propisima". To je učinjeno Osnovnim zakonom o stipendijama od 9. jula 1955. godine.[25] Član 27. stav 4. je ovlastio fakultetsku upravu da raspisuje konkurs i vrši izbor stipendista. Prilikom izbora kandidata, u okviru uslova konkursa, prednost su uživala deca palih boraca Narodnooslobodilačkog rata i žrtava fašističkog terora, kao i kandidati slabijeg imovnog stanja (član 30).

23 Popović, D., Mirković, Z. S., 2024, str. 701, 702, 703.

24 AJ, 318, 60, 87, Primedbe na Treći nacrt opšteg zakona o univerzitetima, dokument broj 12.

25 *Službeni list FNRJ*, br. 32/55.

Studenti su uživali pravo na zdravstvenu i socijalnu zaštitu i druga prava i povlastice saglasno propisima koje donosi SIV. Studenti su dobili pravo da učestvuju u radu organa upravljanja na univerzitetu i fakultetu, kao i u upravljanju ustanovama koje se bave zdravstvenim, socijalnim i materijalnim pitanjima studenata.[26]

5.4. NASTAVNICI I FAKULTETSKI I UNIVERZITETSKI SARADNICI

Tri meseca po okončanju ratnih dejstava, 16. avgusta 1945. godine, Narodna vlada Srbije donela je Uredbu o univerzitetskim vlastima i nastavnom osoblju Univerziteta u Beogradu. Redovni i vanredni profesori, docenti i lektori birani su na osnovu konkursa. Za profesora i docenta Univerziteta moglo je biti izabrano lice koje ima doktorsku diplomu i odgovarajuću naučnu spremu, kao i pedagošku sposobnost. Za redovnog ili vanrednog profesora mogao je biti pozvan istaknuti naučni radnik, bez obzira na formalne kvalifikacije. Redovni i vanredni profesori Univerziteta i docenti mogli su biti zbog stručne, moralne i društvene nepodobnosti uklonjeni sa Univerziteta po predlogu univerzitetskog saveta ili na zahtev ministra prosvete, a po rešenju fakultetskog saveta. Pri izboru redovnih profesora glasali su samo redovni profesori, vanredne profesore birali su redovni i vanredni profesori, a u izboru docenata učestvovali su i docenti. Uredba iz 1945. godine je poznavala i honorarne profesore i nastavnike. Odluke o postavljanju i uklanjanju nastavnog osoblja Univerziteta donosio je ministar prosvete u saglasnosti sa Predsedništvom Narodne vlade Srbije, a u duhu ove uredbe. Uredbom o prosvetno-naučnoj struci iz septembra

26 Suprotno agitpropovskim tvrdnjama da se u predratnoj Jugoslaviji siromašnijim studentima nije poklanjala gotovo nikakva pažnja, pažljivija analiza odgovarajućih propisa – Opšte uredbe univerziteta iz 1931. godine (čl. 204–214), Pravila o davanju državne stipendije studentima univerziteta Kraljevine Srba, Hrvata i Slovenaca od 15. septembra 1925. godine (*Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 843–846), Uredbe o udruženjima slušalaca univerziteta od 20. aprila 1934. godine, sa docnijim izmenama, Pravila potpornog udruženja studenata Beogradskog univerziteta, koja je odobrio Univerzitetski senat na svojim sednicama od 12. i 24. januara 1938. godine, Pravilnika o davanju pozajmica studentima Beogradskog univerziteta iz sredstava potpornog udruženja, koji je usvojio Univerzitetski senat na svojoj sednici od 14. marta 1938. godine (*ibid*., str. 788–805, 806–814, 815–830, 831–837), Pravilnika o letovalištima slušalaca univerziteta od 3. jula 1935. godine (*ibid*., str. 855–857) i dr. – pokazuje da one nisu bile istinite. Postojali su, za odlične i vrlodobre, kao i siromašne studente, odnosno studentkinje Studentski dom kralja Aleksandra sa 480 kreveta i Dom studentkinja u Ulici kraljice Marije sa 100 kreveta, a uz smeštaj su išli i menza, ogrev, kupatilo, pranje veša i dr., kao i različite povlastice u prevozu, besplatna lekarska pomoć i niz dugih privilegija. Raspoložive su bile i mnoge stipendije.

1947. godine bilo je uvedeno i zvanje predavača. Petnaest meseci kasnije, 25. decembra 1948. godine, doneta je Uredba o organima i nastavnom osoblju Univerziteta i velikih škola, kojom je lektor prebačen u pomoćno nastavno osoblje (sa starijim asistentima i asistentima), a zvanje honorarnog profesora je ukinuto.

Opštim zakonom o univerzitetima iz 1954. godine bilo je predviđeno da su univerzitetski nastavnici samo redovni profesori, vanredni profesori i docenti, pri čemu je bila zadržana mogućnost da se u slučaju potrebe biraju honorarni redovni i vanredni profesori i honorarni docenti na način i pod uslovima koji su važili i za izbor nastavnika.

Izuzetno, van uslova predviđenih ovim zakonom, za redovnog profesora je mogao biti pozvan istaknuti naučnik i stručnjak čiji naučni i stručni radovi uživaju opšte priznanje.

Ni Opštim zakonom o univerzitetima iz 1954. godine nisu bili detaljnije formulisani kriterijumi za izbor u nastavnička zvanja, koji se, kao i do tada, vršio na osnovu konkursa. Za sva tri nastavnička zvanja – redovni profesor, vanredni profesor i docent – tražio se doktorat, uz mogućnost da se na nekim fakultetima (npr. tehničkim ili medicinskim) ili za određene predmete zahteva završeni fakultet sa primljenim habilitacionim radom. Osim toga, zahtevano je da kandidat vlada problemima svoje naučne discipline i da pokazuje sposobnost za samostalan naučni i nastavnički rad. Gradacija uslova za izbor u neko nastavničko zvanje sprovedena je u Opštem zakonu o univerzitetima jedino tako što je, u odnosu na najniže, docentsko zvanje, za vanrednog, odnosno redovnog profesora bilo propisano da može biti izabran kandidat koji ima brojnije i značajnije naučne i stručne radove. Statutom fakulteta je bilo moguće predvideti i druge uslove za izbor univerzitetskih nastavnika.

Opštim zakonom o univerzitetima iz 1954. godine promenjen je sastav nastavničkih kolegijuma u kojima se vrše izbori u zvanja. Po stupanju na snagu njegovih odredaba, u izboru redovnog profesora učestvovali su redovni i vanredni profesori, a u izboru vanrednog profesora i docenta svi nastavnici fakulteta. Reizbor (svake pete godine) nije bio zadržan samo za docente već je proširen na vanredne profesore. Na taj način je radni odnos na neodređeno vreme (eng. *tenure*) bio pružen samo redovnim profesorima. Izbor je vršen na osnovu referata najmanje dva nastavnika (za docenta), najmanje dva profesora (za vanrednog profesora), odnosno najmanje tri redovna profesora (za redovnog profesora).

Dotadašnje opšte propise o penzionisanju univerzitetskih nastavnika kao državnih službenika zamenio je *lex specialis*, u vidu čl. 29. Opšteg zakona o univerzitetima. Njime je bilo predviđeno da nastavniku univerziteta prestaje redovna služba sa navršenom 70. godinom života, ali je bila

ostavljena mogućnost da mu odlukom univerzitetskog saveta služba može prestati i ranije ako za to postoji potreba i ako ima uslova za starosnu penziju po opštim propisima, kao i ako je po opštim propisima ispunio uslove za penziju i podneo zahtev za penzionisanje.[27]

Zakon o izmenama i dopunama Opšteg zakona o univerzitetima, od 29. decembra 1955. godine,[28] predvideo je u članu 1. mogućnost da nastavnik izuzetno može biti zadržan u redovnoj službi, uz vlastiti pristanak, i posle navršene 70. godine života, ako je to od posebnog interesa za nastavu.

Nezavisno od penzionisanja, nastavniku univerziteta je mogla prestati služba – odlukom univerzitetskog saveta, a na predlog fakultetske uprave – i pre isteka vremena na koje je biran, i to ako se ustanovi:

- da nije u mogućnosti da obavlja svoju dužnost ili
- da je moralno nepodoban za poziv univerzitetskog nastavnika.

Protiv odluke univerzitetskog saveta nastavnik je imao pravo žalbe republičkom izvršnom veću.

Krupna novina Opšteg zakona o univerzitetima, kako je već pomenuto, bila je odredba člana 30. da fakultetski savet može, „kad to traže interesi unapređenja naučnog i nastavnog rada u pojedinoj struci ili naučnoj disciplini, odlučiti da se izvan slučaja predviđenog odredbom čl. 24 st. 6 raspiše konkurs za izbor redovnog i vanrednog profesora. U konkursu može učestvovati i profesor koji je zauzimao mesto za koje se konkurs raspisuje". Na ovaj način je posrednim putem uvedena mogućnost ponovnog izbora (reizbornost) i za redovne profesore. Ipak, treba reći da se radi o izuzetnom slučaju i da je zbog toga Zakon tražio da odluku fakultetskog saveta o raspisivanju konkursa za ponovni izbor potvrdi univerzitetski savet. Povrh toga, u prelaznim i završnim odredbama Opšti zakon o univerzitetima je ovlastio republička izvršna veća da mogu predvideti da se u roku od tri godine od dana stupanja na snagu ovog zakona izvrši izbor i redovnih profesora radi dovođenja u sklad njihovog izbora sa odredbama ovog zakona (član 59. stav 3).

U Opštem zakonu o univerzitetima ukinuta je formulacija „pomoćno nastavno osoblje" i zamenjena izrazom „fakultetski i univerzitetski saradnici". Saradnike su činili: asistenti, naučni i stručni saradnici, rukovodioci vežbi i praktičnih radova, lektori, nastavnici veština i drugi. Propisano je da asistenti rade po uputstvima nastavnika na izvođenju nastave i pomažu nastavnicima u radu. Izbor univerzitetskih i fakultetskih saradnika se

27 Popović, D., Mirković, Z. S., 2024, str. 269–271.

28 *Službeni list FNRJ*, br. 58/1955.

vršio konkursom i obnavljao „se prema zvanjima na vreme od tri do pet godina". Fakultetski savet je raspisivao konkurs za izbor asistenata i drugih fakultetskih saradnika – na predlog fakultetske uprave ili po sopstvenoj inicijativi. Fakultetska uprava je birala i razrešavala asistente i druge fakultetske saradnike, uz učešće u glasanju svih članova tog organa (dakle, i asistentskih predstavnika). Fakultetski savet je potvrđivao izbor, pa se tako, za razliku od izbora nastavnika, izborni postupak za asistente završavao na fakultetu.

Izbor nastavnika bi počinjao tako što bi fakultetski savet raspisivao konkurs. Procedura u vezi s konkursom je bila kao i u Drugom nacrtu. Fakultetska uprava bi birala nastavnika, a univerzitetski savet je potvrđivao izbor. Za razliku od Drugog nacrta, po kome je posle mišljenja univerzitetskog saveta (koji su činili samo univerzitetski nastavnici) saglasnost davao republički organ nadležan za prosvetu i kulturu, sada je po Opštem zakonu posle izbora na fakultetskoj upravi izbor potvrđivao univerzitetski savet, koji su činili i predstavnici društvene zajednice.

Za razliku od Drugog nacrta, koji je detaljno propisao postupak, Opšti zakon je, u skladu sa svojim imenom, dao samo opšti okvir (izbor na osnovu konkursa, broj referenata, organi nadležni za izbor).

Da bi se uočile krupne promene koje su nastupile posle rata, neophodno je upoznati se i sa predratnim stanjem. Po Zakonu o univerzitetima iz 1930. godine, nastavnici univerziteta su bili: 1) redovni profesori, 2) vanredni profesori, 3) univerzitetski docenti, 4) privatni docenti, 5) honorarni profesori i honorarni nastavnici, 6) lektori i 7) univerzitetski učitelji veština.

Ustanova privatnog docenta je dospela u taj zakon iz Zakona o Sveučilištu u Zagrebu Franc Jozef Prvi iz 1874. godine, sa izmenama i dopunama iz 1894. godine, kojim je Sveučilište u Zagrebu bilo uređeno sve do donošenja jedinstvenog Zakona o univerzitetima iz 1930. godine.[29] Taj zakon o Sveučilištu u Zagrebu iz 1874. godine propisao je da, pored redovnih i vanrednih profesora, postoje docenti, koji „nisu činovnici, nedobivaju nikakove plaće iz javne blagajne, te mogu samo naukovinu od

29 Zakonski članak sabora kraljevinah Dalmacije, Hrvatske i Slavonije od 5. siečnja 1874, ob ustrojstvu sveučilišta Franje Josipa I. u Zagrebu (*Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju*, godina 1874, komad I-XXVI, broj 1–58, Zagreb 1875, str. 11–28 [ovde naročito 12, 24, 26]).

Zakon od 6. listopada 1894. kojim se preinačuju, odnosno nadopunjuju njeke ustanove zakonskog članka sabora kraljevinah Hrvatske, Slavonije i Dalmacije od 5. siečnja 1874, ob ustrojstvu sveučilišta Franje Josipa I. u Zagrebu (br. 3 zbornika od godine 1874) (*Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju*, godina 1894, komad I-XXIV, broj 1–97, Zagreb 1894, str. 463–473 [ovde naročito 464, 471]).

polazećih učenikah iskati" (član 6). Član 64: „Naukovina, koja se na ovom sveučilištu uvodi, neplaća se u javnu blagajnu već pripada dotičnim predavaocem t. j. profesorom i docentom." Član 73. je propisao da svaki slušalac može prvih deset dana u semestru slobodno (besplatno) da pohađa neki kurs predavanja („kolegij"). To je bilo vreme u kome bi slušalac ocenio da li hoće da sluša dotični kurs i predavača i, ako hoće, da plati naukovinu za taj kurs. Ustanova privatnog docenta se razvila na univerzitetima nemačkog govornog područja oko 1800. godine i naročito posle osnivanja Univerziteta u Berlinu 1810. godine, kada nastaje Humboltov model univerziteta, koji je doživeo svetsku recepciju. Mladi doktori nauka odlaze na univerzitete i nude kurseve predavanja u nadi da će privući slušaoce i tako se preporučiti za profesuru. Privatna docentura, zajedno sa poboljšanjem materijalnog položaja profesora, kroz udeo od plaćane školarine („naukovine") postali su jedna od odlika nemačkih univerziteta. To je dalo podsticaj za unapređenje studiranja kroz materijalnu zainteresovanost profesora da ponude dodatna i bolja i veća znanja u poređenju sa drugim univerzitetima kako bi privukli nove i naročito motivisane studente. Takvo materijalno poboljšanje omogućavalo je profesorima da se oslobode dodatnih poslova i službi, što je bilo uobičajeno pod starim režimom, i da posvete više vremena svojim istraživanjima.[30]

Izbor nastavnika, kao i unapređenje vanrednih profesora u redovne i docenata u vanredne profesore moglo se vršiti „samo u granicama odobrenim budžetom", kako je propisao Zakon o univerzitetima iz 1930. godine.

Redovni i vanredni profesor se postajalo ili pozivom ili izborom po objavljenom konkursu (stečaju, kako su onda govorili).

Redovni i vanredni profesori su birani u fakultetskom savetu (glasalo se za kandidata u istom ili nižem zvanju, tako je vanredni profesor glasao za izbor vanrednih profesora i docenata, ali ne i redovnih profesora); njihov izbor je primalo ili odbacivalo univerzitetsko veće. Izvršeni izbor se podnosio na odobrenje Ministarstvu prosvete. Profesori univerziteta su se postavljali kraljevim ukazom i odmah su sticali stalnost i nepokretnost u državnoj službi. Čak i više od toga, u prelaznim naređenjima u članu 44. stav 1. Zakona o univerzitetima iz 1930. godine propisano je da „redovni i vanredni profesori, kao i docenti sa više od pet godina docentske službe, koji se zateknu na univerzitetima u službi kad ovaj zakon dobije obaveznu snagu, postaju stalni i dobivaju sva prava po ovom Zakonu, bez ponovnog izbora".

30 O Humboltovom modelu univerziteta i njegovoj recepciji u Habzburškom carstvu vid. Mirković, Z. S., Nastanak Velike škole 1863. godine i njeno evropsko okruženje, u: Mirković, Z. S., Milenković, M., (ur.), 2014, *Vek i po Velike škole u Beogradu (1863–2013)*, Beograd, Univerzitet u Beogradu, Filozofski fakultet & Pravni fakultet, str. 34–37.

Bio je propisan vrlo detaljan postupak uklanjanja sa univerziteta kada bi profesor univerziteta fizički tako oslabio da ne bi mogao da vrši svoju dužnost (što se imalo utvrditi lekarskim komisijskim pregledom) ili bi se svojim postupcima onemogućio za zvanje profesora u moralnom i socijalnom pogledu.

One profesore koji su navršili 65 godina, a žele da ostanu u službi i dalje, mogao je ministar prosvete zadržati u službi i do 70 godina starosti zaključno, po rešenju univerzitetskog veća, a na predlog fakultetskog saveta.[31]

5.5. UPRAVLJANJE UNIVERZITETOM I FAKULTETOM

5.5.1. Upravljanje univerzitetom

Uspostavljanje monopola vlasti KPJ podrazumevalo je i ustanovljavanje mehanizama kojima bi Partija mogla da upravlja univerzitetima i fakultetima u njihovim sastavima. Tako su posle Drugog svetskog rata nastupile fundamentalne promene, koje su bile nauštrb autonomije univerziteta. Narodna vlada Srbije je, ponovimo, 16. avgusta 1945. godine donela Uredbu o univerzitetskim vlastima i nastavnom osoblju Univerziteta u Beogradu, prema kojoj su univerzitetske vlasti: rektor, prorektor, univerzitetski savet, dekani, prodekani i fakultetski savet. Ministar prosvete vršio je vrhovni nadzor nad radom univerzitetskih vlasti. Rektora i prorektora birao je na godinu dana skup univerzitetskih profesora i docenata. Rektor se birao iz reda redovnih profesora, a prorektor iz reda redovnih i vanrednih profesora. Izbor rektora i prorektora je potvrđivao ministar prosvete.

Univerzitetski savet su sačinjavali rektor, prorektor, dekani i prodekani. Univerzitetski savet je: 1) rešavao o svim pitanjima koja se tiču Univerziteta kao celine; 2) davao mišljenje po pitanjima koja mu upute ministar prosvete, rektor i studentske organizacije; 3) predlagao uklanjanje sa Univerziteta profesora i docenata u slučajevima stručne, moralne i društvene nepodobnosti; 4) predlagao ministru prosvete pomoćno nastavno osoblje, administrativno i tehničko osoblje rektorata, fakulteta i drugih univerzitetskih ustanova; 5) utvrđivao nacrt budžeta Univerziteta na osnovu predloga fakultetskih saveta i rektora; 6) rukovao zadužbinama, fondovima i imovinom Univerziteta.

Uredba o izboru rektora Univerziteta i velikih škola i dekana fakulteta NR Srbije, od 2. oktobra 1948. godine, predvidela je da rektora i prorek-

31 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 263–266, 271.

tore Univerziteta i velikih škola bira skupština univerzitetskih nastavnika. Skupštinu univerzitetskih nastavnika činili su svi redovni i vanredni profesori, docenti, predavači i honorarni nastavnici univerziteta, odnosno velike škole. Pravo biranja rektora i prorektora imali su svi članovi skupštine univerzitetskih nastavnika, osim honorarnih nastavnika. U naučnoj literaturi je dokumentovano da je Komunistička partija odlučivala ko će biti kandidat za rektora (kao i za prorektora, dekana i prodekana) i držala pod kontrolom svaku fazu izbornog postupka.[32] Izbor se vršio na početku ili na kraju svake školske godine. Za rektora Univerziteta, odnosno velike škole mogao je biti izabran redovni profesor, a za prorektora redovni ili vanredni profesor Univerziteta, odnosno velike škole. Univerzitet odnosno velika škola mogli su imati dva prorektora. Izbor rektora i prorektora potvrđivao je predsednik Vlade NR Srbije.

Prema odredbama Opšteg zakona o univerzitetima iz 1954. godine, univerzitetom upravljaju univerzitetski savet, univerzitetska uprava i rektor univerziteta.

Univerzitetski savet (čl. 34–38) sačinjavali su:

- članovi koje bira republička narodna skupština iz reda naučnih, stručnih i drugih javnih radnika;
- po jedan član koga bira fakultetska uprava svakog fakulteta iz reda članova uprave;
- jedan član koga bira iz reda narodnih odbornika narodni odbor grada u kome je sedište univerziteta;
- jedan član koga biraju studenti iz svojih redova;
- rektor i prorektor univerziteta.

Broj članova koje bira republička narodna skupština određivao se odlukom skupštine o izboru. Predlog za izbor ovih članova podnosilo je republičko izvršno veće, a pretresao ga je i podnosio izveštaj skupštini odbor za prosvetu republičkog veća. Univerzitetski savet se birao na vreme od dve godine.

Univerzitetski savet je bio nadležan za: utvrđivanje statuta univerziteta i predračuna prihoda i rashoda univerziteta, davanje mišljenja o statutima fakulteta i predračunima prihoda i rashoda fakulteta, potvrđivanje izbora nastavnika, naučnih saradnika i rukovodilaca univerzitetskih ustanova, donošenje zaključaka i preporuka o pitanjima od zajedničkog interesa za upravljanje fakultetima i organizaciju nastave i naučnog rada, biranje i razrešavanje članova drugostepenog disciplinskog suda za nastavnike, donošenje propisa o disciplinskoj odgovornosti studenata i biranje i

32 Upor. Popović, D., Mirković, Z. S., 2024, str. 53–55.

razrešavanje članova drugostepenog disciplinskog suda za studente, pretresanje opšteg materijalnog položaja studenata, davanje saglasnosti na pravila studentskih udruženja, vršenje nadzora nad korišćenjem opštenarodne imovine od strane fakulteta i univerziteta.

Član izabran iz reda studenata nije učestvovao u glasanju o potvrdi izbora nastavnika, saradnika i rukovodilaca univerzitetskih ustanova, o izboru i razrešenju članova drugostepenog disciplinskog suda za nastavnike i o donošenju zaključaka i preporuka o nastavnim planovima.

Univerzitetsku upravu (čl. 39–40) činili su rektor, prorektor i dekani svih fakulteta. Predstavnici studenata su imali pravo da prisustvuju sednici univerzitetske uprave i izlože mišljenje kada se na dnevnom redu nalazilo pitanje o materijalnom stanju studenata i druga pitanja od interesa za njih.

Delokrug rada univerzitetske uprave je obuhvatao uglavnom dve grupe poslova.[33] U prvu grupu poslova spadalo je sastavljanje predloga i vršenje drugih poslova o kojima konačno odlučuje univerzitetski savet: predloga statuta univerziteta, predloga prihoda i rashoda univerziteta, predloga za osnivanje, spajanje i ukidanje univerzitetskih ustanova, predloga o drugim pitanjima o kojima rešava univerzitetski savet. U drugu grupu spadali su poslovi o kojima je univerzitetska uprava samostalno odlučivala: izbor naučnih i stručnih saradnika i rukovodilaca univerzitetskih ustanova, upravljanje imovinom, fondovima i zadužbinama univerziteta, dodeljivanje titule počasnog doktora, izbor članova prvostepenog disciplinskog suda za nastavnike, staranje o materijalnom stanju studenata, izbor sekretara univerziteta, razmatranje pitanja organizacije nastave i naučnog rada od zajedničkog interesa za fakultete.

Rektora i prorektora (čl. 41–42) birala je univerzitetska skupština iz reda univerzitetskih profesora, dakle, iz reda redovnih i vanrednih profesora. Cilj je bio, kako je stajalo u „Tezama za Zakon o univerzitetu", da se razbije „izrazito staleško-esnafski karakter" predratnog, buržoaskog univerziteta. Po odredbama prva dva nacrta, rektor bi se birao iz reda redovnih, a prorektor iz reda redovnih i vanrednih profesora. Međutim, po odredbama prva dva nacrta, o izboru rektora i prorektora izveštavao se republički organ nadležan za prosvetu i nauku. Ukoliko ovaj organ ne bi izrazio svoju nesaglasnost u roku od 15 dana od dana obaveštenja o izvršenom izboru, izbor se smatra punovažnim. Ovo nije bilo predviđeno u Opštem zakonu o univerzitetima.

Rektor je predstavljao univerzitet, sazivao i predsedavao sednicama univerzitetske uprave, pripremao sednice univerzitetskog saveta i univerzitetske uprave, izvršavao odluke ovih tela i starao se o primeni statuta univerziteta.

33 Đorđević, J., 1954a, str. 18.

Bila je predviđena i univerzitetska skupština (član 43). Za razliku od prva dva nacrta, u Opštem zakonu o univerzitetu univerzitetska skupština nije bila organ upravljanja univerziteta. Njena osnovna funkcija je bila izborna – birala je i razrešavala rektora i prorektora. Univerzitetsku skupštinu su činili svi nastavnici jednog univerziteta i određeni broj fakultetskih i univerzitetskih saradnika (što je trebalo da utvrdi statut univerziteta). Iako se protekom desetak godina od oslobođenja broj članova Partije među nastavnicima Univerziteta u Beogradu značajno uvećao, Univerzitetski komitet SK Srbije (UK SKS) nije smeo da organu čiji su članovi *svi* nastavnici prepusti da slobodno bira rektora. Tako je, na primer, 13. septembra 1956. godine UK SKS raspravljao ko od potencijalnih kandidata za rektora, na koje SK računa, može da sa najmanje teškoća dobije većinu glasova u Univerzitetskoj skupštini i kako da Udruženje univerzitetskih nastavnika sprovede odgovarajuću agitaciju (odlučili su se za prof. Borislava Blagojevića sa Pravnog fakulteta).[34] Univerzitetska skupština se sastajala jedanput godišnje radi pretresanja izveštaja o radu univerziteta.

Za odnos i rad univerzitetskih organa su značajne još dve odredbe zakona. 1) Univerzitetska uprava i fakultetski savet i uprava imali su prava da stave prigovor republičkom izvršnom veću ako nađu da pojedina odluka univerzitetskog saveta nije u saglasnosti sa zakonom i statutom. Prigovor je obustavljao odluku od izvršenja. 2) Pravo i dužnost obustavljanja od izvršenja imao je i rektor u odnosu na odluke univerzitetske uprave koje su protivne zakonu, statutu i odlukama univerzitetskog saveta. Rektor je bio dužan da sporno pitanje iznese pred univerzitetski savet radi donošenja konačne odluke. Jovan Đorđević je zapisao: „Ove odredbe pokazuju da je društveno upravljanje jedna statusna, zakonska situacija. U takvoj pravnoj situaciji zakon je izvor ovlašćenja a zakonitost garantija da društveno upravljanje ne postane samovolja i u sebe zatvoreni režim odvojen od opštih interesa zajednice."[35]

Razmatranje o čelništvu univerziteta i fakulteta trebalo bi, međutim, dopuniti osvrtom na stanje koje je postojalo pre Drugog svetskog rata. Po Zakonu o univerzitetima od 28. juna 1930. godine, univerzitetske vlasti su bile: 1) rektor, 2) dekani, 3) univerzitetsko veće, 4) univerzitetski senat, 5) univerzitetska uprava, 6) fakultetski saveti, 7) niži i viši disciplinski sud, 8) sud za slušaoce. Univerzitetsko veće su činili rektor, kao predsednik, i redovni profesori, kao članovi. To veće je biralo rektora iz reda svojih članova, redovnih profesora, na period od dve godine. Univerzitetsko veće

34 Istorijski arhiv Beograda, fond UK SKS, 1956, 1959, organizaciona jedinica Zapisnici i materijali sa sastanaka UK SKS, inventarski broj 50, Zapisnik sa sastanka UK, 13. septembar 1956. godine; Popović, D., Mirković, Z. S., 2024, str. 120–121.

35 Đorđević, J., 1954a, str. 20.

je o izboru rektora samo izveštavalo ministra prosvete, što je bila garancija autonomije univerziteta u pogledu izbora vlastitog čelništva, pored prava univerzitetskih organa da biraju univerzitetske nastavnike i saradnike. U univerzitetskom senatu su zasedali rektor, kao predsednik, prorektor, dekani i prodekani svih fakulteta. Univerzitetsku upravu su činili rektor, kao predsednik, i dekani svih fakulteta, kao članovi.[36]

Ako se ode korak dalje u prošlost, vidi se da je Zakon o univerzitetu Kraljevine Srbije od 27. februara 1905. godine predvideo kao univerzitetske vlasti: 1) rektora, 2) dekane fakulteta, 3) univerzitetski savet, 4) univerzitetsku upravu, 5) fakultetske savete i 6) univerzitetski sud. Univerzitetski savet su činili rektor, kao predsednik, i svi redovni profesori Univerziteta. Rektora je birao univerzitetski savet na godinu dana iz reda svojih članova, redovnih profesora, „koji su služili na Univerzitetu (Velikoj školi) kao redovni profesori najmanje pet godina". O izboru rektora samo se izveštavao ministar prosvete i crkvenih dela, što je bila garancija autonomije univerziteta u pogledu izbora njegovog čelništva. Univerzitetsku upravu su sačinjavali rektor, kao predsednik, i dekani svih fakulteta.[37] Prema odredbi člana 3. Zakona o Univerzitetu Kraljevstva Srba, Hrvata i Slovenaca u Ljubljani od 23. jula 1919. godine, Univerzitet u Ljubljani imao se upravljati u svemu po zakonu i uredbama o Univerzitetu u Beogradu.[38] Uredbom o izmenama i dopunama u Zakonu o Univerzitetu (iz 1905) od 2. februara 1921. godine uneto je Univerzitetsko veće, koje čine rektor, kao predsednik, i redovni profesori, kao članovi, i ovo veće je biralo rektora. Univerzitetski savet su činili rektor, kao predsednik, dekani i prodekani svih fakulteta, kao članovi.[39]

Sveučilište u Zagrebu je do donošenja jedinstvenog jugoslovenskog Zakona o univerzitetima iz 1930. godina bilo uređeno Zakonom o Sveučilištu Franc Jozef Prvi u Zagrebu iz 1874. godine, sa izmenama i dopunama iz 1894. godine. Univerzitetske vlasti su bili rektor i senat, koji su činili rektor, dekani i prodekani sva četiri fakulteta. („bogoslovni, pravo– i državoslovni, liečnički i mudroslovni").[40]

Prema Opštem zakonu o univerzitetima, administrativne, tehničke i druge poslove univerziteta vršio je sekretarijat univerziteta, kojim je ruko-

36 *Ibid*., str. 259–261.

37 *Ibid*., str. 178–179. Na osnovu Zakona je doneta Opšta uredba Univerziteta od 2. oktobra 1905. godine (*ibid*., str. 191–197).

38 *Ibid*., str. 236.

39 *Ibid*., str. 243–245. Na osnovu ovoga je doneta i Uredba o izmenama i dopunama u Opštoj uredbi o Univerzitetima od 9. februara 1921. godine (*ibid*., str. 246–249).

40 *Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju*, godina 1874, komad I-XXVI, broj 1–58, str. 14–15; *Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju*, godina 1894, komad I–XXIV, broj 1–97, str. 465.

vodio sekretar, pod nadzorom i po uputstvima rektora. Sekretar je trebalo da ima fakultetsku spremu. Poređenje sa predratnim propisima pokazuje da je Zakon iz 1954. godine bio škrt kada je reč o uređivanju uslova koje bi sekretar univerziteta trebalo da ispunjava. Zakon o Univerzitetu i Opšta uredba Univerziteta iz 1905. godine posvetili su pažnju samo sekretaru Univerziteta (ne i sekretaru fakulteta, jer izgleda da nisu postojali) i njegov su položaj izravnali sa položajem sekretara ministarstva. Uredba o izmenama i dopunama u Opštoj uredbi Univerziteta od 22. maja 1920. godine propisala je da kancelarijsko osoblje na Univerzitetu sačinjava: sekretar Univerziteta, sekretar fakulteta, šef računovodstva i potreban broj pisara i prepisača. Sekretar Univerziteta se postavljao ukazom po izboru u Univerzitetskom savetu, a imao je rang i platu vanrednog profesora Univerziteta. Morao je imati završen fakultet, položen profesorski ili sudijski ispit i najmanje deset godina ukazne službe.[41] Po Zakonu o univerzitetima od 28. juna 1930. i Opštoj uredbi Univerziteta od 11. decembra 1931. godine položaj sekretara univerziteta je ostao približno isti.[42]

5.5.2. Upravljanje fakultetom

Ponovimo da se obnova rada na fakultetima posle Drugog svetskog rata odvijala u okolnostima svemoćne nove vlasti. Uredba o univerzitetskim vlastima i nastavnom osoblju Univerziteta u Beogradu, od 16. avgusta 1945. godine, koju je donela Narodna vlada Srbije, propisala je da dekana i prodekana bira fakultetski savet na godinu dana. Dekan se birao iz reda redovnih profesora, a prodekan iz reda redovnih i vanrednih profesora. Izbor dekana i prodekana potvrđivao je ministar prosvete. Fakultetski savet sačinjavali su redovni i vanredni profesori, docenti i honorarni profesori i nastavnici. Pravo glasa imali su redovni i vanredni profesori i docenti. Fakultetski savet rešavao je sva pitanja koja se tiču fakulteta. Fakultetski savet je predlagao „ministru prosvete na potvrdu izbor i uklanjanje nastavnog osoblja".

Prema odredbama Uredbe o izboru rektora Univerziteta i velikih škola i dekana fakulteta NR Srbije, od 2. oktobra 1948. godine, dekana i prodekana fakulteta birao je fakultetski savet. Fakultetski savet činili su svi redovni i vanredni profesori, docenti, predavači i honorarni nastavnici. Pravo biranja dekana i prodekana imali su svi članovi fakultetskog saveta, osim honorarnih nastavnika. Izbor se vršio na početku ili na kraju svake školske godine. Za dekana fakulteta mogao je biti izabran redovni ili vanredan profesor, a za prodekana redovni i vanredni profesor ili

41 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 236.

42 *Ibid.*, str. 266, 319.

docent. Fakulteti su mogli imati dva prodekana. Izbor dekana i prodekana potvrđivao je predsednik Komiteta za naučne ustanove, Univerzitet i visoke škole NR Srbije.

Opšti zakon o univerzitetima iz 1954. godine propisao je da fakultetom upravljaju fakultetski savet, fakultetska uprava i dekan.

Fakultetski savet su činili:

- članovi koje bira republička narodna skupština iz reda naučnih, stručnih i drugih javnih radnika,
- članovi koje bira fakultetska uprava iz reda svojih članova,
- član koga biraju studenti iz svojih redova,
- dekan i prodekan fakulteta.

Prvi saziv Saveta Pravnog fakulteta Univerziteta u Beogradu tako je imao 22 člana, od kojih je eksternih članova (izabranih od Narodne skupštine NR Srbije) bilo deset (45,5%), Fakultetska uprava je izabrala iz svojih redova devet članova i dva člana su bila po položaju – dekan i prodekan (50%), a jednog člana su imenovali studenti (4,5%). Za predsednika Fakultetskog saveta izabran je Branislav Jevremović, savezni javni tužilac, što je svedočilo o značaju koji je država („društvena zajednica") pridavala tom fakultetskom organu upravljanja.[43]

Fakultetski savet je, slično univerzitetskom savetu, u svojoj nadležnosti imao:

- utvrđivanje predloga statuta fakulteta i predračuna prihoda i rashoda fakulteta,
- raspisivanje konkursa za izbor nastavnika, asistenata i drugih fakultetskih saradnika,
- potvrđivanje izbora asistenata i drugih fakultetskih saradnika, kao i rukovodilaca fakultetskih ustanova,
- davanje mišljenja o izboru nastavnika i naučnih saradnika na traženje univerzitetskog saveta ili po sopstvenoj inicijativi,
- razmatranje predloga o osnivanju fakultetskih ustanova,
- davanje preporuka za izradu nastavnih programa,
- donošenje odluke o uvođenju nastave za usavršavanje i specijalizaciju,
- davanje preporuke o pitanjima plana naučnog rada fakultetskih ustanova,
- biranje i razrešavanje članova prvostepenog disciplinskog suda za studente,

43 Popović, D., Mirković, Z. S., 2024, str. 969–970.

– staranje o uslovima života i rada studenata,
– pretresanje rada fakulteta u celini.

Analogno rešenju koje je važilo za univerzitetski savet, i u fakultetskom savetu član koga su birali studenti nije učestvovao u glasanju o pitanjima izbora nastavnika, fakultetskih saradnika i rukovodilaca fakultetskih ustanova i utvrđivanja nastavnih planova, jer nije bio kompetentan i pozvan da odlučuje o tim pitanjima.

Fakultetski savet dobio je značajno mesto u vođenju kadrovske politike na fakultetima, posebno putem odlučivanja o raspisivanju konkursa za izbor u zvanje i o potvrđivanju izbora asistenata i drugih fakultetskih saradnika, kao i korišćenjem mogućnosti da daje mišljenje o izboru nastavnika univerzitetskom savetu (koji je potvrđivao izbor izvršen od fakultetske uprave). Savez komunista je u najvećem broju slučajeva nastojao da podržava napore fakultetske uprave da akademski kriterijumi igraju odlučujuću ulogu prilikom izbora. Međutim, na fakultetskom savetu je budno pazio, posebno na fakultetima gde su komunisti bili u manjini u nastavničkom kolegijumu, da ne prođe neko od „politički nepodobnih" ili „spornih" kandidata. Tada su eksterni članovi saveta, po pravilu državni ili partijski funkcioneri, dobijali zadatak da sprečavaju takav razvoj događaja. Ilustrativan je primer intervencije člana Saveta Pravnog fakulteta Univerziteta u Beogradu Miloša Minića, člana CK SKS i predsednika Gradskog narodnog odbora Beograda, koji je decembra 1955. godine zaustavio konkurse na koje su se prijavili Božidar S. Marković i Tihomir Vasiljević, predratni nastavnici koje Ministarstvo prosvete juna 1945. godine nije preuzelo u sastav nastavničkog kolegijuma beogradskog Pravnog fakulteta. On je izneo stav da konkurs treba produžiti kako bi se pružila prilika drugim ljudima da se prijave jer su Božidar S. Marković i Tihomir Vasiljević „udaljeni od fakulteta iz političkih razloga, da ti razlozi i dalje stoje i da nije potrebno dovoditi ih ponovo na fakultet".[44] Na taj način dvojica odličnih kandidata, jedan civilista, a drugi krivični procesualista, nisu izabrani jer je tom prilikom „partijski" kriterijum nadvladao „akademski".

Fakultetsku upravu sačinjavali su svi nastavnici i određen broj saradnika fakulteta. Broj fakultetskih saradnika i način njihovog izbora trebalo je da utvrdi statut fakulteta.

Opšti zakon o univerzitetima je propisao nadležnost fakultetske uprave: sastavlja predlog statuta i predračuna prihoda i rashoda fakulteta; bira nastavnike, naučne saradnike i rukovodioce fakultetskih ustanova,

44 Arhiv Pravnog fakulteta u Beogradu (u daljem tekstu: APf), Zapisnik sa sednice Saveta Pravnog fakulteta, održane 29. decembra 1955. godine, str. 1–2. Preuzeto iz: Popović, D., Mirković, Z. S., 2024, str. 48.

asistente i druge fakultetske saradnike, dekana, člana univerzitetskog saveta i članove fakultetskog saveta, postavlja i razrešava sekretara fakulteta; razmatra pitanja izvođenja nastave i naučnog rada i planova naučnog rada fakulteta i njegovih ustanova, utvrđuje nastavne programe, odlučuje o uvođenju neobaveznih predmeta, daje predloge za osnivanje, spajanje i ukidanje ustanova fakulteta; pravi planove i programe studija za usavršavanje i specijalizaciju, stara se o podizanju naučnog i nastavnog podmlatka i o spremi i radu studenata, predlaže dodeljivanje titule počasnog doktora, sprovodi postupak za sticanje stepena doktora kao i za habilitaciju; odlučuje o pozivanju istaknutog naučnika i stručnjaka za redovnog profesora, poziva stručne i naučne radnike iz zemlje i inostranstva da drže predavanja na fakultetu; upravlja fakultetskom imovinom, zadužbinama i fondovima, pretresa poslove od interesa za nastavu i rad fakulteta i njegovih ustanova i donosi zaključke i odluke o tome.

Predstavnici studenata su imali pravo da prisustvuju sednici fakultetske uprave kada se razmatraju pitanja izvođenja nastave i sprovođenja pravila studija i da iznose svoja mišljenja i daju svoje predloge.

Radi zaštite zakonitosti u radu fakultetskih organa, zakon je predvideo da fakultetska uprava može koristiti pravno sredstvo prigovor republičkom izvršnom veću protiv svih odluka fakultetskog saveta za koje smatra da nisu u saglasnosti sa zakonom i statutom. Prigovor je zadržavao izvršenje te odluke.

Iz raspodele nadležnosti je vidljivo da je fakultetski savet vršio osnovne poslove fakultetske politike, a fakultetska uprava sve ostale poslove upravljanja fakultetom.

Odredbama Opšteg zakona o univerzitetima iz 1954. godine zadržani su raniji uslovi za izbor *dekana* i *prodekana* – oni iz Uredbe iz 1948. godine (dekan se birao iz reda redovnih i vanrednih profesora, a prodekan iz reda profesora i docenata). Međutim, Opšti zakon je propisao da dekan iz protekle postaje prodekan u sledećoj školskoj godini. To rešenje bilo je predviđeno još u Trećem nacrtu (to je propisivao još član 18. Opšte uredbe univerziteta iz 1931. godine[45]), jer je to traženo zbog kontinuiteta u radu. Sada je u Zakonu usvojeno da je to tako u pravilu. Pored toga, po rešenju Zakona izlazi da postoji samo jedan prodekan. Još u Drugom nacrtu je, na zahtev većih fakulteta, bilo predviđeno: „Dekanu u poslovima pomažu prodekani." No, to je ograničeno na jednog prodekana već u Trećem nacrtu.

Dekan je imao pravo i dužnost da obustavi od izvršenja odluke fakultetske uprave koje su protivne zakonu i odlukama fakultetskog saveta.

45 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 281.

Dekan je bio dužan da sporno pitanje iznese pred fakultetski savet radi donošenja konačne odluke.

Honorarni nastavnik (honorarni redovni i vanredni profesor i honorarni docent), iako član fakultetske uprave, nije mogao biti biran za člana univerzitetskog ili fakultetskog saveta, kao ni za rektora, prorektora, dekana, prodekana, šefa katedre i sl.

Na kraju svake školske godine predviđeno je održavanje javne fakultetske skupštine nastavnika, fakultetskih saradnika i studenata. Skupštinu saziva fakultetska uprava i podnosi joj izveštaj o stanju na fakultetu i o radu nastavno-naučnog kolektiva i studenata.

Na kraju školske 1954/1955. godine su, kako se saznaje iz *Službenog glasnika Univerziteta u Beogradu*, na tom univerzitetu održane godišnje skupštine fakulteta. Kao jedna od poslednjih, održana je 24. oktobra 1955. godine godišnja skupština Pravnog fakulteta. To je istovremeno bio i početak nove školske godine. Skupštini je prisustvovalo preko 600 studenata, nastavnika, asistenata i članova Saveta koje je delegirala Narodna skupština NR Srbije. Fakultetska uprava je skupštini podnela godišnji izveštaj o radu u kome se govorilo o broju upisanih studenata (5.350 studenata), broju ispita (ukupno su prijavljena 32.432 ispita) i uspehu na ispitima (u procentima izraženo studenti su u školskoj 1954/55. godini položili 43,1% ispita, nisu položili 13,4%, a odustali su sa 43,5% ispita).[46]

Poređenje rešenja iz Opšteg zakona o univerzitetima o upravljanju fakultetima sa odgovarajućim odredbama koje su bile na snazi u Kraljevini SHS, odnosno Kraljevini Jugoslaviji pokazuje razmere nastale promene.

Zakon o Univerzitetu Kraljevine Srbije od 27. februara 1905. godine predvideo je kao fakultetske vlasti: dekana fakulteta i fakultetski savet. Svi profesori i stalni docenti su činili savet jednog fakulteta (stalni docenti su imali pravo savetovanja, ali nisu mogli glasati). Predsednik fakultetskog saveta je bio dekan. Dekan je bio biran između redovnih profesora na godinu dana. O izboru dekana se samo izveštavao ministar prosvete i crkvenih dela. Dekan je upravljao poslovima na svom fakultetu, a naročito je vodio brigu o nastavi i ispitima.[47]

Zakon o Sveučilištu Franc Jozef Prvi u Zagrebu iz 1874. godine, sa izmenama i dopunama iz 1894. godine, propisao je da su fakultetske vlasti dekan (i prodekan) i profesorski zbor, koji su činili svi redovni i vanredni profesori i predstavnik docenata (jedan ako ih ima do tri, dvojica ako ih

46 *Univerzitetski vesnik – list Udruženja univerzitetskih nastavnika*, god. VI, br. 104, 2. novembar 1955, str. 3. U istom broju na str. 1 i 3 vid. Đorđević, J., Fakultetska skupština i njen značaj.

47 *Ibid*., str. 178–180.

je više).[48] Ovaj Zakon o Sveučilištu iz 1874, odnosno 1894. godine i srpski Zakon o Univerzitetu iz 1905. godine, da ponovimo još jednom, bili su na snazi i po stvaranju zajedničke države 1. decembra 1918. godine, sve do donošenja jedinstvenog Zakona o univerzitetima iz 1930. godine (po prvom se ravnalo Sveučilište u Zagrebu, a po drugom Univerzitet u Beogradu i Univerzitet u Ljubljani).

Zakon o univerzitetima iz 1930. i Opšta uredba univerziteta iz 1931. godine su propisali da fakultetski savet bira dekana iz redova redovnih profesora na godinu dana. O izboru dekana rektor je samo obaveštavao ministra prosvete. Prethodni dekan postajao je prodekan. Jedan profesor je mogao najviše tri puta uzastopce biti izabran za dekana. U tom slučaju mogao je već prilikom drugog izbora prodekan zahtevati da se na njegovo mesto izabere drugi.[49]

Vratimo se Opštem zakonu o univerzitetima. Njime je predviđeno da administrativne, tehničke i druge slične poslove fakulteta vrši sekretarijat, kojim je rukovodio sekretar pod nadzorom i po uputstvima dekana. Za sekretara fakulteta moglo je biti izabrano samo lice koje ima fakultetsku spremu. U propisima koji su važili u Kraljevini SHS, odnosno Kraljevini Jugoslaviji sekretari fakulteta su od 1920. godine imali kvalifikacije, rang i platu sekretara Ministarstva prosvete. Postavljani su ukazom po izboru u fakultetskom savetu.[50] Od 1930. godine sekretar fakulteta – sa fakultetskom spremom i položenim državnim stručnim ispitom – imao je položaj i platu srednjoškolskih profesora. Međutim, on je mogao imati i srednjoškolsku spremu i u tom slučaju položaj i platu po Zakonu o činovnicima i ostalim državnim službenicima građanskog reda.[51]

5.6. PRELAZNE I ZAVRŠNE ODREDBE

U članu 58. bilo je propisano da će se odredbe Opšteg zakona o univerzitetima neposredno primenjivati do donošenja republičkih zakona.

U skladu sa ovim, Narodna skupština Narodne Republike Srbije je 21. oktobra 1954. godine donela Odluku o utvrđivanju broja članova Univerzitetskog saveta i fakultetskih saveta Univerziteta u Beogradu. Narodna skupština NR Srbije izabrala je u Univerzitetski savet Univerziteta u Beogradu 17 članova (u decembru je dodan još jedan član), a u fakultetske

48 *Sbornik zakonah i naredabah valjanih za Kraljevinu Hrvatsku i Slavoniju*, godina 1874, komad I-XXVI, broj 158, str. 14–16.

49 *Zbornik zakona i uredaba o Liceju, Velikoj školi i Univerzitetu u Beogradu*, str. 260, 281.

50 *Ibid*., str. 236.

51 *Ibid*., str. 260, 320.

savete Univerziteta u Beogradu: Filozofskog fakulteta 11 članova; Prirodno-matematičkog fakulteta 11 članova; Pravnog fakulteta 10 članova; Ekonomskog fakulteta 9 članova; Medicinskog fakulteta 10 članova itd.[52]

Narodna skupština NR Srbije je, takođe, 30. oktobra 1954. godine donela Zakon o privremenom načinu izbora predstavnika i članova koje biraju studenti, fakultetski saradnici i saradnici univerzitetskih ustanova i fakultetske uprave u organe fakulteta i Univerziteta u Beogradu.[53] Tako je univerzitetskoj skupštini imalo pravo da prisustvuje i učestvuje u raspravljanju i 100 predstavnika studenata, koji su birani tajnim glasanjem iz redova redovnih studenata Univerziteta u Beogradu. Asistenti i drugi fakultetski saradnici i saradnici univerzitetskih ustanova birali su iz svojih redova 100 članova za univerzitetsku skupštinu. Univerzitetska uprava je određivala koliko se asistenata i drugih fakultetskih saradnika, odnosno saradnika univerzitetskih ustanova, bira sa svakog fakulteta i iz univerzitetskih ustanova srazmerno broju saradnika u njima, s tim da svaki fakultet i univerzitetske ustanove biraju najmanje jednog člana.

Fakultetski saradnici svakog fakulteta birali su iz svojih redova za članove fakultetske uprave najmanje jednu petinu svojih članova.

Bio je određen i broj članova koje iz svojih redova biraju fakultetske uprave u fakultetski savet: Fakultetska uprava Filozofskog fakulteta u Beogradu 12 članova; Fakultetska uprava Prirodno-matematičkog fakulteta 12 članova; Fakultetska uprava Pravnog fakulteta 9 članova; Fakultetska uprava Ekonomskog fakulteta 9 članova; Fakultetska uprava Veterinarskog fakulteta 8 članova itd.

Slično je postupljeno i u drugim republikama. Primera radi, Izvršno veće NR Slovenije je 27. oktobra 1954. godine predložilo Narodnoj skupštini te republike odluku o izboru predstavnika nastavnika, saradnika i studenata u Savet i Skupštinu Univerziteta i savete fakulteta u Ljubljani.[54]

O neposrednoj primeni odredbi Opšteg zakona o univerzitetima, do donošenja republičkih zakona, svedoči da je na Pravnom fakultetu Univerziteta u Beogradu rad na statutu otpočeo odmah po donošenju tog saveznog zakona 1954. godine. Tada je formirana Komisija za statut, koja je održala preko 30 sednica i čiji predlozi su bili predmet diskusije fakultetskih organa, istaknutih pravnika iz prakse i Udruženja studenata prava.[55]

U prelaznim i završnim odredbama Opšteg zakona o univerzitetima prepušteno je republičkim izvršnim većima (do donošenja republičkih

52 *Službeni glasnik NR Srbije*, br. 56/54.

53 *Službeni glasnik NR Srbije*, br. 58/54.

54 *https://www.sistory.si/publication/1084*, 2. mart 2025.

55 APf, Izveštaj o radu Pravnog fakulteta u Beogradu za školske 1954/55, 1955/56. i 1956/57. godine, str. 2.

zakona o univerzitetima) da propišu sprovođenje odredaba ovog zakona o habilitacionom radu i ispunjenju uslova za nastavnike kod ponovnog izbora (član 59. st. 1–2).

Zakon o izmenama i dopunama Opšteg zakona o univerzitetima, od 29. decembra 1955. godine, u članu 2. je propisao: „Za lica koja su se na dan stupanja na snagu Opšteg zakona o univerzitetima zatekli u zvanju profesora univerziteta na fakultetima na kojima se po ranijim propisima za izbor nastavnika nije tražio kao uslov doktorat ili habilitacioni rad, smatra se da ispunjavaju uslov koji se po ovom zakonu traži u pogledu doktorata ili habilitacionog rada.

Odredba iz prethodnog stava ne važi za slučaj ponovnog izbora vanrednog profesora ili njegovog kandidovanja za redovnog profesora."

U prelaznim odredbama prvobitnog Opšteg zakona o univerzitetima bilo je propisano da se zvanje predavača po potrebi može zadržati najduže četiri godine (do 15. jula 1958. godine), pri čemu su im u tom periodu bila data prava i dužnosti saradnika, s tim što su, osim predavanja, mogli da održavaju i ispite (član 60. stav 3).

U republikama u kojima su postojale visoke škole, stvorene od ranijih fakulteta, republička izvršna veća dobila su obavezu da odrede vreme i način njihovog uključivanja u univerzitet i spajanje pojedinih srodnih fakulteta u jedan fakultet (član 61). Tako je Izvršno veće NR Slovenije donelo privremenu uredbu o uključivanju visokih škola i samostalnog fakulteta za agronomiju, šumarstvo i veterinarstvo u Univerzitet u Ljubljani. „Umesto 12 nekadašnjih jedinica, tj. viših škola i samostalnih fakulteta, sada imamo 5 fakulteta i to: Prirodno-matematički fakultet sa dva odseka, Pravno-ekonomski fakultet sa dva odseka, Tehnički fakultet sa sedam odseka, Medicinski fakultet sa dva odseka i Agronomski, šumarski i veterinarski fakultet sa tri odseka."[56]

Član 62. Opšteg zakona o univerzitetima je, kako je već pomenuto, propisao rok od dve godine, u kome se imaju odbraniti već odobrene doktorske disertacije od strane fakulteta i akademija nauka.

6. Zaključak

Sprovedeno istraživanje arhivske građe, zakonskih i podzakonskih propisa i literature potvrdilo je ispravnost prve hipoteze. Brojni pripadnici akademske zajednice iskoristili su pruženu mogućnost da uzmu aktivnog učešća u kreiranju prvog posleratnog zakona o univerzitetima, koji

56 Stenografske beleške sa zasedanja Narodne skupštine NR Slovenije od 27. oktobra 1954. godine, *https://www.sistory.si/publication/1084*, 2. mart 2025.

je – uprkos obeležju „opšti" – prilično detaljno uređivao materiju visokog obrazovanja za celu FNRJ, ostavljajući republičkom zakonodavstvu da bliže uredi samo neka pitanja. Iako je od šezdesetih godina prošlog veka kompletno uređivanje te materije prepušteno republičkim zakonima, zajednički temelji uspostavljeni saveznim Opštim zakonom o univerzitetima iz 1954. godine ostali su očuvani do raspada jugoslovenske države. Nacrte zakona je izradila posebna komisija u Savetu za nauku i kulturu Vlade FNRJ, a o njima je vođena veoma živa, svestrana i temeljita rasprava. Sačuvana arhivska građa svedoči o toj diskusiji, naročito u univerzitetskim organima i telima, na fakultetima, u sekcijama udruženja univerzitetskih nastavnika, naučnim društvima. Sačinjena su obimna i detaljna mišljenja o nacrtima, sa sugestijama, predlozima izmena i dopuna, koja su upućena sastavljaču nacrta. Posle godina ćutanja pod stegom administrativnog socijalizma, čuo se glas akademske javnosti. Na kraju su nastojanja da se jugoslovenski model socijalizma učini drukčijim od sovjetskog dovela na terenu univerzitetskog obrazovanja do rešenja koja su univerzitete i fakultete učinila u dobroj meri autonomnim, spremnim da prate akademske tokove na zapadnoevropskim, kasnije i severnoameričkim univerzitetima kroz intenzivnu međuuniverzitetsku saradnju. Zaključili smo da je ta autonomija, od 1954. do kraja jugoslovenskog socijalizma, imala svoja ograničenja, u vidu eksterne i interne kontrole koju je sprovodio SK – sve više na republičkom, kasnije i na pokrajinskom nivou. Eksterna kontrola sprovođena je putem delegiranja „naučnih, stručnih i drugih javnih radnika" u članstvo univerzitetskih i fakultetskih saveta, pri čemu je njihovo učešće u savetima, zajedno sa predstavnicima studenata, bilo 50%. Internu kontrolu vršili su sami nastavnici i saradnici – članovi Partije, koji su, kako su godine prolazile, postajali sve brojniji u nastavničko-saradničkom kolegijumu. I u ranijim posleratnim godinama, kada su bili malobrojni u odnosu na nasleđeni predratni profesorski kadar, nastavnici – komunisti su iza sebe imali podršku brojne partijske organizacije, čije su jezgro predstavljali studenti – komunisti, a iza te organizacije stajala je Udba, vrlo ubedljivi garant da će se politika KPJ/SKJ sprovoditi bez većih problema. Koliko god se želeo otklon u odnosu na rešenja iz perioda administrativnog socijalizma, kada su univerziteti i fakulteti bili samo sastavne jedinice nadležnog republičkog organa uprave, nastojala se i razbiti od pre rata nasleđena „cehovsko-staleška struktura", a profesorski stalež je valjalo svesti na „podnošljivu" meru (za izbor u zvanje redovnog profesora glasali su redovni i vanredni profesori).

I druga polazna hipoteza potvrđena je u sprovedenom istraživanju. U Opštem zakonu o univerzitetima iz 1954. godine postavljeni su temelji pravne konstrukcije ustanova visokog obrazovanja koji se, u sasvim drukčijem političkom okruženju, drže i u prvoj četvrtini XXI veka u državama

sukcesorima nekadašnje Jugoslavije. Uprkos preovlađujućem trendu unutar Bolonjskog procesa da je samo univerzitet nosilac pravnog subjektiviteta, u Srbiji, Hrvatskoj i Severnoj Makedoniji tim zakonom dobijen status pravnog lica fakulteti su uspeli da zadrže. U Sloveniji je nađeno nekakvo međurešenje: iako nije pravno lice, fakultet može nastupati u svoje ime i za svoj račun u pravnom prometu i s tim u vezi ostvarivati svoju pravnu i poslovnu sposobnost, ali samo kada obavlja delatnost koja se odnosi na promet dobara i usluga na tržištu. U pravima Crne Gore i oba entiteta u BiH svojstvo pravnog lica priznato je samo univerzitetima, a ne i fakultetima u njihovom sastavu. I drugo, važno dostignuće Opšteg zakona o univerzitetima, pravo visokoškolskih ustanova da donose svoje statute, opstalo je do današnjeg vremena.[57] Ne sme se izgubiti iz vida ni rešenje iz toga zakona po kojem se postupak izbora nastavnika i saradnika sprovodi isključivo u visokoškolskim ustanovama: izbor je vršio stručni organ fakulteta (fakultetska uprava, kasnije fakultetsko veće, pa nastavno-naučno veće), a potvrđivao ga je univerzitetski savet (u periodu 1954–1960. godine), a kasnije fakultetski savet.[58] Kako je prisustvo predstavnika „društvene zajednice" u savetima padom komunizma izgubilo prvobitni smisao (političko kontrolisanje rada visokoškolskih ustanova), izborni postupak je donekle modifikovan u svojoj drugoj fazi, utoliko što je gotovo svuda eliminisano učešće predstavnika države (kao osnivača državnih univerziteta) iz postupka izbora u nastavnička zvanja. Uticaj osnivača je posredno zastupljen jedino u Hrvatskoj, u čijem važećem pravu nadležni matični odbor – koga sa liste kandidata koju je utvrdilo Ministarstvo nauke i obrazovanja (moraju biti u zvanju redovnog profesora ili naučnih savetnika) bira Nacionalno vijeće za visoko obrazovanje, znanost i tehnološki razvoj (telo čije članove imenuje Hrvatski sabor) – odlukom utvrđuje da li predloženi kandidat ispunjava Nacionalne sveučilišne, znanstvene i umjetničke kriterije. Prethodno je fakultetsko veće donelo odluku kojom se utvrđuje da kandidat ispunjava propisane kriterijume za izbor u odgovarajuće zvanje, ali je odluka matičnog odbora konačna.[59] U ostalim državama sukcesorima SFRJ nema takvog indirektnog uticaja osnivača državnih univerziteta. Razlike postoje jedino u pogledu (ne) postojanja dvostepenosti u izbornoj proceduri. U Srbiji i u oba entiteta BiH na stručnom organu fakulteta utvrđuje se predlog odluke o izboru,

57 U važećem crnogorskom i slovenačkom pravu, kao i prema kantonalnim zakonima o visokom obrazovanju u Federaciji BiH, fakulteti nemaju svoje statute. U Republici Srpskoj, iako nema svojstvo pravnog lica, fakultet ima pravo na donošenje statuta.

58 Do stupanja na snagu Opšteg zakona o univerzitetima, fakultetski organ (savet po Uredbi iz 1945. godine) predlagao je izbor nastavnika, a nadležni državni organ je odlučivao o postavljenju.

59 Čl. 43. Zakona o visokom obrazovanju i znanstvenoj djelatnosti.

na osnovu izveštaja stručne komisije, a izbor se obavlja na univerzitetu. U Sloveniji i Severnoj Makedoniji takva dvostepenost postoji samo kod izbora u zvanje redovnog profesora; izbori u zvanja docenta i vanrednog profesora okončavaju se u fakultetskim stručnim organima. Jedino u Crnoj Gori fakultet ne učestvuje u izboru nastavnika, već se celokupan postupak sprovodi na univerzitetu.

U Srbiji izborno veće fakulteta utvrđuje predlog da se kandidat izabere u odgovarajuće nastavničko zvanje, a izbor vrši nadležni stručni organ univerziteta (veće naučne oblasti).[60] U Republici Srpskoj naučno-nastavno veće fakulteta utvrđuje predlog odluke o izboru u zvanje nastavnika, a veće odgovarajuće naučne oblasti na univerzitetu daje senatu univerziteta mišljenje o tom predlogu. Odluku o izboru u zvanje nastavnika donosi senat univerziteta, na osnovu predloga odluke fakultetskog nastavno-naučnog veća i mišljenja veća odgovarajuće naučne oblasti.[61] U kantonima Federacije BiH procedura izbora u nastavnička zvanja gotovo je ista kao u prvoimenovanom entitetu: predlog odluke o izboru utvrđuje veće organizacione jedinice (fakulteta), a izbor sprovodi senat univerziteta.[62] U slovenačkom pravu fakultetski senat bira docente i vanredne profesore, a redovne profesore univerzitetski senat.[63] U Severnoj Makedoniji je propisana slična procedura: fakultetsko nastavno-naučno veće (*наставно-научниот совет*) bira docente i vanredne profesore, a izbor redovnih profesora, pošto bude obavljen na fakultetskom nastavno-naučnom veću, ide na potvrdu senatu univerziteta.[64] Prema crnogorskom pravu, izbore u sva nastavnička zvanja sprovodi senat univerziteta.[65]

I ideja o „društvenom upravljanju", realizovana kroz učešće predstavnika „društvene zajednice" (koje je birala republička skupština, a kasnije imenovalo republičko izvršno veće) u savetima univerziteta i fakulteta nastavila je putovanje kroz vreme, prolazeći kroz različite metamorfoze. Iako se u demokratskim društvima učešće predstavnika osnivača univerziteta u organu upravljanja smatra sasvim legitimnim, u onim *ex*-jugoslovenskim republikama koje su, po raspadu SFRJ, prolazile i kroz periode autoritarne vlasti, koja je narušavala autonomiju univerziteta, među pripadnicima akademske zajednice postoji bojazan da bi značajnije prisustvo predstavnika države (kao osnivača ustanove) moglo da ponovo dovede do takvog narušavanja. O tome svedoči primer srpskog Zakona o visokom obrazovanju,

60 Čl. 75, st. 2. Zakona o visokom obrazovanju.

61 Čl. 95. Zakona o visokom obrazovanju.

62 Npr. čl. 125. Zakona o visokom obrazovanju Kantona Sarajevo.

63 Člen 56, st. 1–2. Zakona o visokem šolstvu.

64 Чл. 173, ст. 1–2. Закона на високото образование.

65 Čl. 72, st. 2. Zakona o visokom obrazovanju.

u kojem je 2005. godine zamenjeno rešenje nasleđeno iz perioda Miloševićevog postsocijalizma, kada je Vlada imenovala 50% od ukupnog broja članova saveta univerziteta, odnosno fakulteta. Tim novim zakonom učešće Vladinih i studentskih članova spušteno je na 33,33% – po 16,66% za obe grupacije), a predstavnici zaposlenih na univerzitetu, odnosno fakultetu dobili su 66,67% mesta u savetima.[66] Međutim, Zakon o visokom obrazovanju iz 2017. godine umanjio je učešće zaposlenih u savetima univerziteta i fakulteta na 55%, a dao predstavnicima Vlade 30% i predstavnicima studenata 15% mesta u tim organima visokoškolskih ustanova.[67] Već prilikom prvih izbora za rektore i dekane po tom novom zakonu zabeležene su političke manipulacije jer su u nekim univerzitetskim i fakultetskim savetima bili zastupljeni studenti bliski vladajućoj partiji – Srpskoj naprednoj stranci (SNS). Uz glas ili dva podrške od članova saveta iz reda nastavnika, koalicija Vladinih i studentskih predstavnika bila je u stanju da izabere kandidate bliske vlastima, često suprotno stavovima univerzitetskih senata, odnosno fakultetskih nastavno-naučnih veća. Tek u 2025. godini, pod pritiskom studentskih protesta, podržanih od državnih univerziteta, novelama Zakona o visokom obrazovanju učešće zaposlenih u savetima univerziteta i fakulteta povećano je na 60%, dok je učešće predstavnika Vlade smanjeno na 25%; studentima je ostalo 15% glasova u tim organima.[68] U predstojećem periodu će se pokazati da li je *buffer* zona od 10 procentnih poena, proširena eventualnim promenama u strukturi studentskih predstavnika u savetima, dovoljna da spreči ponavljanje loše prakse iz prethodnih izbora za rektore i dekane na pojedinim univerzitetima i fakultetima. Ovim zaključkom je potvrđena i naša treća hipoteza – ona o izazovima koje je invencija zakonodavca iz 1954. godine o „društvenom upravljanju" univerzitetima i fakultetima postavila pred postkomunističke vlasti u državama čiji novi ustavi garantuju autonomiju univerziteta.

66 Čl. 52, st. 4. Zakona o visokom obrazovanju, *Službeni glasnik RS*, br. 76/05, ..., 87/16.

67 Predsednik i četiri člana Nacionalnog saveta za visoko obrazovanje (inače, članovi SANU) dali su ostavke na članstvo u tom telu, protestujući protiv nametnutih rešenja u Zakonu o visokom obrazovanju iz 2017. godine, za koja su smatrali da narušavaju autonomiju univerziteta.

68 Predstavnici nastavnika, saradnika i ostalih zaposlenih imaju većinu u organu upravljanja univerziteta još samo u Federaciji BiH (54,5%), dok je u Hrvatskoj njihovo učešće 50%. U Severnoj Makedoniji, Crnoj Gori i Republici Srpskoj učešće predstavnika nastavnika, saradnika i ostalih zaposlenih je 45,5%, a u Sloveniji 44,4%. Ostatak članova saveta univerziteta / sveučilišnog vijeća (Severna Makedonija i Hrvatska), odnosno upravnog odbora (Slovenija, Crna Gora i oba entiteta u BiH) imenuju osnivač (Vlada) i studenti, a u Severnoj Makedoniji, Sloveniji i Republici Srpskoj i poslodavci.

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

Part Two

Dejan Popović

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ABSTRACT

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

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

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REVIEW ARTICLE

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PROTECTION OF CONTRACTING PARTY EQUALITY IN MARRIAGE CONTRACTS

***Abstract*:** *The protection of the equality of contracting parties in marriage contracts is a key prerequisite for achieving fairness in such legal relationships. The paper analyzes potential solutions and suggests ways to integrate them into the Serbian legal system, in the absence of adequate mechanisms to protect the equality of the contracting parties. This study focuses on concrete legal mechanisms, providing brief relational contract theory insights about their dynamic nature. The paper presents a thorough analysis of protective measures for both the formation and execution of contracts by drawing essential lessons from German civil law, which has developed sophisticated judicial review systems. The study also assesses how gender equality principles work to resolve the previous legal inequalities that existed in these agreements.*

The paper outlines specific mechanisms that should be implemented in the Serbian legal system, applying doctrinal and comparative legal methods.

Key words: Marriage Contract, Equality of Contracting Parties, Autonomy of Will, Legal Safeguards, Comparative Law, Relational Contract Theory, Property.

1. Introduction

A marriage contract is one of the most significant legal instruments in modern family law.[1] It allows contracting parties – spouses or future

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1 The marriage contract is one of the key instruments for the harmonization of family law at the EU level. See more: Stjepanović, B., 2024, Bračni ugovor u pojedinim aktima Evropske unije, *Evropsko zakonodavstvo*, Vol. 23, No. 87–88, pp. 62–74;

spouses – to independently regulate property relations, in accordance with their needs and beliefs. In some legal systems, it can also cover other matters that may impact their shared life.[2]

This contract is based on the freedom of the contracting parties to determine their relationship terms while maintaining legal boundaries and following fundamental principles of equality, good faith and fairness. In this context, the marriage contract functions as a preventive measure against future disputes, while maintaining marital harmony through its role in establishing clear rights and responsibilities of the spouses.

The marriage contract has become more significant in contemporary society because people are motivated to safeguard their property assets during marriage, especially when they bring substantial wealth into the relationship or encounter business uncertainties. Due to this, marriage contracts need to follow fundamental legal and moral standards, especially the requirement for equal treatment of the parties involved in the contract.

Although the law declares equal rights of the spouses, these rights often remain unenforced in practice. The Republic of Serbia lacks explicit legal mechanisms that would protect equality in marriage contract creation and execution. The current legal framework lacks sufficient protections for power imbalances between parties because it does not establish clear safeguards. The legislator failed to identify the potential risks from marriage contracts entering the legal system because it did not establish protective measures for the "weaker" spouse and children born within the union, and third parties who become legally connected to the spouses.

The marriage contract exists as an essential part of marriage law because its terms and conditions stem from the fundamental bond between spouses. The sui generis nature of marriage requires more than traditional contract law principles because it stems from a deep and enduring connection between the spouses. The legal framework for commercial contracts between unrelated parties does not fully apply to marriage contracts because their unique dynamics require special fairness mechanisms.[3] This

Stjepanović, B., 2024, Harmonization of family law in the EU with special reference to the marriage contract, *Balkan Social Science Review*, Vol. 23, pp. 149–167.

2 Iasechko, S. *et al.*, 2022, Marriage Contract as a Regulator of Non-Property Relations Comparative Characteristics of Ukrainian and European Legislation, *Journal of Interdisciplinary Research*, Vol. 12, No. 2, pp. 17–22.

3 "Where you are dealing with prenups, you are dealing with something special. You are dealing with people's emotions", respondent 10, Thompson, S., 2015, *Prenuptial Agreements and the Presumption of Free Choice – Issues of Power in Theory and Practice*, Oxford and Portland, Oregon, Hart Publishing, p. 95.

distinction underscores the need for marriage contracts to account for the dynamic and evolving nature of marital relationships. A marriage contract functions as a tool for achieving mutually fair outcomes only when it remains equitable to both parties, during both the creation and execution phases. This paper examines different legal protections that apply during the contract formation and enforcement phases, through comparative legal analysis of civil law systems, with special focus on Germany.

2. On Gender Equality and Its Impact on Other Areas

Consideration of the position of men and women, as contracting parties in marriage contracts, is unfeasible without taking into account the principle of gender equality[4] and its impact on other spheres, such as labor law, which is the source of human existence. Societies have encountered many stereotypes throughout history, which, due to their adoption by the majority, have produced certain consequences for their members. There are practically no systems without gender-based stereotypes that have led to the unequal position of men and women. Such inequality first occurred in the home, where women took on a larger part of the household chores. In addition, women were responsible for raising children and played a key role in their education. Taking care of the elderly and weak members of the household is also the responsibility of women. Traditional societies saw men only as the breadwinner in the family, which meant that only men could be employed. Authors point out that patriarchy is a deeply rooted phenomenon in the Balkans: "It is not symbolic, but materialized in the action of total control that targets the reproductive abilities of a woman and her goods [which is why it is] natural for a woman to fear her husband."[5] The same authors point out that in the modern understanding of the countries in the Balkans, following the communist organization of society, patriarchalism touches on the concept of pater familias in Roman law, which is often incomprehensible to authors "from the West". The long emancipation of women enabled them to join the labor market as a workforce. However, unequal treatment at home has also been transferred to

4 More on this topic: Rajić Ćalić, J., 2023, The Importance of the Principle of Equal Treatment of Men and Women in European Union Law, *Glasnik Advokatske komore Vojvodine*, Vol. XCV, No. 3, pp. 976–1015.

5 Stanciulescu, M., 2009, Politica si gen in Balcani. Modele patriarhale in Europa de sud-est, *Jumalui de Studii Juridice*, Vol. IV, No. 1–2, p. 182, translated by author.

the place where new workers are sought and recruited.[6] As women were searching for equal status with men, seeking the opportunity to financially contribute to the family budget, they took on the additional obligation of working outside the home, because the division of household chores did not occur. The original role of the woman, as a mother, is often sidetracked in her professional fulfillment, due to the discrimination that she experiences when joining the workforce, using of leave of absence due to family duties, the desire for career advancement, but also keeping her job after having a child – to name a few. The aforementioned stereotype has led to the underrepresentation of women in many spheres of social life where they are considered insufficiently competent, such as politics.[7] It can be concluded that "there are ongoing changes that are a consequence of understanding the necessity of protecting human rights, especially the rights of women and children in family relationships, which results in a kind of humanisation of rights."[8]

Modern principles of labor law (e.g. the equality and non-discrimination, the prohibition of discrimination, and special protection of women) play a significant role in correcting the long-standing unequal legal positions.[9] Some authors see the seeds of inequality in the constitutional treatment of special protection for women provided for in Article 66 of the Constitution of the Republic of Serbia, given that it does not regulate a special degree of protection for men.[10] In this sense, there is a fear that "protective legislation will only reinforce the already existing inequality in society that exists between men and women, and will particularly negatively affect women's autonomy and the exercise of their right to work, that is, the envisaged possibility of choosing for themselves whether to engage in paid work and what type of work they will perform for an employer."[11] Ljubinka Kovačević draws a similar conclusion, believing that

6 For more on this this topic see Rajić Ćalić, J., Bračni i porodični status kao zabranjeni osnov diskriminacije – opšti osvrt, in: Ćeranić, D. *et al.*, (eds.), 2024, *Zbornik radova „Pravne praznine i punoća prava" Vol. 2: XII Naučni skup povodom Dana Pravnog fakulteta*, Pale, Pravni fakultet Univerziteta u Istočnom Sarajevu, pp. 348–366.

7 Kovačević, N., Marković, Ž., Nikolić, N., 2014, *Ljudska prava u Srbiji*, Belgrade, Beogradski centar za ljudska prava, p. 53.

8 Čović, A., Nikolić, O., The Influence of the Crisis of Religion on the Weakening of Patriarchal Family, in: Đurić, V., Đukić, D., (eds.), 2023, *Savremeno državno-crkveno pravo – uporednopravni izazovi i nacionalne perspektive*, Belgrade, Institut za uporedno pravo, Budva, Pravoslavna Mitropolija crnogorsko-primorska, p. 1280.

9 For more: Reljanović, M., Rajić Ćalić, J., 2024, Menstrual leave and gender equality, *Strani pravni život*, Vol. 68, No. 1, pp. 1–14.

10 Misailović, J., 2020, Posebna radnopravna zaštita materinstva, *Zbornik radova Pravnog fakulteta u Nišu*, Vol. 86, No. 59, pp. 237–252.

11 Fredman, S., 1997, *Women and the Law*, Oxford, Clarendon Press, p. 68.

the lack of understanding of the special needs of men leads to a simplified understanding of the principle of equality, in the sense of neglecting the importance of the role that men play in empowering women, but also for the consistent application of this principle.[12] In this sense, the recognition of the special needs of men as participants in the labor market is also a prerequisite for eliminating gender-based discrimination, especially in the context of stereotypes related to the enjoyment of the right to leave of absence to care for a child and other rights aimed at reconciling professional and family duties, which are believed to be held only by women. Therefore, gender equality implies a set of principles ranging from equality of men and women in the recruitment process, at work, and upon dismissal, through equal pay for work of equal value and maternity protection, equal access to education, and equal availability of health insurance services, to the reconciliation of the professional and private obligations of employees. Although gender equality is an integral part of the concept of decent work, the ideal of social justice, and human rights, it remains a goal to be strived for and which is still not fully achievable.[13]

The issue of gender equality, as a matter of equal transparency, support, and participation of both sexes in all social spheres,[14] has been addressed by scholars since the recognition of women's rights that men had. "Female labour is still available when needed and dispensable when it is not," is perhaps the maxim that best describes gender inequality in the world of work.[15] The role of women in the home, which some authors refer to as "sacrificial matriarchy", should also be added to this.[16] The latter term is used to denote women's unquestioning commitment to parental responsibilities, with the sacrifice of work and life that exists outside the parental role. Therefore, women often feel guilty when they leave their young children in the care of nannies or nurseries and kindergartens, believing that they are not spending enough time with their children during their "tender years".[17] The status of "more important parent" is particularly present in Serbian society, greatly shaping gender relations and

12 Kovačević, Lj., 2021, *Zasnivanje radnog odnosa*, Belgrade, Pravni fakultet Univerziteta u Beogradu, p. 1061.

13 Kring, S. A., Kawar, M., 2009, *Guidelines on gender in employment policies*, Geneva, International Labour Office, p. 7.

14 Gender Equality Commission, 2016, *Gender equality glossary*, Strasbourg, Council of Europe, p. 11.

15 Politakis, G., 2001, Night work of women in industry: standards and sensibility, *International Labour Review*, No. 140, p. 407.

16 Blagojević Hughson, M., 2011, *Rodni barometar u Srbiji: Razvoj i svakodnevni život*, Belgrade, UNDP, p. 105.

17 Buddhapriya, S., 2009, Work-family challenges and their impact on career decisions: a study of Indian woman professionals, *Vikalpa*, No. 34, p. 33.

allowing the other parent to participate equally in child raising. Blagojević Hughson particularly emphasizes the importance of jointly carrying out activities related to children and establishing "egalitarian parenting".[18] The asymmetry of the relationship fostered by the gender positions of the father and mother greatly impacts the development of the child, but also the psyche of women who, unlike their male partners, have more likely to doubt that they are "good mothers" to their children. Given that they bear the greatest burden of upbringing and education, mothers are less likely than fathers to want a larger number of children.[19] This is also reflected in the position of women as contracting parties in marriage contracts. In theory, gender inequality occurs primarily due to the unequal opportunities provide to men and women by social institutions.[20] If the chances for equal access to education and employment are disrupted by having children, this can result in shorter employment for women, not having children, and ultimately excluding women from the labor market. Finally, we should not ignore the authors who point out the clear connection between gender equality and equal reconciliation of family and professional obligations, due to the societal expectation for women to be more devoted to children than men, which results in discrimination against women in professional life. The conclusion is that the unequal division of labor in family life leads to direct discrimination between the sexes. This discrimination is already manifested in the employment process – where women are viewed as employees who will often be absent from work due to family duties – and which can appear during the duration of the employment relationship, through denial of career advancement on account of career breaks due to childbirth and a decline in productivity, also due to maternity leave. The connection between gender inequality and the reconciliation of family and professional obligations was also pointed out by the Court of Justice of the European Union, marking the different treatment of a pregnant woman as discrimination on the grounds of sex, in when the Thibault case C-36/95.[21] In doing so, the Court unequivocally took the position that the issue of gender equality represents an important principle within the framework of the European Union. Instead of separately developing the areas of gender equality and the reconciliation of professional and family obligations, the authors propose that they be united, thus contributing to the effectiveness of the application of the principle of gender

18 Blagojević Hughson, M., 2011, p. 105.

19 *Ibid.*

20 RAND Europe, 2014, *Gender Equality in Workforce: Reconciling Work, Private and Family Life in Europe*, Brussels, RAND, p. 29.

21 Kring, S. A., Kawar, M., 2009, p. 14.

equality in practice, which can be achieved, among other things, through the equal participation of men and women in family obligations.[22]

3. Power Imbalance in Marriage Contracts and the Need for Legal Safeguards

The process of creating and finalizing marriage contracts shows a high risk of power differences between the involved parties. The power imbalance between parties stems from economic differences, however, emotional and social elements also play a role that threatens to violate the substantive equality by giving an unfair advantage to one party.[23] The main practical difficulty involves identifying the existence of such imbalances and developing and implementing suitable legal solutions to address them and to safeguard the weaker party.

The marriage contract operates under the premise that two independent parties enter into it to safeguard their assets. Does this situation occur in every real-life scenario? The deep emotional bond between spouses, together with changing financial and life situations during marriage, makes traditional contractual independence both challenging and susceptible to change. The initial financial independence of the spouses when signing the contract does not prevent the development of future dependency, because one spouse may take on greater caregiving duties or experience career interruptions, which tend to impact women more severely.[24]

Since marriage contracts are often initiated by one spouse, there is an inherent risk that the economically or otherwise more powerful party may leverage their position, leading to terms that are significantly unfavorable

22 *Ibid.*

23 Brian Bix states that entering into marriage with a marriage contract that undoubtedly favors one party is worse than not entering into marriage at all. Bix, B., The ALI Principles and Agreements: Seeking a Balance between Status and Contract, in: Wilson, R., (ed.), 2006, *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution*, Cambridge, Cambridge University Press, p. 389.

24 Regarding the variability of various circumstances during the marriage, it is interesting to mention Milton Regan's view on the contractual relationship between spouses and its changeability. He argues that by the end of the marriage, one cannot speak of the same individuals as at the beginning of the marriage, as the circumstances that occur during the marriage influence the spouses to such an extent that they have changed, becoming different people from those who originally entered into the marriage. Regan, M., 1999, *Alone Together: Law and the Meaning of Marriage*, Oxford, Oxford University Press, p. 189.

to the other.[25] This necessitates strong legal oversight along with particular safeguards to verify that negotiations were fair and the parties exercised their will freely, as opposed to being coerced or influenced.

To effectively address power imbalances, legal systems need separate mechanisms to handle power imbalances during two stages of contract implementation: its conclusion and its enforcement.

The conclusion of agreements requires protective measures to verify that both parties understand the terms and to prevent any form of excessive pressure. The mechanisms for safeguarding include mandatory independent legal advice for both parties and complete financial disclosure requirements, and possibly a post-signing waiting period before marriage to enable reflection and decrease emotional pressure.

The enforcement phase requires legal systems to establish judicial review procedures focusing on agreements that undergo fundamental changes or produce unconscionable results causing severe disadvantages to one party. The unique relational aspect of marriage contracts requires fairness assessments through dynamic reviews extending beyond the agreement's signing moment.

The assessment of agreement fairness entails more than merely following contractual formalities, requiring the comprehensive evaluation of both parties' positions and the long-term effects of the contract on their lives, when the initial agreement circumstances change.

3.1. THEORETICAL FRAMEWORK FOR OVERCOMING POWER IMBALANCES BETWEEN SPOUSES

The control of marriage contract provisions by a specialized judge is considered as one of the mechanisms for overcoming power imbalances and achieving substantive fairness in the contract terms. The implementation of this mechanism requires clarification of the process to the judge, in order to establish the existence of power imbalances in the marriage

25 The concept of power is difficult to define. It has many facets and can be attributed various meanings. In this paper, we understand it as the dominance of one spouse over the other in the economic, social, and/or emotional sphere. Economic power is a self-explanatory concept and requires no further elaboration. Social power refers to a higher position on the social ladder or a higher level of education of one spouse, which enables them to achieve a better economic position through the marriage contract. Emotional dominance and the ability to manipulate emotions involve one spouse's lack of emotional attachment, allowing them to condition the other spouse (who is completely emotionally devoted and unconditionally trusting), thereby securing greater economic benefits for themselves.

contract, while deciding on which nullifying provisions or invalidating the entire contract, without harming the agreements or the relying party.

The following theoretical discussion addresses situations where marriage contract provisions appear fair yet the judge faces uncertainty regarding the execution process.[26]

In addressing this matter, it is necessary to first establish a theoretical framework and, within it, determine what freedom of contract between spouses entails. Once the boundaries of freedom of contract between spouses are defined, a foundation for judicial assessment of the fairness of specific provisions of the marriage contract or the contract as a whole will be established.

What factors should be examined when establishing the theory as a solid basis for understanding contract relationships and ensuring fair application of marriage contracts, aligning with their original purpose?

Marriage contracts are concluded between future spouses or existing spouses in cases where these parties wish to regulate their property matters differently from what is prescribed by law. The first issue that arises when concluding such contracts is the question of the existence of freedom of contract, i.e., the autonomy of will. The next problematic aspect arises from the fact that a marriage contract is usually concluded long before the termination of the marriage. In the interim, various life circumstances may change, raising the issue of the applicability of the marriage contract if these changes are not taken into account. The question arises whether these elements should be viewed in the same way as in the case of ordinary commercial contracts and whether general rules relating to autonomy of will and changed circumstances should be applied.

3.1.1. Specificities of the Principle of Autonomy of Will Between Spouses

The principle of autonomy of will between spouses or individuals preparing for marriage cannot be viewed in the same way as the autonomy of parties entering into other legal relationships, as marriage represents a primary and unique relationship that encompasses emotional and social components. While emotional bonds are foundational to marriage,

26 In cases of evident unfairness, the specialized judge could annul an unfair clause or the entire marriage contract and enforce the statutory property regime. Evident unfairness would exist, for example, if the contract stipulates that all assets acquired during the marriage would belong to the wife, while the husband, despite not engaging in commercial activities, cared for four children, managed household tasks, and provided mental support for the wife's career pursuits.

they also represent a legal vulnerability that can influence contractual decisions.[27] The traditional legal definition of coercion or duress does not fully explain the delicate yet important ways one spouse can control another in this close relationship.[28] The implicit pressure to maintain marital relationships in postnuptial situations reduces genuine consent more than prenuptial agreements do.[29]

The inherent vulnerability to influence – which does not equate to legal coercion – prevents us from assuming the marriage contract is fair based solely on formal consent. Economic or emotional power exercised by one party during the contract signing process may remain invisible at first but produces major problems throughout long marriages, as life circumstances transform. Marriage contracts handle present and future assets in such a way that predicting all potential life changes and their consequences becomes both difficult and impossible when the contract is first established.

This necessitates a comprehensive understanding of marital autonomy of will in matrimonial law, specifically tailored to the primary relationship between spouses. We propose the implementation of a legal standard of unfairness or unconscionability that extends beyond regular procedural issues. This standard would protect spouses from evident unjust treatment in circumstances stemming from unforeseen events. The evaluation of such scenarios should be conducted by judges who specialize in matrimonial matters, through assessment of indicators established by the law or case law that describe manifest unfairness.

While notaries play an essential part in marriage contract conclusions, because they warn about consequences and check for formal errors,

27 Stjepanović, B., 2024, The Principle of Autonomy of the Will and the Marriage Contract, *Legal gaps and the completeness of law*, Vol. 3, Pale, Pravni fakultet Univerziteta u Istočnom Sarajevu, p. 253.

28 It is reasonable to question whether the influence one spouse exerts over the other can be considered coercion. Emma Hitchings argues that coercion in such relationships is difficult to prove unless a third party is involved. Additionally, she holds that a statement suggesting marriage will not occur without signing a marriage contract does not constitute coercion unless accompanied by other additional factors. Hitchings, E., 2011, *Law Commission Report: A study of the views and approaches of family practitioners concerning marital property agreements*, Bristol, University of Bristol School of Law, p. 67.

29 "Post-nuptial agreements, however, are very different from prenuptial agreements. The couple are now married. They have undertaken towards one another the obligations and responsibilities of the married state. A pre-nuptial agreement is no longer the price which one party may extract for his or her willingness to marry." UKSC, *Radmacher (formerly Granatino) (Respondent) v. Granatino (Appellant)*, 2009 EWCA Civ 649, 10 October 2010, para. 36, (https://www.supremecourt.uk/cases/docs/uksc-2009-0031-judgment_db72197d25.pdf, 3. 10. 2025).

they do not evaluate the core fairness of the contract terms or their future effects. Therefore, the specialized judge plays a fundamental role in establishing higher protection for the "weaker" party, because long-term marriages experience inevitable changes in circumstances.

It is our belief that, in order to protect the essence of the marriage contract and safeguard the "weaker" party, it is necessary to adopt a broader understanding of the autonomy of will, tailored primary to the relationship between spouses. Besides that, it is our opinion that a legal standard for unfairness or dishonesty should be established to handle evident injustices that occur between spouses. This standard would require the application of statutory examples that establish these situations, in addition to enforcement by matrimonial judges who specialize in evaluating all aspects of marriage contracts within specific contexts.

Regarding marriage contract equality between parties, the law fails to address the widespread yet inevitable differences in negotiating power between contracting spouses.[30] The existing inequality between spouses makes marriage contracts inherently prone to significant power imbalances between partners, unless the government steps in. The deep-seated nature of this imbalance leads people to ignore it, which damages the fundamental equality between parties and their ability to achieve their marriage contract interests.[31]

3.1.2. Relational Theory and Its Application to the Autonomy of Will in Marriage Contracts

While traditional contract theory often assumes detached rational actors, a relational perspective offers valuable insights into the unique context of marriage contracts. The relational perspective recognizes that the autonomy of spouses is deeply influenced by their interdependence and evolving emotional ties, which can create subtle power imbalances that conventional contract law theory struggles to fully address. This perspective shows that formal equality does not lead to

30 In the legal systems of Nordic countries, marriage contracts are legally binding but can be invalidated if inequality between the parties is established. The German Constitutional Court allows lower courts to review marriage contracts. However, it did not specify the scope of review, leaving this determination to the Supreme Court (Bundesgerichtshof). Pintens, W., Matrimonial Property Law in Europe, in: Boele-Woelki, K., Miles, J., Scherpe, J. M., (eds.), 2011, *The Future of Family Property in Europe*, Cambridge, Intersentia, p. 39.

31 A study conducted with a group of attorneys involved in drafting marriage contracts in New York reveals that autonomy is something contracting parties rarely possess, although it is almost always presumed to exist. The marriage contract is often assumed to equally reflect the will of both parties. Thompson, S., 2015, p. 103.

substantive equality because parties exist within a deeply personal and ongoing relationship.[32]

The main strength of the relational perspective for legal purposes emerges from its ability to create particular legal standards, which evaluate contract fairness and autonomy. This approach demands conceptual frameworks that move past procedural defect assessments (such as overt coercion), to evaluate the substantive fairness of agreements especially when initial expectations or circumstances undergo significant changes. The approach supports three key measures, which include mandatory independent legal advice and complete financial disclosure at the time of agreement, and judicial review during enforcement – because these measures address real-life relationships.

The understanding that autonomy can be compromised by disparities in power, resources, or knowledge within a relational context strengthens the theoretical argument for judicial intervention based on the principles of unconscionability or material imbalance. The approach requires legal protection to address imbalances between parties regardless of gender so both men and women in disadvantaged positions receive protection.[33] The objective is to protect the interests of both spouses, through marriage contracts, by using a comprehensive legal framework that recognizes relationship specifics without conducting extensive sociological research. This approach establishes a theoretical framework for enhancing fairness and justice in marriage contract legal applications.

4. Legal Mechanisms for Overcoming Power Imbalances Between Spouses

The legal mechanisms for overcoming power imbalances between spouses and protecting the potentially "weaker" spouse may vary. Gordana Kovaček-Stanić and Sandra O. Samardžić divide them into direct and indirect mechanisms. Under direct legal mechanisms, they refer to such mechanisms where the provisions of the law explicitly take into account the property position of the spouses.[34] Indirect protection of the

32 Thompson, S., 2018, Feminist Relational Contract Theory: A New Model for Family Property Agreements, *Journal of Law and Society*, Vol. 45, No. 4, pp. 12–13.

33 Kingdom, E., 2000, Cohabitation Contracts and the Democratization of Personal Relations, *Feminist Legal Studies*, Vol. 8, No. 1, p. 5.

34 Kovaček-Stanić, G., Samardžić, S. O., 2016, Zaštita slabijeg partnera u ugovornom bračno-imovinskom režimu, *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4, pp. 1047–1048.

weaker spouse is achieved through the prohibition of contracting or excluding certain rules, as well as the possibility of concluding only legally prescribed contractual regimes.

A positive example of direct protection of the "weaker" spouse can be found in Russian legislation.[35] Article 44, Section 2 of the Family Act of the Russian Federation allows a court, upon the request of a spouse, to declare a marriage contract null and void, either partially or entirely, if its conditions place that spouse in an extremely unfavorable position.[36] This approach represents an important legal protection mechanism that could serve as a model for a solution in Serbian legislation.

In some countries, indirect protection of the weaker spouse is achieved through statutory provisions on certain property regimes that spouses can opt for in their marriage contract. The laws of Sweden and Greece restrict married couples to specific pre-defined property arrangements. This method provides some protection through its restriction of individualized arrangements yet it restricts the freedom to make contracts. On the other hand, in other countries, such as Germany and France, the law determines which property regimes can be agreed upon, while at the same time allowing spouses to contract other regimes of their choosing. The ability to create flexible arrangements requires supplementary safeguards to protect the equal status of parties involved in complex contractual agreements.

At the European level, the Council of Europe has recognized the need to protect the "weaker" spouse in marriage contracts and has adopted two significant acts: the Resolution on Equality of Spouses in Civil law (1978)[37] and the Recommendation of the Committee of Ministers to member states on Family Mediation.[38] The Resolution on Spousal Equality in Civil Law requires governments to establish appropriate measures that prevent marriage contracts from containing discriminatory provisions

35 Art. 44, pt. 2 Family Act of Russian Federation (Семейный кодекс Российской Федерации), N 223-ФЗ of 29 December 1995.

36 Similarly, indirect protection of the weaker spouse in French law is reflected in the impossibility of excluding the basic property regime, which includes the obligation for spouses to jointly bear household expenses. This regime also includes provisions on child-rearing and the preservation of the family home, thereby providing additional legal security and protection for family relationships. Art. 1387–1581, Code Civil.

37 Council of Europe Committee of Ministers, Resolution (78) 37 on Equality of Spouses in Civil law, (https://rm.coe.int/res-78-37e-on-the-equality-of-spouses-in-civil-law/1680a3b3f1, 1. 2. 2025).

38 Council of Europe Committee of Ministers, Recommendation No. R (98) 1 of the Committee of Ministers to member states on Family Mediation, (https://rm.coe.int/rec-98-1e-on-family-mediation/1680a3b3ef, 1. 2. 2025).

affecting either spouse, while the Recommendation on Contribution After Divorce suggests member states should create rules about marital property regimes that include provisions for fair property distribution between former spouses.[39] The Recommendation on Family Mediation encourages member states to implement mediation as a solution for family disputes, including marital and divorce matters. These recommendations work to safeguard spouses by establishing equal rules for marital asset division and financial responsibility after divorce. The Council has repeatedly emphasized that family relation laws and marriage contracts must provide fair results to both spouses, especially when financial differences or power imbalances exist.

In the following, we identify specific mechanisms that we believe will enhance protection for the weaker spouse when applied in conjunction. The mechanisms are discussed chronologically, starting from the inception of the idea of entering into a marriage contract, through its notarization, duration, and, finally, its enforcement.

4.1. SAFEGUARDS AT THE TIME OF CONTRACT CONCLUSION

The first stage of a marriage contract conclusion significantly determines the fairness of the contract itself. The main goal of the mechanisms during this period focuses on protecting both parties from immediate power differences and ensuring they understand the terms of the agreement.

The most essential mechanism for addressing power imbalance during contract formation requires both spouses to have mandatory independent legal counsel. The provision of professional legal support to each spouse helps them understand the legal content and consequences of the contract, which minimizes the risk of manipulation or misunderstandings regarding their rights and obligations.[40] The autonomy of the contracting parties' wills would be better achieved through independent legal counsel because this counsel could explain the effects of the marriage contract provisions. Through independent legal advice the parties would gain knowledge about additional consequences that would otherwise remain invisible

39 Kovaček-Stanić, G., Samardžić, S. O., 2016, p. 1048.

40 The Principles of European Family Law state that a notary or another legal professional with a similar function should: provide impartial advice to each spouse individually; ensure that each spouse understands the legal consequences of the marriage property contract; and ensure that both spouses give their free consent to the contract. Boele-Woelki, K., Ferrand, F. *et al.*, 2013, *Principles of European Family Law Regarding Relations Between Spouses*, Cambridge, Intersentia, p. 128.

to an untrained person. Professional advice, combined with constructive dialogue, would assist couples in determining whether to sign a marriage contract or adjust its terms according to their personal interests. Also, a qualified legal advisor could assist the parties in identifying potential future life changes and their effects on the contractual rights and responsibilities. The main advantage of an independent legal counsel consists of warning the parties about hidden consequences that will emerge after the contract creation, impacting their relationship and financial stability.[41]

Under the current legal framework in Serbia, the notary is the one who points out to the spouses the possible consequences of entering into a marriage contract.[42] It is the notary's obligation to notify the parties about contract conclusions that result in abandoning predefined property rights between spouses. The role of the notary ends there. In this way, such counsel fails to meet the criteria for establishing a fairer contract process in the conclusion of marriage contracts. The notary acts as part of an equitable procedure, yet stands alone as an insufficient protection system for the contracting parties. We argue that each party should receive independent legal advice, from separate legal professionals, before signing the contract. The parties should receive counseling before notarizing the contract, while having enough time (30 to 60 days) to consider their decisions. This method would enhance understanding while providing greater freedom to act, which would lower the chances of creating unfair agreements.

A person's free will when signing the marriage contract does not ensure continuous freedom of will during the entire marriage period. The life's uncertainty prevents spouses from predicting future changes, and they cannot update their contract accordingly. Consequently, the law must establish mechanisms that enable changes to marriage contracts as new circumstances emerge.

We recommend that The Preliminary Draft of the Serbian Civil Code should contain detailed and complete rules to protect the interests of the "weaker" party in marriage contracts.[43] We suggest that the legislator investigate different comparative law models to create an equilibrium between contractual liberties and essential equal and fair standards between spouses.

41 For example, the parties agree that each spouse's income will be considered their separate property. Subsequently, one spouse gives up their career during the marriage to focus on childcare and upbringing, leaving their job, and at the time of divorce, finds themselves in a significantly disadvantaged and unfair economic position.

42 Art. 188, pt. 2. Family Act of Republic of Serbia, *Official Gazette of the RS*, Nos. 18/2005, 72/2011 – other law, and 6/2015.

43 The Preliminary Draft of the Serbian Civil Code, https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html.

A fundamental protection in the last stage the process requires both parties to provide complete financial disclosure. A party cannot provide truly informed consent unless they possess full knowledge of their partner's assets, along with debts and financial income. The American Law Institute (ALI) has defined principles for handling family dissolution and marital property distribution,[44] focusing on the reducedrationality that exists between the parties involved in the contract. The principles work to enable the parties involved in a contract while safeguarding their basic rights and freedom of choice, recognizing the existing power differences in that particular situation. The ALI principles state that the party waiving a right must have basic knowledge of the other party's financial situation and assets and should obtain independent legal advice and ensure the agreement uses straightforward language. They also recognize that parties entering into marriage contracts will not make rational decisions without specific procedural safeguards. The proposed 30-day waiting period between signing and marriage serves as a vital recommendation by the ALI, allowing for reflection and possible agreement changes, which we believe would be advantageous if adopted in Serbian law.

4.2. SAFEGUARDS DURING CONTRACT ENFORCEMENT AND JUDICIAL REVIEW

Life circumstances are unpredictable and the spouses cannot foresee all the changes or adjust the contract accordingly. Therefore, it is necessary to ensure legal mechanisms that allow for the modification or judicial review of marriage contracts, in line with unforeseen developments and changed circumstances.

In this regard, we suggest that the Preliminary Draft of the Serbian Civil Code Serbian Civil Code should include more precise and comprehensive provisions, which would clearly protect the interests of the "weaker" party in marriage contracts. This approach is significantly informed by comparative law, particularly the robust system of judicial review of marriage contracts in Germany.

4.2.1. The German Model of Judicial Review: BVerfG Decisions of 2001

The German legal system demonstrates an advanced approach to merging contractual freedom with mandatory fairness principles in marriage contracts. On 6 February 2001, the German Federal Constitutional

44 American Law Institute, 2001, Principles of the Law of Family Dissolution: Analysis and Recommendations, *Duke Journal of Gender Law & Policy*, Vol. 8, No. 1, pp. 1–85.

Court (Bundesverfassungsgericht – BVerfG) issued an important decision[45] which serves as the foundation of this approach. The Court declared that marriage contracts contain contractual autonomy but become subject to constitutional review if they establish unconscionable terms that place an excessive burden on any party involved.

The Court acknowledged that family law contractual freedom has its limits under Article 6 of the Basic Law, which protects marriage and family, and Article 3 of the Basic Law, which enforces equality. Marriage contracts must undergo evaluations that assess their procedural aspects, as well as their substantive fairness elements.

The German judicial review process consists of two separate evaluation phases.

1. The initial validity review (Sittenwidrigkeitsprüfung or contra bonos mores review) assesses contracts for immorality or unconscionability when they are signed. The courts must determine whether one party faced such extreme power imbalance at signing that they have lost their ability to make voluntary decisions. The assessment includes the evaluation of major economic differences, as well as insufficient legal guidance and extreme emotional dependence and forceful situations. The court requires a contract to demonstrate clear unfairness that reaches the level of "manifest one-sidedness" or "patent inequity". A marriage contract that demonstrates immorality in the course of this assessment automatically becomes null from its inception.
2. A German court may enforce effect control (Ausübungskontrolle or "exercise control") on a marriage contract if the marriage experiences unforeseen fundamental changes that produce an unconscionable situation for one party, even though the contract remains valid. The enforcement of this principle becomes essential when one spouse becomes completely dependent on their partner because of traditional gender expectations and lacks proper financial support after divorce. The review process relies on both good faith principles (Treu und Glauben, § 242 BGB)[46] and rights abuse prohibitions. The court maintains the power to adjust or partially invalidate contract terms that would otherwise produce

45 BVerfG, Judgment of the First Senate of 6 February 2001 – 1 BvR 12/92, paras. 1–56, (https://www.bverfg.de/e/rs20010206_1bvr001292en, 3. 10. 2025).

46 German Civil Code, Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [*Bundesgesetzblatt*] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the Act of 10 August 2021 (Federal Law Gazette I p. 3515).

an unacceptable outcome, based on marriage and family constitutional safeguards.

The German legal system acknowledges that spouses may sign unfavorable contracts when marrying because they want to build or sustain their relationship, while unexpected life changes can make originally fair provisions unjust during the marriage dissolution. The dual review system establishes a powerful framework that maintains party self-determination through substantive family law justice applications, while providing significant grounds value for developing Serbian matrimonial law.

5. Conclusion

It is our belief that only a multi-step control process for the conclusion and execution of the marriage contract would allow the achievement of the goal for which the concept of the marriage contract was created – enabling spouses to agree on their property relations in a way different from the one proposed by law, but in a manner that benefits the interests of both spouses, not just one of them. This multi-step review and strict regulation of the process, from the conclusion to the execution of the marriage contract, may be perceived as a restriction of the spouses' autonomy and the undermining of the very essence of the marriage contract. This conclusion could be drawn based on the perception of the marriage contract as just another commercial agreement, and the view that the principle of autonomy of will in the context of classical contract theory is a legally formed, impersonal concept, utopian in nature, considered in complete isolation from external factors.

However, this concept is hard to maintain even in traditional commercial contracts, let alone in a marriage contract. By redefining autonomy of will and viewing it as freedom within the freedom of others – freedom that has multiple limitations (the term "limitation" here is not used with a negative connotation, as in life and, consequently, in marriage, it is necessary to limit many things, and in marriage, this refers to making the right sacrifices for the sake of true coexistence of two individuals) – we allow for a different, more realistic perspective that is closer to the reality of life and, therefore, should lead to a more accurate and just outcome.

For this reason, it is our belief that legally specifying the exact steps would contribute to the autonomy of the spouses' wills and their freedom to contract, rather than restrict it. Such an approach would favor relationally understood autonomy of will, protect the "weaker" spouse, and

preserve the essence of marriage as a union through love, in which both partners are not only equal but are one.

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ZAŠTITA RAVNOPRAVNOSTI STRANA UGOVORNICA U BRAČNOM UGOVORU

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APSTRAKT

Zaštita ravnopravnosti ugovornih strana u bračnom ugovoru je ključni preduslov za postizanje pravičnosti u ovom pravnom odnosu. Rad analizira potencijalna rešenja i predlaže načine za njihovu integraciju u srpski pravni sistem, u nedostatku adekvatnih mehanizama za zaštitu ravnopravnosti ugovornih strana.

Glavni fokus istraživanja je na konkretnim pravnim mehanizmima, uz uzimanje u obzir autonomije volje i kratak prikaz teorija relacionih ugovora o njihovoj dinamičnoj prirodi. Rad sprovodi temeljnu analizu zaštitnih mera kako za formiranje tako i za izvršenje ugovora, izvlačeći bitne pouke iz nemačkog građanskog prava koje je razvilo sofisticirane sisteme sudske revizije. Istraživanje takođe procenjuje kako principi rodne ravnopravnosti doprinose rešavanju prethodnih pravnih nejednakosti koje su postojale u ovim sporazumima.

U istraživanju su izloženi specifični mehanizmi koje treba implementirati u srpski pravni sistem, uz korišćenje doktrinarnih i uporednopravnih metoda.

Ključne reči: bračni ugovor, ravnopravnost ugovornih strana, autonomija volje, pravne zaštite, uporedno pravo, teorija relacionih ugovora, imovina.

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CASE NOTE / KOMENTAR ODLUKE

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THE ICJ'S ADVISORY OPINION ON CLIMATE CHANGE: A POSITIVE, YET SMALL, STEP FORWARD

Abstract: *The ICJ's Advisory Opinion on the obligations of States in respect of climate change represents a pivotal moment in international environmental law. Being one of three recent decisions on this matter, the Opinion fits neatly within a growing body of jurisprudence aimed at compelling States to fulfill their internationally owed duties.*

The Opinion clarifies that States have legal obligations from a panoply of legal instruments to mitigate, adapt and cooperate in regard to the adverse effects of climate change. A breach of these obligations constitutes an internationally wrongful act and triggers State responsibility. Additionally, the Court endorsed the 1.5°C temperature goal as a legally binding target.

While the Opinion is laudable in many respects, others could have been improved. These include the reluctance of the Court to give a definite answer on the rights of future generations and the question of continued statehood due to the permanent loss of territory due rising sea levels.

Key words: Climate Change, ICJ, Advisory Opinion, State Obligations, State Responsibility, Climate Change Treaties, Statehood, Human Rights, International Environmental Law.

1. Introduction

The climate crisis is an existential challenge to both current and future generations. Amidst political inaction, judicial bodies are being asked to weigh in on the matter to clarify and potentially mandate States to take action. The International Court of Justice's (ICJ) Advisory Opinion on the obligations of States in respect of climate change,[1] which was delivered on 23 July 2025 in response to a request by the United Nations General

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1 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, General List No. 187.

Assembly (UNGA), is the latest addition to a growing body of jurisprudence of international tribunals that aims to compel States to fulfill their duties owed to the world and its peoples in the face of the climate crisis.

The ICJ's Opinion is both clear and decisive: under various climate change treaties, customary international law, human rights law and other international law, States have an overwhelming obligation to protect and preserve the climate system. A breach of these obligations constitutes an internationally wrongful act and will trigger State responsibility. Most notably, the Court affirmed findings of the Intergovernmental Panel on Climate Change's (IPCC) as the best available science regarding climate change and established a temperature goal of 1.5°C as the legally binding target.

There is much worthy of praise in the ICJ's Opinion, among others the clear rejection of the *lex specialis* argument brought by especially high emitting States and its rigorous engagement of scientific evidence. The Court clarified that there is enough scientific evidence to conclude causation and attribution of State responsibility. Yet, as this case note contends, the Court was equally cautious, leaving not only many questions unanswered but also opening the door to further uncertainty. These specifically include two aspects: the right of future generations and the precarious legal status of small island developing States facing the potential loss of their territory due to sea-level rise. Following a detailed analysis of the Court's key findings, this note critically evaluates the achievements and shortcomings of the Opinion. It is suggested that the Court's Opinion represents a positive, yet small, response to the UNGA's expansive request for clarification.

2. Factual and Legal Background

The ICJ's Advisory Opinion of 23 July 2025 on the obligations of States in respect of climate change is the latest decision in a currently evolving transnational judicial dialogue. Resolution 77/276, adopted on 29 March 2023 by the UNGA, formally requested the ICJ to clarify States' international obligations owed to the climate system as well as corresponding legal consequences for harming the climate system through significant emissions of anthropogenic greenhouse gases (GHG).[2]

The Court was asked to render an Advisory Opinion on the following questions:

2 UNGA Resolution 77/276, *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN doc. A/RES/77/276, (29 March 2023).

a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
   i. States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
   ii. Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[3]

The UNGA asked that, in answering the request, the Court take into particular consideration the Charter of the United Nations, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESC), the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Agreement, the United Nations Convention on the Law of the Sea (UNCLOS), the duty of due diligence, the rights recognized in the Universal Declaration of Human Rights, the principle of prevention of significant harm to the environment and the duty to protect and preserve the marine environment.[4]

The proceedings attracted unprecedented global engagement, with 91 initial written submissions and 62 subsequent comments from States and International Organizations.[5] Public hearings where held from 2 to 13 December 2024, with 102 oral statements heard.[6] Notably, before the public hearing, the Court also met with the past and present authors of the reports of the IPCC, to get better acquainted with the scientific basis and effects of climate change.[7]

The Court opined unanimously that the climate change treaties, customary international law and the Conventions referenced in Resolution 77/276 trigger international obligations for States in respect to climate change. A breach of any of these obligations by a State would constitute

3 *Ibid*.; ICJ, Advisory Opinion, p. 8.
4 *Ibid*.
5 *Ibid*., p. 11, para. 17; p. 12, para. 24.
6 *Ibid*., p. 14, para. 35.
7 *Ibid*., p. 13, para. 33.

an internationally wrongful act that entails the responsibility of the State. Where the obligation is one of conduct, a stringent standard of due diligence needs to be applied.[8]

Markedly, the ICJ's Opinion is situated in a broader discourse on state obligations relating to climate change, as illustrated by the Advisory Opinions of the International Tribunal for the Law of the Sea (ITLOS) and the Inter-American Court of Human Rights (IACtHR). The ITLOS rendered its Advisory Opinion on 21 May 2024, affirming in it that the law of the sea is directly applicable in determining the content and scope of States' obligations in respect to climate change.[9] Similarly, the IACtHR's Advisory Opinion was delivered on 29 May 2025, only two months before the Advisory Opinion of the ICJ. The IACtHR was tasked with giving guidance on the obligations of States in respect to the climate emergency, which it affirmed to exist, within the framework of international human rights law.[10]

What all three Advisory Opinions have in common is that they categorically affirm States' obligations in respect to climate change. Taken together, these three opinions illustrate a transnational and trans-judicial dialogue aimed at strengthening the international framework for State obligations with respect to climate change. The high level of participation in all these proceedings, culminating in the ICJ proceedings, demonstrates a growing consensus on the urgency of climate obligations as well as their justiciability. Additionally, all three opinions show a willingness to address the climate crisis in a robust and ambitious manner, interlinking international environmental principles with human rights and scientific evidence.

3. The Court's Opinion Under the Microscope

The Court took up a total of 15 pages reviewing the latest scientific evidence on climate change and another 60 pages reviewing the applicable law – before it started its legal analysis. It found the Charter of the United Nations, the climate change treaties (i.e. the UNFCCC, the Kyoto Protocol, and the Paris Agreement), UNCLOS and other environmental treaties – including the Ozone Layer Convention and the Montreal Protocol, the Biodiversity Convention and the Desertification Convention – to

8 *Ibid*., p. 130, para. 457.

9 ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, Case No. 31, (*Advisory Opinion on Climate Change and International Law*), para. 441.

10 IACtHR, *On the scope of the state obligations for responding to the climate emergency and human rights*, Advisory Opinion of 20 May 2025, AO-32/25 214, p. 214.

be part of the directly applicable law in this case.[11] Additionally, the Court examined customary international law and found the duty to prevent significant harm to the environment and the duty to cooperate for the protection of the environment equally to be part of the applicable law.[12] It similarly found the core human rights treaties, including the ICCPR and the ICESCR, and the human rights recognized under customary international law to be applicable.[13]

Lastly, the Court stated that the principles of sustainable development, common but differentiated responsibilities and respective capabilities, equity, intergenerational equity and the precautionary approach are applicable as guiding principles for the interpretation and application of the aforementioned applicable law.[14] However, the "polluter pays" principle was rejected by the Court, stating that this principle was neither part of any of the climate change treaties nor has it been accepted as applying directly between States without having been specified in a treaty.[15]

This long list of applicable law demonstrates the comprehensive nature of the Court's undertaking of establishing a coherent framework for legal obligations of States in respect of climate change. As stated above, the Court was similarly rigorous in its examination of the latest scientific evidence available.[16] In particular, the Court acknowledged from the beginning that the climate system has undergone widespread and rapid changes and that this change is caused primarily by anthropogenic GHG emissions. It recognized the IPCC's findings as the best available science on the causes, nature and consequences of climate change, and cited its reports throughout its Opinion.[17] Most notably, the Court endorsed the temperate goal of 1.5°C from the IPCC's reports as a legal target to be fulfilled when States' obligations are determined, under the Paris Agreement.[18] For better clarity, the following analysis is divided into three separate sections: the treaty-based obligations of States (Section 3.1.), the obligations found in customary international law (Section 3.2.), and the obligations found in other environmental treaties, UNCLOS and international human rights law (Section 3.3.). Section 3.4. addresses the Court's reasoning in relation to the second question posed to it, namely, State responsibility in respect of climate change obligations.

11 ICJ, Advisory Opinion, p. 47, paras. 121, 124.
12 *Ibid*., p. 48, para. 129.
13 *Ibid*., p. 51, para. 145.
14 *Ibid*., p. 56, para. 161.
15 *Ibid*., p. 56, para. 160.
16 *Ibid*., pp. 34–38, paras. 72–87.
17 *Ibid*., pp. 34–35, paras. 72–74.
18 *Ibid*., p. 73, para. 224; p. 130, para. 457.

3.1. TREATY-BASED OBLIGATIONS

The Court commenced its legal analysis by examining the obligations flowing from the climate change treaties. It found that obligations can be grouped into three categories: obligations of mitigation, obligations of adaptation, and obligations of cooperation.[19] While the UNFCCC is, as its name suggests, only a framework law, the Kyoto Protocol and the Paris Agreement are concretizations of the obligations contained in the UNFCCC.[20] Nevertheless, the UNFCCC in itself also entails binding legal obligations. The primary objectives of it are the limiting of anthropogenic GHG emissions by sources and the preservation and enhancement of sinks and reservoirs for GHGs.[21]

According to the Court, all States parties to the UNFCCC have legally binding obligations to adopt measures that contribute to the mitigation of GHG emissions and adaptation to climate change.[22] Chief among them is the obligation to develop, periodically update, publish and make available national inventories of GHG anthropogenic emissions by sources and removals by sinks, and to implement programs containing measures to mitigate climate change (Art. 4 (1) UNFCCC). Developed country Parties and other Parties listed in Annex I of the UNFCCC (Annex I Parties), have an additional obligation to adopt national policies and corresponding measures to mitigate climate change, by limiting their anthropogenic GHG emissions and protecting and enhancing their carbon sinks and reservoirs, therefore taking the lead in combating climate change (Art. 4 (2) UNFCCC).[23]

The Court noted that these obligations contain both obligations of result and conduct. Importantly, the Court stressed that where the obligation is one of conduct, a State acts wrongfully when it fails to use all its available means to bring about the objective; relating to an obligation of result, policies and measures adopted to fulfill the obligation need to be able to achieve the required goal. Hence, the purely formal but substantially empty adoption of a policy or measure will not fulfill the obligation.[24]

Additionally, international cooperation lies at the heart of the UNFCCC, mandating collaboration in various areas, from financial transfers to technology transfers and capacity-building. The duty to cooperate is an

19 *Ibid*., p. 62, para. 185.
20 *Ibid*., p. 64, para. 195.
21 *Ibid*., p. 65, para. 200.
22 *Ibid*., p. 130, para. 457.
23 *Ibid*., pp. 66–67, paras. 201–204.
24 *Ibid*., p. 68, para. 208.

obligation of conduct, and its fulfillment must be judged against a standard of due diligence. However, which obligations particularly arise from the duty of cooperation has to be determined on a case-by-case basis and cannot be stated in the abstract.[25]

The Court equally affirmed that the Kyoto Protocol is a concretization of certain obligations under the UNFCCC. It requires Annex I Parties of the UNFCCC to commit to quantified emission reductions within certain commitment periods.[26] Although there is currently no commitment period beyond 2020, the Protocol establishes legally binding reduction commitments for Annex I Parties. Non-compliance with the reduction commitments by an Annex I Party constitutes an internationally wrongful act.[27]

Moving on to the Paris Agreement, the Court stated that it exemplifies the most comprehensive climate change treaty to date. It sets out legally binding obligations not only on issues of mitigation and adaptation but also on issues of finance, technology development and transfer, transparency of action and support, and capacity-building. It also contains the temperature goal of 1.5°C, which states that the global average temperature should be limited to an increase of 2°C, with efforts made to limit it to 1.5°C above pre-industrial levels, to significantly reduce the risks and impacts of climate change (Art. 2 (1) Paris Agreement).[28] The Court started by observing, that there is now a scientific consensus on the temperature goal of 1.5°C as the target to be achieved under the Paris Agreement, despite it only being worded as an additional effort. This temperature goal has also become the new legal target for States Parties, as various documents of the Conference of the Parties (COP) cite exclusively this goal. As such, in accordance with Art. 31 (3) (a) of the Vienna Convention on the Law of Treaties, the Court found the temperature goal of 1.5°C to be a subsequent agreement by the Parties.[29]

The Paris Agreement entails several obligations of conduct and result. First, States are obliged to prepare, communicate and maintain nationally determined contributions (NDCs). Second, while the Paris Agreement does not provide requirements for the content of these NDCs, they nevertheless must be "capable of making an adequate contribution to the achievement of the temperature goal,"[30] meaning that States do not have

25 *Ibid*., p. 71, para. 218.
26 *Ibid*., p. 71, para. 219.
27 *Ibid*., p. 72, para. 221.
28 *Ibid*., p. 72, para. 223.
29 *Ibid*., p. 73, para. 224.
30 *Ibid*., p. 77, para. 242.

unfettered discretion in the matter. Importantly, the discretion that States do have regarding their NDCs, must be exercised with due diligence. The Court found the standard of due diligence to be stringent in light of the serious threat posed by climate change. The NDCs should therefore represent the highest possible ambition of States to achieve the objectives set out by the Paris Agreement.[31] Third, the NDCs must be implemented through domestic mitigation measures. These measures also must include the activity of private actors and can be achieved by an effective national system of appropriate legislation, administrative procedures and enforcement mechanisms.[32] Fourth, adaptation measures must be put in place. The Paris Agreement does not in itself provide a list of actions necessary to fulfil this obligation. Hence, States also must be assessed against a standard of due diligence when implementing adaptation measures and they will have to align their efforts with the best available science. Citing an IPCC report from 2023, the Court observed that effective adaptation options, such as the restoration of ecosystems and the creation of early warning systems, could be considered appropriate measures to fulfil the adaptation obligations under the Paris Agreement.[33] Lastly, the Paris Agreement also entails obligations relating to cooperation, including financial assistance, technology transfer and capacity-building. In this context, the Court states that "the customary duty to co-operate for the protection of the environment reinforces the treaty-based co-operation obligations under the Paris Agreement."[34]

3.2. OBLIGATIONS UNDER CUSTOMARY INTERNATIONAL LAW

The Court found two obligations to arise from customary international law: the duty to prevent significant harm to the environment, and the duty to cooperate for the protection of the environment. Reiterating its jurisprudence on this matter,[35] the Court confirmed that both du-

31 *Ibid*., p. 78, paras. 245–246.

32 *Ibid*., pp. 79–80, paras. 252–253.

33 *Ibid*., p. 81, paras. 257–258.

34 *Ibid*., p. 82, para. 261; pp. 82–83, paras. 264, 267.

35 The Court references several cases, *ibid*., p. 85, para. 272: Arbitral Tribunal, *Trail smelter case (United States v. Canada)*, Decision of 11 March 1941, United Nations, Reports of International Arbitral Awards, Vol. III. (*Trail Smelter*); ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgment, *ICJ Reports* 1949, p. 4 (*Corfu Channel*); ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports* 2010, p. 14 (*Pulp Mills*); ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, p. 226 (*Nuclear Weapons Advisory Opinion*); ICJ,

ties are well established within customary international law. The duty to prevent significant harm to the environment applies to the climate system, as the climate system "is an integral and vitally important part of the environment."[36] The Court also confirmed that this duty arises toward both present and future generations.[37] As confirmed in several of the Court's cases, the duty to prevent arises when there is a risk of a significant harm to the environment.[38] Whether an activity constitutes a risk of significant harm depends on the level of probability and severity of the harm.[39] The Court considered that such a risk may also be present where the harm is caused by a cumulative effect of different acts, where various States and private actors under their jurisdiction are involved, irrespective of the difficulty to ascertain the exact share of responsibility of any particular State. Relying on the assessment of the IPCC, the Court ultimately found that the accumulation of GHG emissions in the atmosphere is causing significant harm to the climate system and other parts of the environment. Yet, the specific responsibilities of States need to be assessed *in concreto*.[40]

The Court considered at length the standard of due diligence in this connection. It reiterated that due diligence requires states to use all the means available to them to prevent the risk of significant harm.[41] In the context of the climate crisis, this means at least mitigation and adaptation measures that control both public and private conduct within the States' jurisdiction or control. Such measures need to be effective. Additionally, the Court observes that, where ample scientific evidence that a significant harm will occur is available, the diligence owed by States will be more demanding. Similarly, if a State has the technologies means to prevent harm, the State is expected to use them.[42] However, the principle of common but differentiated responsibilities and capabilities also plays

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment, *ICJ Reports* 2015, p. 665 (*Certain Activities*); ICJ, *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *ICJ Reports* 2015, p. 706 (*Construction of a Road*).

36 ICJ, Advisory Opinion, p. 85, para. 273.

37 *Ibid*.

38 *Ibid*., p. 86, para. 274.

39 *Ibid*., p. 86, para. 275, with reference to ITLOS, *Advisory Opinion on Climate Change and International Law*, Advisory Opinion of 21 May 2024, Case No. 31, p. 91, para. 239; *Ibid*., p. 137, para. 397.

40 ICJ, Advisory Opinion, pp. 86–87, paras. 276–279.

41 *Ibid*., p. 87, para. 281, with reference to the *Pulp Mills* case.

42 ICJ, Advisory Opinion, pp. 88–89, paras. 282–286.

a significant role here, as developed States will be required to implement more demanding measures and will have to satisfy a higher standard of conduct than least developed States.[43] Lastly, the Court stated that the duty to exercise due diligence in preventing significant harm to the environment also requires certain procedural steps, this being primarily an environmental impact assessment.[44]

Turning to the duty to cooperate, the Court reiterates that this duty has a customary character and is especially important when a shared resource is in question. The duty to cooperate applies to the climate system, as the climate system is a resource shared by all States. Therefore, the Court found that cooperation is the very basis of meaningful international efforts in respect to climate change. While States are not required to conclude treaties to further their efforts under this duty, they are nevertheless required to make good faith efforts to arrive at collective actions. The duty to cooperate is founded on the interdependence of States and thus requires continued development and implementation of collective climate action by States.[45] As the Court concluded, "[c]limate change is a common concern. Co-operation is not a matter of choice for States but a pressing need and a legal obligation."[46]

Concerning the relationship between treaty-based obligations and obligations based on customary rules, the Court noted that "compliance [with treaty-based obligations as interpreted by the Court] in full and in good faith"[47] will suggest a substantial compliance with the customary duties to prevent significant environmental harm and to cooperate, without meaning that these obligations are necessarily the same. Most importantly, the Court continued by outlining how Non-State Parties to the climate change treaties could fulfil their customary obligations, namely through cooperating with the State Parties to the climate change treaties in such a way that the "practice that comports with the required conduct of [State Parties to] the climate change treaties."[48] Without cooperation, a Non-State Party "has the full burden of demonstrating that its policies and practices are in conformity with its customary obligations."[49]

43 *Ibid*., pp. 90–91, paras. 290–294.
44 *Ibid*., pp. 91–92, paras. 295–298.
45 *Ibid*., pp. 93–94, paras. 301–307.
46 *Ibid*., p. 95, para. 308.
47 *Ibid*., p. 96, para. 314.
48 *Ibid*., p. 96, para. 315.
49 *Ibid*.; *Ibid*., p. 96, paras. 314–315.

3.3. OBLIGATIONS UNDER OTHER ENVIRONMENTAL TREATIES, UNCLOS AND INTERNATIONAL HUMAN RIGHTS LAW

The Court considered several other environmental treaties: the Ozone Layer Convention and the Montreal Protocol, the Biodiversity Convention and the Desertification Convention. It found that all these treaties similarly prescribe obligations to their State Parties which amount to the protection of the climate system and other parts of the environment. The Biodiversity Convention obliges State Parties to ensure that activities within their jurisdiction or control do not cause damage to the environment of another State or areas beyond the limits of national jurisdiction as well as to develop national strategies for the conservation and sustainable use of biological diversity. The Court observed that ecosystem protection can in certain instances simultaneously function as a climate change mitigation or adaptation measure.[50]

The Court then considered the United Nations Convention of the Law of the Sea. Here, it took note of the Advisory Opinion delivered by ITLOS on 21 May 2024 and decided to put "great weight to the interpretation adopted by the Tribunal."[51] It then affirms, citing repeatedly the decision of ITLOS, that anthropogenic GHG emissions constitute marine pollution and that States are obliged to protect and preserve the marine environment from harm.[52] In relation to sea-level rise and the possibility of losing State territory because of climate change, the Court considered that UNCLOS does not contain any provisions requiring States to update charts or lists of geographical coordinates that outline a State's maritime zone. While not engaging further with this topic, the Court notes that the loss of one of the constituent elements of a state would not necessarily result in the loss of statehood.[53]

Finally, the Court also turned to international human rights law and extracted therefrom the obligations of States in respect to climate change. The Court connected the issues of climate change and human rights by stating that under international human rights law States have an obligation to respect, protect and ensure the enjoyment of human rights of individuals and peoples. It continued by finding that the protection of the environment is a precondition for the enjoyment of human rights.[54] Accordingly, a number human rights are impaired because of the adverse

50 *Ibid*., p. 99, paras. 327–329.

51 *Ibid*., p. 101, para. 338.

52 *Ibid*., p. 102, paras. 340–342.

53 *Ibid*., pp. 105–107, paras. 358–359, 362, 364.

54 *Ibid*., pp. 108–109, paras. 371–373.

effects of climate change: the right to life, the right to health, the right to an adequate standard of living, the right to privacy, family and home, as well as the rights of women, children and indigenous people.[55] The Court also noted that other regional human rights courts have already affirmed the relation between the adverse effects of climate change and the impairment of human rights, citing recent decisions of different regional courts.[56] It concluded its analysis of international human rights law by stating that the right to a clean, healthy and sustainable environment is also a precondition for the enjoyment of many human rights and therefore essential.[57] States are therefore obligated to take measures to protect the climate system and other parts of the environment in order to safeguard human rights.[58]

3.4. STATE RESPONSIBILITY

Turning to the second question posed to the Court, it again started by reviewing the applicable law, which in this case were the customary rules on State responsibility.[59] It equally found that the climate change treaties do not constitute *lex specialis* in respect to the customary rules on State responsibility. Therefore, the customary rules are applicable.[60]

In general, a State will be responsible for breaches of any of the obligations determined by the Court, as identified in its Opinion. A breach of such an obligation will constitute an internationally wrongful act that entails State responsibility.[61] The Court found that the most significant obligation of States in relation to climate change will be the obligation to prevent significant harm to the climate system and other parts of the environment. It reiterated that responsibility will be triggered when a State fails to take all measures available to it to prevent the significant harm. To determine whether a State failed its obligation, its actions are to be judged under a standard of due diligence.[62]

The Court observed that the complex and multifaceted nature of the climate crisis gives rise to distinct issues in relation to the application of

55 *Ibid*., pp. 109–111, paras. 377–382.
56 *Ibid*., p. 112, para. 385.
57 *Ibid*., p. 113, para. 393.
58 *Ibid*., p. 115, para. 403.
59 *Ibid*., p. 116, para. 407 (with reference to its case law on the matter).
60 *Ibid*., pp. 118–119, paras. 411, 414–417.
61 *Ibid*., p. 130, para. 457.
62 *Ibid*., p. 117, para. 409.

the customary rules on State responsibility, as concentrations of GHG emissions are not produced by a single activity or group of activities that can neatly be ascribed to a particular State or States. Thus, the Court identifies the two main issues in respect to climate change: attribution and causation.[63]

Concerning the question of attribution, the Court stated that it is possible to determine each State's total contribution to global emissions through scientific methods. To underscore its point, it relied on a 2023 IPCC report, which included data on current and historical emissions attributable to individual States. While acknowledging that several States have contributed to climate change, the Court also stresses that the rules on State responsibility have no issue addressing cases in which more than one State is injured or responsible.[64]

Regarding causation, the Court observed that causation involves two elements: whether a climatic event could be attributed to anthropogenic climate change and to what extent the damage caused by it can be attributed to a specific State or group of States.[65] While the second element requires an *in concreto* assessment, the first element can be answered by looking at scientific data. The Court found that in relation to the first element of causation, the scientific evidence is clear: significant harm to the climate system and other parts of the environment has been caused by anthropogenic GHG emissions.[66]

Last but not least, the Court found that all States have a common interest in the protection of global environmental commons, such as the atmosphere and the high seas. As such, the obligations determined in the Court's Opinion constitute obligations *erga omnes* insofar as they are based on customary international law, and obligations *erga omnes partes* insofar as they are treaty-based.[67]

Finally, the Court stated that the legal consequences arising from wrongful acts included all legal consequences provided for under the law of State responsibility. These include the duty of performance, the duty of cessation and guarantees of non-repetition, and the duty to make reparation (restitution, compensation and satisfaction).[68]

63 *Ibid*., p. 120, paras. 421–422.
64 *Ibid*., pp. 122–123, paras. 429–430.
65 *Ibid*., p. 124, para. 437.
66 *Ibid*.
67 *Ibid*., p. 125, para. 440.
68 *Ibid*., pp. 126–129, paras. 445–455.

4. A Positive, Yet Small, Development: What Went Right and Where Could the Court Have Done More?

The ICJ's Advisory Opinion was proclaimed by many as a "historic"[69] and "ground-breaking"[70] ruling. There is much within this Opinion that can be applauded, yet there are some parts where the Court's arguments were lacking. Commendable aspects of the Opinion are, among others, the Court's clear stance on the applicability of varying sources of international law to the climate crisis (despite the attempt of many developed States to argue that the climate change treaties constitute *lex specialis*), the applicability of international human rights law, and its rigorous engagement with scientific evidence.

Concerning the broad application of both treaty and other international law, it is noteworthy that especially high-emitting States, such as the US,[71] the UK[72] and Australia,[73] argued for a narrow interpretation and an exclusion of rules – especially customary rules – outside the climate change treaties based on *lex specialis*. The Court clarified, by referencing the ILC, that the principle of *lex specialis* only applies when an inconsistency between the potentially applicable rules, or an identifiable intention to exclude one over another, exists in the cases where several rules apply to the same circumstances. Such an inconsistency or intention was found to not exist between the climate change treaties and other rules of international law, therefore the whole body of relevant international law was found to be applicable.[74] Given the global nature of the climate crisis, the systemic integration approach[75] taken by the Court, over the *lex*

69 Schaugg, L., Jones, N., Qi, J., 2025, Historic International Court of Justice Opinion Confirms States' Climate Obligations, *International Institute for Sustainable Development*, 28 July, (https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate-change, 18. 10. 2025).

70 Jantarasombat, P., Chan, I., 2025, ICJ Climate Change Advisory Opinion: Peoples and Individuals as Obligees, *EJIL: Talk!*, 17 October, (https://www.ejiltalk.org/icj-climate-change-advisory-opinion-peoples-and-individuals-as-obligees, 18. 10. 2025).

71 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, General List No. 187, Verbatim Record 2024/40, 4 December 2024, pp. 41 and 44.

72 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, General List No. 187, Verbatim Record 2024/48, 10 December 2024, p. 44.

73 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, General List No. 187, Verbatim Record 2024/35, 2 December 2024, p. 41.

74 ICJ, Advisory Opinion, p. 57, paras. 166–168.

75 Arato, J., Uriburu, J., 2025, Treaty and Custom in the ICJ's Climate Change Opinion, *EJIL: Talk!*, 24 July, (https://www.ejiltalk.org/treaty-and-custom-in-the-icjs-climate-change-opinion, 14. 11. 2025).

specialis approach, is to be applauded. An acceptance of the *lex specialis* argument could have seriously restricted the reach of the obligations. By rejecting this argument, the Court made it clear that other rules of international law, most notably customary international law and the law of the sea, are also applicable and even States not parties to the climate change treaties are bound by them. This is particularly relevant now that certain high-emitting States, such as the US, have left the treaty regime. By interconnecting the obligations of treaty and customary rules,[76] Non-State Parties have been drawn closer to the treaty regime[77] and can be held accountable for their emissions. In this respect, it is also noteworthy that when the Court clarified the obligations under UNCLOS, it explicitly cited ITLOS jurisprudence and in various parts endorsed ITLOS' latest Advisory Opinion from May 2024.[78]

A narrow reading would have also prevented the Court from incorporating human rights into the applicable law – this despite widespread acceptance among States that climate change is impacting human rights.[79] The Court's analysis of the various rights, while welcome in and of itself, could have been improved in several instances. Chief among them is that the Court left it open how exactly the rights of future generations would manifest and how such rights would have to be balanced against the rights of current generations. This is so despite the fact that the UNGA asked specifically for clarification on this point in its Resolution 77/276. The Court only discussed intergenerational equity as a "manifestation [of the principle] of equity in the general sense" and deemed it significant as a "guide for the interpretation of applicable rules,"[80] despite its observation that "its relevance for the obligations in respect of climate change

76 ICJ, Advisory Opinion, pp. 95–96, paras. 309–315.

77 Arato, J., Uriburu, J., 2025; Gehring, M., 2025, When Custom Binds All States: Reflections on Customary International Law in the ICJ Climate Advisory Opinion, *Verfassungsblog*, 15 August, (https://verfassungsblog.de/customary-law-icj-climate-advisory-opinion, 14. 11. 2025).

78 See, for example, ICJ, Advisory Opinion, pp. 102–103, paras. 340, 342–347. For a deeper discussion on the this matter, see, for example, Spiegeleir, A. de, Rocha, A., 2025, Sea-Level Rise Reaches The Hague: Findings in Relation to the Law of the Sea in the ICJ's Climate Change Advisory Opinion, *Verfassungsblog*, 4 August, (https://verfassungsblog.de/law-of-the-sea-in-the-icjs-climate-change-advisory-opinion, 14. 11. 2025).

79 See, for example, ICJ, Verbatim Record 2024/40, p. 47, although rejecting the argument that international human rights law can emanate obligations in respect to GHG emissions, the US nevertheless accepts that human rights are impacted by climate change. See also Heri, C., 2025, Human Rights in the ICJ's Climate Opinion, *Verfassungsblog*, 1 August, (https://verfassungsblog.de/human-rights-in-the-icjs-climate-opinion, 18. 10. 2025).

80 ICJ, Advisory Opinion, p. 55, para. 157.

is undisputable."[81] It is lamentable that the Court shied away from this question as it would have potentially impacted standing requirements in many jurisdictions, as well as the substantive content and temporality of many rights.

In the same vein, the Court only remarks – seemingly in passing – that States may have an obligation under the non-refoulement principle when it comes to climate refugees.[82] While remarkable that the Court addressed the issue of climate refugees at all[83] – without having been directly requested to do so, as Judge Aurescu also wrote in his separate opinion – it would have been important to also include positive obligations, covering proactive measures to prevent refoulement. Such positive obligations could include the obligation to admit those seeking protection and the issuance of temporary residence permits.[84]

Ultimately, the Court also avoided a definite answer to whether the right to a clean, healthy and sustainable environment is an autonomous right. It only stated that this right is a "precondition for the enjoyment of many human rights" and that it is "inherent in the enjoyment of other human rights."[85] It is regrettable that the Court did not take this opportunity to declare it an independent right. However, as some scholars have already noted, this is due to the nature of the proceedings and the ICJ being a court of general jurisdiction – not one of human rights.[86] Yet, on a positive note, just as when the Court considered States' obligations under the law of the sea, it similarly cited the latest jurisprudence on the application of human rights in relation to the adverse effects on climate change by regional human rights courts, namely the IACtHR[87] and the ECtHR[88].[89] Taken together,

81 *Ibid*., p. 54, para. 155. See also Odermatt, J., 2025, What the Court Didn't Say, *Verfassungsblog*, 30 July, (https://verfassungsblog.de/what-the-court-didnt-say, 18. 10. 2025).

82 ICJ, Advisory Opinion, p. 110, para. 378.

83 For a deeper discussion of this topic, see, for example, Riemer, L., 2026, A Single Paragraph's Promise, *Verfassungsblog*, 26 July, (https://verfassungsblog.de/icj-advisory-opinion-on-climate-change-human-displacement, 18. 10. 2025); Rao, M., 2025, Climate Displacement in the ICJ's Advisory Opinion: Recognised but Not Resolved, *Völkerrechtsblog*, 11 August, (https://voelkerrechtsblog.org/climate-displacement-in-the-icjs-advisory-opinion, 18. 10. 2025).

84 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, Separate Opinion of Judge Aurescu, General List No. 187, p. 10, paras. 25–26.

85 ICJ, Advisory Opinion, p. 113, para. 393.

86 See, for example, Heri, C., 2025.

87 IACtHR, *On the scope of the state obligations for responding to the climate emergency and human rights*, Advisory Opinion of 20 May 2025, AO-32/25 214.

88 ECtHR, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, No. 53600/20, Judgment of 9 April 2024, [GC].

89 ICJ, Advisory Opinion, p. 112, para. 385.

this can be seen as a positive development of the trans-judicial dialogue between the various international courts, which will hopefully lead to a global and harmonized jurisprudence on climate change matters.

Lastly, the Court's engagement with scientific evidence is to be applauded. On the one hand, the Court made a visible effort to understand the scientific basis, impacts and risks of climate change.[90] On the other hand, it also found that the reports of the IPCC constitute the best available science at the moment, in respect to climate change.[91] This also has important consequences for the due diligence owed by States when assessing whether they have fulfilled their international obligations in respect to climate change. Additionally, the Court transformed a scientifically determined goal, namely the temperature goal of 1.5°C, into a legally binding target for States.[92]

However, there are other parts of the decision where the Court made statements that were not backed by proper reasoning or arguments. These include, for example, its proclamation that the obligations determined are owed *erga omnes (partes)*[93] and that statehood may not necessarily be lost with the loss of territory. In light of the length of the case note, the following will only discuss the issue of statehood.

The Court only noted in brevity, after finding that charts delimiting the maritime area of a State do not have to be updated, that "once a State is established, the disappearance of one of its constituent elements would not necessarily entail the loss of its statehood."[94] Several judges took up this

90 *Ibid*., p. 13, para. 33.

91 *Ibid*., p. 88, para. 284.

92 *Ibid*., p. 73, para. 224. For a further discussion on the incorporation of science in the ICJ's Opinion, see Sulyok, K., 2025, On the Science-Coloured Glasses of the ICJ: Harmfulness, Wrongfulness, and Climate Accountability, *Völkerrechtsblog*, 6 August, (https://voelkerrechtsblog.org/on-the-science-coloured-glasses-of-the-icj, 14. 11. 2025).

93 ICJ, Advisory Opinion, pp. 125–126, paras. 439–443. An interesting blog post dissects this statement of the ICJ here: Urs, P., 2025, Open the Floodgates: Standing for the Enforcement of Obligations Erga Omnes in the ICJ's Advisory Opinion on Climate Change, *CIL Dialogues*, 11 August, (https://cil.nus.edu.sg/blogs/open-the-floodgates-standing-for-the-enforcement-of-obligations-erga-omnes-in-the-icjs-advisory-opinion-on-climate-change, 18. 10. 2025); for discussion on what might follow from this *erga omnes (partes)* declaration, see Chan, I., 2025, Further Legal Consequences of Obligations Erga Omnes (Partes) in the ICJ Climate Change Advisory Opinion: Duty of Non-Recognition and Article 62 Intervention, *Völkerrechtsblog*, 28 October, (https://www.ejiltalk.org/further-legal-consequences-of-obligations-erga-omnes-partes-in-the-icj-climate-change-advisory-opinion-duty-of-non-recognition-and-article-62-intervention, 14. 11. 2025).

94 ICJ, Advisory Opinion, p. 107, para. 363.

issue in their separate opinions and declarations.[95] Both Judge Sebutinde and Judge Aurescu wished that the Court would have been more proactive in highlighting that the loss of territory (and population) due to climate-related sea-level rise would not lead to the loss of statehood.[96] Judge Aurescu additionally added that this should also not lead to the loss of membership in the United Nations.[97] As the Court was ambiguous here through its use of the term "necessarily", the wish for a more definitive statement is understandable, especially since it is mostly small island states that will be affected by the loss of territory through sea-level rise. This loss would not only include land territory but, more importantly, also economically important maritime areas, including their exclusive economic zones. By avoiding a definite proclamation on this issue, the Court left small island states in a precarious position, abandoning them to find their own solutions to a pressing and fast-approaching problem.

Notably, Judge Aurescu discussed the broader issue of a State not only losing its territory but also its population – two of the three elements of statehood[98] – through sea-level rise and how a State would still operate its government if it is deprived of its former two elements.[99] Judge Tomka went a step further and remarked that with its statement the Court might have unintentionally quasi-endorsed "the deconstruction of the conditions of statehood as such."[100] In his declaration, he opined that there is no state practice for sea-level rise-induced territory disappearance. Different to other possibly similar cases, the specificity of climate change-induced territory loss would mean the permanent loss of it and its population.[101] As Judge Tomka noted, the international community finds itself in the "midst of a great normative contestation"[102] and in a moment of "profound self-inquiry",[103] where States will have

95 ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, Separate Opinion of Judge Sebutinde General List No. 187; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, Separate Opinion of Judge Bhandari, General List No. 187; ICJ, Separate Opinion of Judge Aurescu, 2025; ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion of 23 July 2025, Declaration of Judge Tomka, General List No. 187.

96 ICJ, Separate Opinion of Judge Sebutinde, 2025, p. 3, para. 8; ICJ, Separate Opinion of Judge Aurescu, 2025, pp. 8–9, paras. 20–22.

97 *Ibid*.

98 Shaw, M., 2021, *International Law*, Cambridge, Cambridge University Press, p. 182.

99 Corneo, A., Scherer, J., 2025, Is Montevideo Sinking?, *Verfassungsblog*, 19 August, (https://verfassungsblog.de/montevideo-climate-statehood-icj, 18. 10. 2025).

100 ICJ, Declaration of Judge Tomka, 2025, p. 1 para. 2.

101 *Ibid*., p. 1, para. 5.

102 *Ibid*., p. 2, para. 7.

103 *Ibid*., p. 3, para. 9.

to redecide what a State is.[104] Although not at the heart of the Advisory Opinion, the Court's statement on continued statehood could potentially redefine the essence of international law. This could both drastically change the understanding of 'State' and through that, potentially, open international law to entities traditionally not included as subjects, such as corporations.

5. Conclusion

Answering all the UNGA's questions from Resolution 77/276 in the affirmative, the Court clarified States' obligations to protect the climate system and urged them to do the utmost to confront this "existential problem of planetary proportions".[105] It equally clarified the legal consequences in cases of breaching these obligations, opening the whole arsenal of possible legal consequences, as provided for in the rules on State responsibility. By basing the obligations on various sources, treaties, customary international law, and human rights, the Court made it abundantly clear that States can and should be held accountable in full for their wrongful actions in respect to climate change.

In summary, the ICJ's Advisory Opinion can be seen as the latest decision in a triad of advisory opinions by international tribunals. Together they form a broader trans-judicial dialogue, which also includes regional human rights tribunals, such as the ECtHR. This dialogue will be further advanced with the currently pending request before the African Court on Human and Peoples' Rights for an Advisory Opinion on the human rights obligations of African states in addressing the climate crisis.[106] Hopefully, this will lead to a global and harmonized response to the adverse effects of climate change. One state or even a continent will not be able to tackle the enormous problems brought about by the climate crisis, yet together our world may still be able to protect and preserve this planet that we all call home. The ICJ's, as well as the other Advisory Opinions and decisions of international tribunals, are a push in the right direction. Yet, as the ICJ

104 *Ibid*., pp. 2–3, paras. 6–9. For further reflections on the topic of statehood, see Syla, Z., Kent, A., 2025, Statehood in the Climate Crisis: The ICJ's Climate Advisory Opinion and the Presumption of State Continuity, *Verfassungsblog*, 19 August, (https://verfassungsblog.de/statehood-in-the-climate-crisis, 14. 11. 2025).

105 ICJ, Advisory Opinion, p. 129, para. 456.

106 PALU, 2025, Request for an Advisory Opinion on the Human Rights Obligations of African States in Addressing the Climate Crisis, *The Climate Litigation Database*, (https://www.climatecasechart.com/documents/request-for-an-advisory-opinion-on-the-human-rights-obligations-of-african-states-in-addressing-the-climate-crisis-petition_68af, 20. 10. 2025).

noted in its conclusion, "[a] complete solution to this daunting, and self-inflicted, problem requires the contribution of all fields of human knowledge [and above] all, a lasting and satisfactory solution requires human will and wisdom [...] to change our habits, comforts and current way of life in order to secure a future for ourselves and those who are yet to come."[107]

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107 ICJ, Advisory Opinion, p. 129, para. 456.

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SAVETODAVNO MIŠLJENJE MEĐUNARODNOG SUDA PRAVDE O KLIMATSKIM PROMENAMA: POZITIVAN, ALI MALI KORAK NAPRED

Melanie Maurer

APSTRAKT

Savetodavno mišljenje Međunarodnog suda pravde o obavezama država povodom klimatskih promena predstavlja prelomni trenutak u međunarodnom ekološkom pravu. Mišljenje se, kao jedna od tri skorašnje odluke u ovoj oblasti, uklapa u rastuću sudsku praksu usmerenu na primoravanje država da ispune svoje međunarodne dužnosti.

Mišljenjem se razjašnjava da države imaju pravne obaveze, iz niza pravnih instrumenata, ublažavanja posledica klimatskih promena, prilagođavanja i saradnje u vezi s njihovim štetnim dejstvima, a kršenje pomenutih obaveza predstavlja međunarodno protivpravno delo i povlači odgovornost države. Najzad, Sud je potvrdio cilj ograničenja globalnog zagrevanja na 1,5° C kao pravno obavezujući.

Iako savetodavno mišljenje u mnogim aspektima zaslužuje pohvale, pojedini aspekti, kao što su uzdržanost Suda da pruži konačan odgovor o pravima budućih generacija i pitanje nastavka državnosti u slučaju trajnog gubitka teritorije usled porasta nivoa mora, mogli su biti progresivniji.

Ključne reči: klimatske promene, Međunarodni sud pravde, savetodavno mišljenje, obaveze država, odgovornost država, sporazumi o klimatskim promenama, državnost, ljudska prava, međunarodno ekološko pravo.

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- Studentkinja osnovnih akademskih studija **Aleksandra Bućković**, sa ostvarenim prosekom 9,33, oslobođena je u celosti obaveze plaćanja školarine za upis četvrte godine studija u akademskoj 2024/25. godini.

STUDENTSKE PRAKSE I STUDIJSKE POSETE

- Stručna praksa je od školske godine 2024/2025. obavezni predmet i traje deset radnih dana (u poslednjoj nedelji maja i prvoj nedelji juna). Studenti i studentkinje se opredeljuju za oblast prava koja ih zanima i mentora/mentorku s kojima dogovaraju zadatak koji će uraditi na praksi, a koordinatorka studentske prakse ih upućuje u izabranu organizaciju. Ove godine su najčešće birani: Viši sud u Beogradu, Privredni sud, Agencija za mirno rešavanje radnih sporova, advokatske kancelarije, privredna društva (neka i van teritorije Beograda). Studenti i studentkinje koji su odslušali nastavu na četvrtoj godini studija mogu svakog meseca, osim u letnjim mesecima, izabrati advokatsku kancelariju, sud, tužilaštvo ili privredno društvo u kome bi obavili praksu, takođe u trajanju od deset radnih dana. Po obavljenoj praksi dobijaju potvrdu koja se unosi u dodatak diplome.

SPISAK STUDENATA KOJI SU DIPLOMIRALI

Redni broj	Ime i prezime	Datum diplomiranja
1.	Olga Čolaković	10. 10. 2024.
2.	Mia Bamburać	16. 10. 2024.
3.	Mina Vučetić	16. 10. 2024.
4.	Anita Šubarić	18. 10. 2024.
5.	Igor Ribičić	18. 11. 2024.
6.	Adam Tanasković	3. 12. 2024.
7.	Nikola Đorđević	6. 12. 2024.
8.	Marija Pavlović	11. 12. 2024.
9.	Pavle Savić	17. 1. 2025.
10.	Sandra Ćirić	23. 1. 2025.
11.	Filip Stanković	23. 1. 2025.
12.	Olja Marinković	23. 1. 2025.
13.	Anđela Aleksić	23. 1. 2025.
14.	Bojan Kitanovski	24. 1. 2025.
15.	Aleksandar Arsić	10. 2. 2025.
16.	Nemanja Ivanić	12. 2. 2025.
17.	Una Grzunov	13. 3. 2025.
18.	Teodora Mitrović	14. 3. 2025.

Redni broj	Ime i prezime	Datum diplomiranja
19.	Nikola Đorđević	10. 4. 2025.
20.	Maša Pejaković	14. 4. 2025.
21.	Andrea Subotić	14. 4. 2025.
22.	Predrag Drulović	15. 4. 2025.
23.	Maša Bulajić	15. 4. 2025.
24.	Nikola Nastasijević	15. 4. 2025.
25.	Dunja Ilić	16. 4. 2025.
26.	Zdravko Erić	16. 4. 2025.
27.	Nikola Matković	12. 5. 2025.
28.	Đorđe Marinković	13. 5. 2025.
29.	Dajana Bogavac	14. 5. 2025.
30.	Milica Joković	14. 5. 2025.
31.	Ivona Lučić	14. 5. 2025.
32.	Igor Radlović	13. 6. 2025.
33.	Nevena Panić	20. 6. 2025.
34.	Katarina Slavković	3. 7. 2025.
35.	Anastasija Nikolić	7. 7. 2025.
36.	Uroš Bogdanović	8. 7. 2025.
37.	Teodora Ilić	11. 7. 2025.
38.	Leonardo Živković	26. 8. 2025.
39.	Ivan Dimitrijević	28. 8. 2025.
40.	Mihailo Popović	28. 8. 2025.
41.	Olga Stefanović	29. 8. 2025.
42.	Filip Ilić	3. 9. 2025.
43.	Luka Trojančević	8. 9. 2025.
44.	Jelena Subić	9. 9. 2025.
45.	Nina Zlatić	9. 9. 2025.
46.	Vuk Petković	9. 9. 2025.

Redni broj	Ime i prezime	Datum diplomiranja
47.	Andrija Glišić	17. 9. 2025.
48.	Nada Širko	18. 9. 2025.
49.	Marko Cvijanović	25. 9. 2025.
50.	Suzana Skakavac	25. 9. 2025.
51.	Svetlana Matović	30. 9. 2025.
52.	Katarina Vučetić	30. 9. 2025.
53.	Aleksandra Bućković	30. 9. 2025.
54.	Bojana Andrić	30. 9. 2025.
55.	Marina Savić	30. 9. 2025.
56.	Jovana Despotović	30. 9. 2025.
57.	Milica Kostić	30. 9. 2025.

STUDENTSKI PROTESTI

- Na dan 1. novembra 2024. godine u Novom Sadu pala je betonska nadstrešnica renovirane zgrade železničke stanice. Kao posledica događaja u Novom Sadu šesnaestoro lica je izgubilo živote, a sam događaj je pokrenuo građanske, a potom i studentske proteste. Krajem novembra školske 2024/25. godine na univerzitetima u Srbiji započele su studentske blokade praćene zahtevima za odgovornost za tragični događaj. Studenti i nastavnici PFUUB koji su podržali proteste odmah su se pridružili protestnim aktivnostima. Prva komemorativna ćutnja, kao centralni događaj svakog protesta, organizovana je na našem Fakultetu 22. novembra, prilikom održavanja jedne naučne konferencije. Tokom decembra samoorganizovana grupa studenata PFUUB organizovala je studentski plenum sa ciljem organizovanog učešća u studentskom pokretu. Studenti PFUUB su zatim u više navrata organizovali blokadu raskrsnice ispred Fakulteta, uz učešće nastavnika. Plenum studenata PFUUB je stao uz zahteve koje su objavili studenti u blokadi državnih univerziteta, posle čega je usledila i podrška Nastavno-naučnog veća PFUUB 26. decembra. Samoorganizovana grupa studenata PFUUB je u okviru svoje plenumske organizacije započela aktivnosti u studentskom pokretu, koje isprva nisu podrazumevale blokadu Fakulteta, ali je na vrhuncu protesta, tokom marta 2025. godine, organizovana i blokada rada PFUUB. Iako je kod velikog dela Nastavno-naučnog veća Fakulteta postojao blagonaklon odnos prema blokadi rada, preovladavalo je stanovište da specifičnost privatne obrazovne ustanove ne ostavlja prostor za dugotrajnu blokadu, što je u komunikaciji sa studentima obrazloženo: prihvaćeno je stanovište da su studenti i nastavnici PFUUB u tekućoj borbi na istoj strani, ali da Fakultet treba da nastavi s radom. Studenti PFUUB istovremeno su aktivnije angažovani u studentskom pokretu, učestvuju u značajnom broju na protestima i drugim dešavanjima kao redari, članovi radnih

grupa, a s radom je nastavio i Plenum studenata PFUUB. Studenti PFUUB učestvovali su u protestnim pešačenjima širom Srbije, pojedini čak i u takvim okolnostima izvršavajući studentske obaveze: snimak našeg studenta koji s čeonom lampom priprema ispit hodajući s kolegama ka Novom Sadu izazvao je široke simpatije u javnosti i među kolegama. Osim ovih simpatičnih epizoda, bilo je i nasilja nad našim studentima, uključujući i hapšenja i saslušanja. Pored većinske podrške studentskom pokretu, deo nastavnika PFUUB učestvovao je na svim većim protestima, zatim u okviru Pobunjenog univerziteta, nastupao u medijima i javnosti, uvek s jasnom porukom odlučne podrške studentskim zahtevima. Fakultet je, prema potrebama, stavljao na raspolaganje svoje prostorije za rad samoorganizovane grupe studenata. Na sve navedene načine angažovani studenti i nastavnici PFUUB protekle školske godine sa entuzijazmom su pružali podršku i aktivno učestvovali u borbi za demokratiju, vladavinu prava i ljudsko dostojanstvo u Srbiji.

IZDAVAČKA DELATNOST

Udžbenici

- Milan Počuča, Nebojša Šarkić, *Porodično pravo i porodičnopravna zaštita*, 11. izdanje, 2024.
- Srđan Šarkić, Srđan Milošević, *Osnovi istorije države i prava*, 2025.
- Nebojša Šarkić, Milan Počuča, Vladimir Crnjanski, *Posebni građanski postupci: izvršni postupak, javnobeležnički postupak, vanparnični postupak i stečajni postupak*, 1. izdanje, 2025.
- Marko Božić, *Uvod u pravo*, 2. izdanje, 2025.

Monografije

- Dijana Marković Bajalović, *Koncentracije privrednih subjekata: kompanijsko-pravni aspekti*, 2025.
- Ljeposava Ilijić, Olivera Pavićević, Nikola Vujičić, *Socijalni i porodični kontakti osuđenika i kvalitet zatvorskog života*, 2025.
- Ivana Stevanović, Sanja Ćopić, Nikola Vujičić, *Žene u zatvoru u Srbiji: međunarodni standardi, nacionalno zakonodavstvo i kvalitet života*, 2025.

Praktikumi, skripta i drugi nastavni materijali

- Jelena Simić, Aleksa Radonjić, *Svojinsko pravo: praktikum za vežbe*, 2024.
- Jelena Simić, *Klinika za medicinsko pravo: praktikum*, 2024.
- Violeta Beširević, Iva Ivanov, Ana Vladisavljević, *Praktikum za vežbe iz Uvoda u pravo Evropske unije*, 2025.
- Slađana Jovanović, *Kriminologija sa penologijom*, 2025.
- Slobodan Vukadinović, *Praktikum za osnove građanskog i privrednog prava*, 2025.
- Jelena Jerinić, Ana Vladisavljević, Bojan Savković, *Praktikum za vežbe iz Ustavnog prava*, 2025.

PROMOCIJE KNJIGA

- Na Pravnom fakultetu Univerziteta Union u Beogradu održana je 14. maja 2025. godine promocija knjige *Izvršnost javnobeležničkog zapisa* autora prof. dr Vladimira Crnjanskog.

PROJEKTNA DELATNOST

Projekti koje finansira Fond za nauku Republike Srbije

- **MIND – Monitoring i indeksiranje mira i bezbednosti na Zapadnom Balkanu** (2022–2025): Projekat je u završnoj godini, sprovodi se u saradnji s Fakultetom organizacionih nauka Univerziteta u Beogradu i Fakultetom političkih nauka Univerziteta u Beogradu, koji je i nosilac projekta. Opšti cilj projekta MIND je da pruži doprinos konsolidaciji mira i bezbednosti na Zapadnom Balkanu kroz inovativna, kontekstualno osetljiva i metodološki mešovita istraživanja. Članovi projektnog tima s PFUUB su prof. dr Violeta Beširević i prof. dr Tatjana Papić.
- **Zamišljanje nacije: Suprotstavljeni narativi o srpskom nacionalnom identitetu u XX–XXI veku** (*Imagining a Nation: The Contesting Serbian National Narratives (XX–XXI centuries*): Fakultet je od 2024. godine uključen u realizaciju navedenog projekta, koji finansira Fond za nauku Republike Srbije iz sredstava Svetske banke u okviru programa Prizma. Projekat se izvodi u saradnji PFUUB s tri druge partnerske institucije, odnosno Etnografskim institutom SANU, Fakultetom političkih nauka Univerziteta u Beogradu i Institutom za filozofiju i društvenu teoriju, koji je i nosilac projekta. Članovi projektnog tima s Fakulteta su prof. dr Marko Božić i prof. dr Srđan Milošević, obojica u svojstvu rukovodilaca radnih paketa. Projekat se bavi istraživanjem različitih, međusobno konkurentnih narativa o srpskom nacionalnom identitetu u drugoj polovini XX veka, odnosno tokom socijalističkog i postsocijalističkog perioda.

Međunarodni projekti

- **COST Action 23103: Life, liberty and health: ensuring universal protection of human rights at sea (BlueRights) (2024–2028).** Projekat uspostavlja međunarodnu, multidisciplinarnu, međusektorsku i međuinstitucionalnu mrežu, koja će se detaljno baviti konceptualnim i praktičnim pitanjima koja proizilaze iz potrebe da se zaštite ljudska prava na moru, i to posebno pravo na život, pravo na slobodu i pravo na zdravlje. Projekat okuplja naučnike i zainteresovane strane koji rade u ovoj oblasti podižući svest o ljudima na moru i njihovim osnovnim pravima i razrađujući teorijski okvir unutar kojeg će se uobličiti potrebni normativni napori, usmereni ka univerzalnoj zaštiti prava na moru. Pored toga, projekat će ponuditi praktične alate za zaštitu prava na moru namenjene državama, različitim sektorima privrede i civilnom društvu.
- **International Mobility Programme – Assessing Constitutional Crisis: Impact and Security (IMP-ACCTS):** Projekat mobilnosti studenata i nastavnog i drugog osoblja u saradnji s konzorcijumom univerziteta u Italiji i jugoistočnoj Evropi. Projekat ima za cilj unapređenje studentske i nastavničke mobil-

nosti i saradnje s obrazovnim ustanovama u inostranstvu. Projekat je osmišljen tako da poveže institucije s različitih kontinenata, oslanjajući se na već postojeće akademske veze i saradnje, kao i na zajedničko članstvo u međunarodnim mrežama. Tematski okvir projekta – „Ustavna kriza i bezbednost" – postavljen je interdisciplinarno, što omogućava razmenu iskustava i uvida iz različitih oblasti, dok učešće partnera različitih političkih sredina i ustavnih tradicija doprinosi intenzivnoj interkulturnoj razmeni. Glavni ciljevi projekta uključuju povećanje studentske i nastavničke mobilnosti, uspostavljanje stabilne mreže naučne i akademske saradnje, stvaranje osnove za zajedničke studijske programe na svim ciklusima studija, kao i razvijanje inovativnih metoda nastave. Poseban značaj ima i treći stub projekta – organizacija intenzivnih kurseva i radionica – koji predstavlja forum za ispitivanje novih modela saradnje i pripremu budućih zajedničkih studijskih programa. Projektni tim u okviru PFUUB čine: prof. dr Violeta Beširević, prof. dr Tatjana Papić, prof. dr Marko Božić, prof. dr Srđan Milošević, prof. dr Jelena Jerinić, asistentkinja Ana Vladisavljević i saradnik u nastavi Petar Mitrović.

- **COST Action 22150:** *Comparative Research on the Executive Triangle in Europe* (CoREx) (2023–2027). Projekat uspostavlja mrežu istraživača iz cele Evrope koji proučavaju odnose između političara, najviših državnih službenika i ministarskih savetnika u izvršnoj vlasti („trougao izvršne vlasti") iz uporedne perspektive. Projekat razvija zajednički okvir za prikupljanje uporednih podataka o njihovim ulogama, razvoju karijere, interakcijama, odgovornosti i transparentnosti širom Evrope. U fokusu istraživanja su odabrane službe vlade i sva ministarstva u zemljama koje sprovode istraživanje. U okviru projektnog tima sa PFUUB je prof. dr Iva Tošić.
- **COST Action 22139:** *Justice to youth language needs: human rights undermined by an invisible disadvantage: Y-JustLang* (2023–2027). Cilj ove akcije je kreiranje transnacionalne platforme za podizanje svesti o potrebi ocenjivanja i utvrđivanja jezičkih sposobnosti mladih osoba pre uključivanja u pravosudne postupke kako bi se razvio nacrt ciljanih alata za procenu fenomena koji se tipično pojavljuju u policijskim i sudskim procesima. Akcija se sastoji od nekoliko radnih grupa, doc. dr Nikola Vujičić je član dve radne grupe WG-4 – Epidemiološke karakteristike mladih prestupnika i WG-5 – Pravni okvir za sistem pravosuđa za mlade.
- **COST Innovators Grant 18123:** *A quality assurance implementation protocol for family support services in Europe: An evidence-based and culturally informed model for professional practice* (2023–2024) – dodeljen u okviru Horizon Europe našem COST Action projektu pod nazivom *The Pan-European Family Support Research Network: A bottom-up, evidence-based and multidisciplinary approach*. Rezultati ovog naučnog projekta će kroz niz dodatnih aktivnosti, u periodu od jedne godine, biti korišćeni u svrhu jačanja evropskih nacionalnih sistema podrške porodici. Prof. dr Jelena Arsić je rukovodilac za Srbiju, a na projektu učestvuje i prof. dr Jelena Jerinić.
- **COST Action CA21120:** *The History of Identity Documentation in European Nations* (HIDDEN) (2022–2026). COST mreža „Istorija dokumentacije o identitetu u evropskim nacijama" okuplja naučnike iz istorije, studija migracija, geografije, sociologije, prava, lingvistike, postkolonijalnih studija, ljudskih prava i drugih srodnih oblasti u cilju analize istorije režima ID u Evropi i šire, povezujući prošlost i sadašnjost. U kontekstu plana održivog razvoja UN u kome se navodi da bi svako trebalo da ima pravni identitet do 2030.

godine i razvoja novih oblika biometrijskih indentifikacionih dokumenata, kao što su sertifikati o vakcinaciji protiv virusa Covid-19, pravo je vreme da interdisciplinarna i multidisciplinarna grupa naučnika kritički ispita istorijske i savremene prakse koje su uticale ili mogu uticati na povećanje društvene nejednakosti. Rukovodilac projekta za Srbiju je prof. dr Violeta Beširević, a u projektu učestvuju i prof. dr Marko Božić i prof. dr Srđan Milošević.

- **COST Action CA19143:** *Global Digital Human Rights Network* (2020–2024). Projekat se završio na jesen 2024. Prof. dr Violeta Beširević bila je rukovodilac za Srbiju i član Upravnog odbora koji je upravljao projektom, a prof. dr Jelena Simić je bila njen zamenik. Globalna mreža za digitalna ljudska prava imala je za cilj da na sistematski način istraži teorijske i praktične probleme u vezi sa zaštitom ljudskih prava u onlajn kontekstu.

STUDIJSKI BORAVCI, GOSTUJUĆA PREDAVANJA I STRUČNA USAVRŠAVANJA NASTAVNIKA I SARADNIKA PFUUB

- **Prof. dr Violeta Beširević** boravila je na Pravnom fakultetu Univerzitetu u Kaljariju (Sardinija) od 27. 5. do 11. 6. 2025. godine kao gostujući profesor u okviru projekta Assessing Constitutional Crisis and Security, koji finansira Vlada Republike Italije i Evropska komisija. Profesorka Beširević održala je gostujuće predavanje na doktorskim studijama na temu „Militant Democracy and Human Rights in Digital Society" i obavila naučnoistraživački rad.
- **Prof. dr Violeta Beširević** bila je članica komisije za odbranu doktorske disertacije „Pravno rasuđivanje i sudski aktivizam – slučaj Ustavnog suda Bosne i Hercegovine", odbranjene na Pravnom fakultetu Univerziteta u Beogradu 13. 12. 2024.
- **Prof. dr Violeta Beširević** bila je predsednica komisije za odbranu projekta doktorske disertacije „Diplomacy and Leadership: Ambassador as Leader and Manager", održanoj 25. 2. 2025. na New University, Faculty of Government and European Studies, Ljubljana (Slovenija).
- **Prof. dr Slobodan Vukadinović** je primljen na naučnoistraživački boravak na Međunarodnom institutu za unifikaciju privatnog prava UNIDROIT u Rimu (Italija) u periodu septembar–oktobar 2024. godine, gde je sprovodio istraživanje iz oblasti međunarodnog ugovornog prava.
- **Prof. dr Slobodan Vukadinović** bio je na naučnoistraživačkom boravku u Evropskom univerzitetskom Institutu u Firenci (Italija) u novembru i decembru 2024. godine. Profesor Vukadinović je sprovodio naučnoistraživački projekat o jedinstvenom tržištu i zaštiti potrošača u Evropskoj uniji, u saradnji sa Istorijskim arhivama Evropske unije, uz podršku Međunarodnog Višegrad fonda.
- **Prof. dr Srđan Milošević** boravio je tokom jula i avgusta 2025. godine na studijskom usavršavanju na Pravnom fakultetu Univerziteta u Sijeni u okviru međunarodnog projekta *International Mobility Programme – Assessing Constitutional Crisis: Impact and Security* (IMP-ACCTS). Ovaj studijski boravak bio je posvećen i istraživačkom radu, što je omogućilo nastavak istraživanja na temama koje su u istraživačkom fokusu doc. dr Miloševića. Osim toga,

ostvareni kontakti i stečena iskustva otvaraju prostor za buduću međunarodnu saradnju i zajedničke naučne projekte. Poseban značaj imalo je učešće na letnjoj školi posvećenoj temi ustavne krize i bezbednosti, u okviru koje je održao izlaganje.

- **Asistentkinja Jovana Popović** boravila je na Pravnom fakultetu Univerziteta u Minsteru, u okviru mobilnosti Erasmus+ programa za kratkoročne doktorske studije, u periodu od 16. januara do 5. februara 2025. godine za potrebe istraživanja doktorske disertacije.

USPESI NAŠIH NASTAVNIKA

- **Prof. dr Violeta Beširević** izabrana je početkom 2025. godine za urednicu u okviru serije publikacija *Biopolitics, Law and Ethics*, koje izdaju CEU Press i Amsterdam University Press.
- **Prof. dr Slobodan Vukadinović** je 26. juna 2025. godine primljen u članstvo Međunarodne akademske asocijacije za planiranje, pravo i svojinska prava (International Academic Association on Planning, Law, and Property Rights – PLPR), međunarodne akademske zajednice koja istražuje odnos javnog i privatnog interesa u korišćenju zemljišta kroz prizmu prava, planiranja i svojine.
- Upravni odbor Vanjskotrgovinske/Spoljnotrgovinske komore BiH na sednici održanoj 9. septembra 2025. godine uvrstio je **prof. dr Dijanu Marković Bajalović** i **prof. dr Slobodana Vukadinovića** na Listu arbitara Arbitražnog suda pri Vanjskotrgovinskoj/Spoljnotrgovinskoj komori Bosne i Hercegovine.
- Tokom sastanka volontera u okviru ekspertske grupe iskusnih mirovnih aktivistkinja i aktivista projekta YMCA Europe „Koreni mira" 13. septembra 2025. godine u Kapeli mira u Sremskim Karlovcima našoj profesorki engleskog jezika **Ankici Dragin** uručena je Medalja mira, priznanje koje se dodeljuje onima koji su, kako navode, svojim znanjem i zalaganjem značajno doprineli sprovođenju projekta „Koreni mira", koji ova organizacija realizuje još od 2007. godine i u čijem je metodološkom osmišljavanju i edukaciji volonterki i volontera profesorka Dragin i sama povremeno, značajnim delom i volonterski učestvovala od samog njegovog početka.

GOSTUJUĆA PREDAVANJA

- **Prof. dr Marko Milanović** održao je gostujuće predavanje na temu „Rat u Gazi: Genocid ili samoodbrana?" 23. oktobra 2024. godine na našem fakultetu. Marko Milanović je redovni profesor međunarodnog javnog prava na Pravnom fakultetu Univerziteta u Redingu (UK). Prethodno je bio redovni profesor međunarodnog javnog prava na Univerzitetu u Notingemu, na kome je bio kodirektor Centra za ljudska prava. Profesor Milanović je diplomirao na Pravnom fakultetu Univerziteta u Beogradu, magistrirao na Pravnom fakultetu Univerziteta u Mičigenu, a doktorirao na Pravnom fakultetu Univerziteta Kembridž. Član je uređivačkog odbora *European Journal of International Law* i kourednik njegovog bloga, *EJIL: Talk*. Kourednik je i projekta „Tallinn Manual 3.0" o primeni međunarodnog prava u kibernetskom (cyber) prostoru. Profesor Milanović je bio potpredsednik Evropskog udruženja za međunarodno pravo i gostujući profesor na univerzitetima Mičigen, Kolumbija, Filipini, Dikin, Australijskom nacionalnom univerzitetu i

na Ženevskoj akademiji za međunarodno humanitarno pravo i ljudska prava. Radio je kao stručni saradnik sudije Tomasa Burgentala u Međunarodnom sudu pravde 2006/2007. godine. Profesor Milanović je autor više od 50 naučnih članaka objavljenih u međunarodnim časopisima najviših kategorija, kao i monografije *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press, 2011), koja se zasniva na njegovoj doktorskoj disertaciji za koju je dobio nagradu Yorke.

KONFERENCIJE, OKRUGLI STOLOVI I SAVETOVANJA KOJE JE ORGANIZOVAO FAKULTET

- Na Pravnom fakultetu Univerziteta Union u Beogradu 22. novembra 2024. godine organizovana je međunarodna radionica pod nazivom **„Šta predstavlja menstrualna (ne)pravda“**. Beogradska radionica ima za cilj da ponovo razmotri teme ljudskih prava, socijalne pravde, prava i menstruacije u kontekstu ženskog zdravlja, javnog zdravlja, poreskog prava i politike, radnih prava, prava LGBTQI zajednice, psihologije, sociologije, zdravstva i feminizma. Uvodna obraćanja održali su: Brankica Janković, poverenica za zaštitu ravnopravnosti; Milena Jenovai, Project Manager Specialist, USAID/Srbija; Ljiljana Lončar, Project Manager, UN Women Srbija; i Violeta Beširević, dekan Pravnog fakulteta Univerziteta Union u Beogradu. Govornici na radionici su bili: Inga Winkler (Univerzitet u Vageningenu), Judit Sándor (Srednjoevropski univerzitet), Aleksandra Čavoški (Univerzitet u Birmingemu), Sanja Barić (Univerzitet u Rijeci), Antonija Petričušić (Univerzitet u Zagrebu), Marinella Matejčić (SOLIDARNA – Fondacija za ljudska prava i solidarnost, Zagreb), Marina Sakač Hadžić (Evropsko udruženje za obrazovanje odraslih, Brisel), Adriana Zaharijević (Univerzitet u Beogradu), Dragica Vujadinović (Univerzitet u Beogradu), Svetislav Kostić (Univerzitet u Beogradu), Mario Reljanović (Institut za uporedno pravo, Beograd), Tatjana Papić (Pravni fakultet Univerziteta Union), Jelena Simić (Pravni fakultet Univerziteta Union), Mila Petrović (Pravni fakultet Univerziteta Union), Iva Ivanov (Pravni fakultet Univerziteta Union), Ankica Dragin (Pravni fakultet Univerziteta Union), Agata M. Đurić (GETEN) i Sanja Radivojević (Beogradski centar za ljudska prava). Moderatori radionice su bili: Zoran Oklopčić (Karleton univerzitet, Otava; Pravni fakultet Univerziteta Union), Marko Božić (Pravni fakultet Univerziteta Union), Aleksa Radonjić (Pravni fakultet Univerziteta Union) i Srđan Milošević (Pravni fakultet Univerziteta Union). Radionicu finansijski podržavaju USAID/Srbija i INL, Ministarstvo spoljnih poslova Sjedinjenih Američkih Država, Srbija.

OSTALE VANNASTAVNE AKTIVNOSTI U ORGANIZACIJI FAKULTETA

- **Kurs: „Priprema za polaganje pravosudnog ispita“** – Fakultet već dugi niz godina organizuje pripremnu nastavu za polaganje pravosudnog ispita. Kurs traje tri meseca s ukupnim fondom od 180 časova. Predavači na kursu su: prof. dr Nebojša Šarkić, prof. dr Bogoljub Milosavljević, prof. dr Slađana Jovanović, prof. dr Jelena Simić, Ljubica Milutinović, sudija, Vida Petrović

Škero, sudija, Maja Panić, sudija, dr Miodrag Majić, sudija, Aleksandar Ivanović, sudija, Predrag Vasić, sudija, Aleksandar Trešnjev, sudija, Mladen Nikolić, sudija, Tatjana Đurica, doc. dr Vladimir Crnjanski, prof. dr Vladimir Čolović, Tatjana Vlaisavljević, sudija, i drugi istaknuti stručnjaci iz oblasti prava. Nastava je u oktobru, novembru i decembru 2024. godine realizovana regularno (klasično) u prostorijama fakulteta, dok je u martu, aprilu i maju 2025. godine nastava održana onlajn putem Zoom platforme. Sva predavanja se snimaju i polaznicima se omogućava pristup bazi audio-video zapisa (dodatno i godinu dana nakon završetka kursa).

- **Pravna klinika za Porodično pravo** – U školskoj 2024/25. godini sprovedena je obuka nove generacije studenata u okviru programa Klinike za porodično pravo. Klinika za porodično pravo PFUUB upisana je u registar pružalaca besplatne pravne podrške koji vodi Ministarstvo pravde Republike Srbije, pa su usluge besplatne pravne podrške na našem fakultetu ponovo bile dostupne našim građanima i građankama. Počevši od 2024. godine, program naše Pravne klinike u oblasti porodičnog prava deo je projekta „Pravda za sve", koji podržava Američka agencija za međunarodni razvoj (USAID).
- **Pravna klinika za medicinsko pravo** – U školskoj 2024/25. godini sprovedena je obuka nove generacije studenata u okviru programa Klinike za medicinsko pravo. Klinika za medicinsko pravo PFUUB upisana je u registar pružalaca besplatne pravne podrške koji vodi Ministarstvo pravde Republike Srbije pa su usluge besplatne pravne podrške na našem fakultetu ponovo bile dostupne našim građanima i građankama. Počevši od 2024. godine, program naše Pravne klinike u oblasti medicinskog prava deo je projekta „Pravda za sve", koji podržava Američka agencija za međunarodni razvoj (USAID).
- **Ponedeljkom u pet** – Na tribini Ponedeljkom u pet, 21. oktobra 2024. godine na PFUUB, državni službenik, aktivista za prava osoba s invaliditetom i komičar Nikola Radojlović izveo je svoj performans „Invaliditet – Brzo i lako! Ravnopravnost, jednake mogućnosti, inkluzija i druge priče uživo sa Nikolom Radojlovićem". Takođe, organizovano je 9. decembra 2024. godine decembarsko izdanje tribine Ponedeljkom u pet, na kojoj je prikazan dokumentarni film „Please Vote for Me", mini-eksperiment o demokratiji. Posle projekcije, razgovor o filmu vodili su: prof. dr Snježana Milivojević, prof. dr Filip Ejdus, politikolog, i prof. dr Violeta Beširević, profesorka Ustavnog prava i Prava EU na PFUUB.

UČEŠĆE NAŠIH NASTAVNIKA NA NAUČNIM KONFERENCIJAMA I TRIBINAMA I PRISUSTVO U MEDIJIMA

- **Prof. dr Violeta Beširević** učestvovala je na uvodnoj konferenciji međunarodnog projekta „Assessing Constitutional Crisis Impact and Security, IMPACCTS, KIc-Off Meeting", koja je održana 16. i 17. decembra 2024. godine na University of Salento, Leče (Italija).
- **Prof. dr Violeta Beširević** je u periodu od 11. do 13. septembra 2025. u svojstvu članice Upravnog odbora Evropske organizacije za javno pravo (EPLO) boravila na sastanku Upravnog odbora EPLO kao i na konferenciji te organizacije pod nazivom „International Law, EU Law and Constitutional Law", na kojoj su razmatrani najnoviji standardi odnosa između te tri pravne discipline. Imajući u vidu da je PFUUB član Evropske organizacije za javno pravo,

prof. Beširević je na sastanku upravnog odbora upoznala članove odbora s naučnim projektima i razvojem studijskih programa na PFUUB.

- **Prof. dr Tatjana Papić** učestvovala je na „OSCE Regional Conference, Human Rights Due Diligence: Building Ethical Supply Chains to Combat Human Trafficking for Labour Exploitation" sa izlaganjem na panelu „Monitoring and Enforcing Human Rights Due Diligence: Challenges in the Access to Remedy", koja je održana 16. i 17. septembra 2024. godine u Budvi.
- **Prof. dr Tatjana Papić** izlagala je na temu „Bleeding the Planet or Bleeding Rights? A Legal Framework for Menstrual Justice in the Sustainable Development" na međunarodnoj radionici „What Stands for Menstrual (In)justice International Workshop", koja je održana 22. novembra 2024. godine na Pravnom fakultetu Univerziteta Union.
- **Prof. dr Tatjana Papić** učestvovala je na međunarodnoj radionici „Assessing Constitutional Crisis Impact and Security, IMP-ACCTS, KIc-Off Meeting", koja je održana 16. i 17. decembra 2024. godine na University of Salento, Leče (Italija).
- **Prof. dr Tatjana Papić** izlagala je na temu „The EU Perspective of the Western Balkans: Past, Present and the Future na European Academic Forum of the Jean Monnet Chair". Izlaganje je održano 17. februara 2025. godine na Nova Univerza u Ljubljani.
- **Prof. dr Jelena Arsić** prezentovala je rad pod naslovom „Serbia: Rights of a Child in Private Law" na međunarodnoj naučnoj konferenciji „Children's Rights Days III", koja je održana 5. i 6. decembra 2024. godine u Budimpešti u organizaciji Central European Academy.
- **Prof. dr Jelena Arsić** izlagala je na temu „Legal Clinics: Legal Education Method Meeting Citizens' Needs" na međunarodnoj naučnoj konferenciji „Children's Rights and Sustainable Practices", koja je održana 10. decembra 2024. godine na Univerzitetu Södertörn u Stokholmu.
- **Prof. dr Jelena Jerinić** je učestvovala na međunarodnoj naučnoj konferenciji „Naučno delo akademika Miodraga Jovičića", koja je održana 3. i 4. juna 2025. godine u Srpskoj akademiji nauka i umetnosti, i tom prilikom je govorila o reformi lokalne samouprave iz perspektive dela Miodraga Jovičića.
- **Prof. dr Jelena Jerinić** učestvovala je na godišnjem sastanku Grupe eksperata za Evropsku povelju o lokalnoj samoupravi, održanom 18. i 19. septembra 2025. godine u Strazburu. Grupa, koja je savetodavno telo Kongresa lokalnih i regionalnih vlasti Saveta Evrope, istražuje ključne izazove i trendove u vezi s implementacijom Evropske povelje širom Evrope. Grupi predsedava prof. Angel M. Moreno, profesor Univerziteta „Carlos III" u Madridu, i čini je 46 eksperata i ekspertkinja – po jedan/jedna iz svake države članice Saveta Evrope. U okviru ovogodišnjeg sastanka, Grupa je održala i posebnu sesiju kojom je obeležena 40-godišnjica Evropske povelje o lokalnoj samoupravi, u okviru koje je održana panel-diskusija o uticaju Povelje na osnaživanje lokalnih vlasti u toku protekle četiri decenije i njenim budućim izazovima. Tom prilikom dodeljene su medalje Kongresa lokalnih i regionalnih vlasti trima dosadašnjim predsednicima Grupe za njihov doprinos.
- **Prof. dr Slađana Jovanović** izlagala je na temu „Značaj psihološkog veštačenja u novom konceptu krivičnog dela silovanja" na nacionalnom naučnom skupu „Veštačenje u kaznenim postupcima", koji je održan 11. i 12. juna 2025. godine na Paliću u organizaciji Instituta za kriminološka i sociološka istraživanja.

- **Prof. dr Slađana Jovanović** izlagala je na temu „Sexual Offences in Serbia: Non-complience with the European Legal Framework" na međunarodnoj konferenciji „Towards the Directive on Combating Violence Against Women and Domestic Violence", koja je održana 9. i 10. oktobra 2024. godine u organizaciji Pravnog fakulteta u Rijeci.
- **Prof. dr Slađana Jovanović** izlagala je na temu „Femicide/Feminicide in Criminal Law: Do we need a new criminal offence?" na međunarodnom naučnom tematskom skupu „The Right to Life and Body Integrity", koji je održan u oktobru 2024. godine u Novom Sadu u organizaciji Instituta za kriminološka i sociološka istraživanja i Advokatske komore Vojvodine.
- **Prof. dr Slađana Jovanović** učestvovala je kao moderatorka panela „Victimization of Women", a izlagala je i svoj rad pod naslovom „Stalking as a Form of Gender-Based Violence in the Judicial Practice in Serbia" na međunarodnom naučnom tematskom skupu „The Position of Victims in the Republic of Serbia", koji je održan 12. i 13. juna 2024. godine na Paliću u organizaciji Instituta za kriminološka i sociološka istraživanja.
- **Prof. dr Slađana Jovanović** je u okviru projekta UNDP i Pravosudne akademije „Seksualno nasilje – izazovi u dokazivanju i razumevanju položaja žrtve" održala četiri predavanja na temu „Evropski standardi u definisanju i dokazivanju seksualnog nasilja" za sudije i javne tužioce s područja apelacionih sudova / javnih tužilaštava u Beogradu, Nišu, Novom Sadu i Kragujevcu, kao i za polaznike Pravosudne akademije u periodu od marta do septembra 2024. godine.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Primena digitalnih tehnologija u distribuciji proizvoda osiguranja" na XXI međunarodnom naučnom skupu „Pravnički dani – Prof. dr Slavko Carić" – „Odgovori pravne nauke na izazove savremenog društva", koji je održan 4. i 5. oktobra 2024. godine u organizaciji Pravnog fakulteta za privredu i pravosuđe Univerziteta Privredna akademija u Novom Sadu.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Pojedini aspekti stečaja fizičkih lica" na naučnoj konferenciji „Izvršno i stečajno pravo", koja je održana 18. i 19. oktobra 2024. godine u organizaciji Pravnog fakulteta Univerziteta Union i Udruženja pravnika Srbije.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Gubitak prava iz obaveznog osiguranja u saobraćaju" na XIII međunarodnom naučnom skupu povodom Dana Pravnog fakulteta Univerziteta u Istočnom Sarajevu, koji je održan 26. oktobra 2024. godine u organizaciji Pravnog fakulteta Univerziteta u Istočnom Sarajevu.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Stečaj povezanih privrednih društava" na Drugoj nacionalnoj školi pozitivnog prava, koja je održana na Zlatiboru od 1. do 3. novembra 2024. godine u organizaciji Udruženja pravnika Srbije.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Digitalizacija sudske saradnje u prekograničnim građanskim i trgovačkim stvarima u pravu EU" na IX međunarodnom naučnom skupu „Usaglašavanje domaćih pravnih standarda sa pravom Evropske unije", koji je održan 26. aprila 2025. godine u Banjaluci u organizaciji Friedrich Ebert Stiftung i Istraživačkog centra Banjaluka.

- **Prof. dr Vladimir Čolović** izlagao je na temu „Kolektivno osiguranje profesionalne odgovornosti (sa osvrtom na kolektivno osiguranje javnih beležnika i advokata)“ s koautorom prof. dr Vladimirom Crnjanskim na godišnjoj konferenciji Udruženja pravnika u privredi „Uticaj digitalnih tehnologija na poslovno pravo – od teorije do primene u praksi“, koja je održana na Zlatiboru od 25. do 28. maja 2025. godine.
- **Prof. dr Vladimir Čolović** izlagao je na temu „Privremeni raskid ugovora o osiguranju“ na naučnoj konferenciji „Aktuelna pitanja savremenog zakonodavstva i pravosuđa“, koja je održana u Budvi od 6. do 10. juna 2025. godine u organizaciji Saveza udruženja pravnika Republike Srbije i Republike Srpske.
- **Prof. dr Vladimir Crnjanski** učestvovao je na naučnom skupu „Zaštita prava zaposlenih“ kao učesnik-izlagač na temu „Specifičnost postupka u parnicama iz radnih odnosa i moguće izmene Zakona o parničnom postupku“, koja je održana 29. i 30. marta 2024. godine u organizaciji Pravnog fakulteta Univerziteta Union u Beogradu, Instituta za uporedno pravo i Udruženja pravnika Srbije.
- **Prof. dr Vladimir Crnjanski** učestvovao je u okviru Druge nacionalne škole pozitivnog prava kao učesnik-izlagač na temu „Javnobeležnički zapis o zasnivanju hipoteke“, koja je održana od 1. do 3. novembra 2024. godine na Zlatiboru u organizaciji Udruženja pravnika Srbije.
- **Prof. dr Slobodan Vukadinović** je 15. oktobra 2024. godine održao gostujuće predavanje po pozivu na engleskom jeziku na „Niccolo Cusano“ University in Rome (Italija), Department of Politics, Law and Social Sciences na temu „Consumer Protection in European Union Law“ studentima osnovnih i master studija.
- **Prof. dr Slobodan Vukadinović** je učestvovao na Međunarodnoj naučnoj konferenciji „Naučno delo akademika Miodraga Jovičića“, koja je održana 3. i 4. juna 2025. godine u Srpskoj akademiji nauka i umetnosti, i tom prilikom je izložio rad na temu „Konstitucionalizacija i ombudsman u funkciji zaštite potrošača“.
- **Prof. dr Slobodan Vukadinović** je učestvovao na XXVIII Budvanskim pravničkim danima u periodu od 7. do 9. juna 2025. godine o aktuelnim i spornim pitanjima savremenog prava, izloživši referat na temu „Arhivski uvidi u nastajanje i razvoj sistema zaštite potrošača u Evropskoj uniji“.
- **Prof. dr Slobodan Vukadinović** je učestvovao na VI godišnjoj konferenciji o istoriji evropskih integracija, održanoj 1. i 2. septembra 2025. godine na Evropskom univerzitetskom institutu u Firenci, gde je predstavio rezultate istraživanja o istorijskom razvoju sistema zaštite potrošača u Evropskoj ekonomskoj zajednici i Evropskoj uniji (od 1957. do danas), zasnovanog na istraživanju originalne arhivske građe, koje je sproveo u Istorijskim arhivama Evropske unije.
- **Prof. dr Slobodan Vukadinović** je završio Međunarodni program za pravo i razvoj 2025. (International Programme for Law and Development – IPLD), koji organizuje Međunarodni institut za unifikaciju privatnog prava UNIDROIT iz Rima. Ove godine je po prvi put u navedenom programu učestvovao predstavnik iz Republike Srbije, a program je obuhvatao onlajn sesije u periodu od 8. do 12. septembra i rezidentni modul programa koji je realizovan u sedištu UNIDROIT u Rimu od 15. do 26. septembra 2025. godine.

- **Doc. dr Vladimir Tiutiuriukov** učestvovao je na konferenciji „Tax Inspectors Without Borders Stakeholders Workshop and Experts Roundtable" kao ekspert TIWB, koja je održana 29. i 30. aprila 2024. godine u Parizu u organizaciji OECD Centre for Tax Policy and Administration.
- **Doc. dr Vladimir Tiutiuriukov** učestvovao je kao nacionalni izvestilac za Srbiju na konferenciji „The Impact of Artificial Intelligence on Tax Law", koja je održana od 3. do 5. jula 2025. godine u Austriji, Rust, u organizaciji Institute for Austrian and International Tax Law of the WU Wien.
- **Doc. dr Vladimir Tiutiuriukov** učestvovao je na konferenciji „The Implementation of the Global Minimum Corporate Tax", koja je održana od 4. do 6. jula 2024. godine u Austriji, Rust, u organizaciji Institute for Austrian and International Tax Law of the WU Wien. Nakon konferencije napisao je nacionalni izveštaj za Srbiju, koji će biti objavljen u istoimenoj monografiji.
- **Doc. dr Nikola Vujičić** izlagao je na temu „Work Engagement, Education, and Vocational Training of Inmates in the Sremska Mitrovica Penitentiary Facility" na međunarodnoj konferenciji „Life in Prison: Criminological, Penological, Psychological, Sociological, Legal, Security and Medical Issues", koja je održana 2. i 3. decembra 2024. godine u Beogradu u organizaciji Instituta za kriminološka i sociološka istraživanja.
- **Doc. dr Nikola Vujičić** učestvovao je na okruglom stolu „Kvalitet zatvorskog života u Republici Srbiji", koji je održan 23. decembra 2024. godine u organizaciji Medija centra.
- **Doc. dr Nikola Vujičić** izlagao je na temu „The Strengthening of Penal Populism in Serbia's Public and Political Discourse" na međunarodnoj konferenciji „ASN World Convention, Panel BK15 – Hate Speech in Multiethnic Societies: Political, Legal, and Social Dimensions in the Balkans", koja je organizovana od 22. do 24. maja 2025. godine na Univerzitetu Kolumbija i Hariman institutu, Njujork (SAD).
- **Doc. dr Nikola Vujičić** prisustvovao je Jutarnjem programu RTS-a, gde je govorio na temu „Kakav je život u zatvorima u Srbiji?", 27. oktobra 2024. godine.
- **Doc. dr Nikola Vujičić** prisustvovao je emisiji „150 minuta" na Prvoj televiziji na temu „Gde su bolji uslovi – u pritvorskim ili zatvorskim jedinicama u Srbiji?", 31. oktobra 2024. godine.
- **Doc. dr Nikola Vujičić** prisustvovao je Insajder TV, „3D Nova dimenzija dana", na temu „Zatvori u Srbiji i poštovanje ljudskih prava", 5. decembra 2024. godine.
- **Doc. dr Nikola Vujičić** prisustvovao je Insajder TV, „Marker", na temu „Zašto policija ne reaguje kada maskirani pojedinci provociraju demonstrante?", 5. decembra 2024. godine.
- **Doc. dr Nikola Vujičić** prisustvovao je Dnevniku 2 na RTS-u na temu „Kvalitet života u zatvorima u Srbiji", 23. decembra 2024. godine.
- **Doc. dr Nikola Vujičić** je 23. oktobra 2024. godine učestvovao na 67. međunarodnom sajmu knjiga u Beogradu u predstavljanju publikacija – monografija proisteklih iz projekta „PrisonLIFE", na promociji monografije „Kvalitet života u zatvorima u Srbiji: norma, praksa i mere unapređenja" (koautori: Ćopić, S., Stevanović, I., Vujičić, N.).

- **Doc. dr Aleksa Radonjić** bio je član organizacionog odbora konferencije i predsedavajući panela „Contemporary Challenges – Heritage, Outer Space & AI na Young Property Lawyers Forum Annual Conference Property Law: Old and New", koja je održana 6. i 7. juna 2024. godine u Budimpešti.
- **Doc. dr Aleksa Radonjić** učestvovao je na konferenciji „Social Justice, Private Law and Europe (?) 2004–2024 – Keeping the Hope Alive", koja je održana 24. i 25. oktobra 2024. godine u Amsterdamu u organizaciji Amsterdamskog centra za transformativno privatno pravo.
- **Doc. dr Aleksa Radonjić** bio je član organizacionog odbora konferencije i predsedavajući panela „Digital Dimension of Property Rights na Young Property Lawyers Forum Annual Conference Dimensions of Property", koja je održana 5. i 6. juna 2025. godine u Antverpenu.
- **Doc. dr Aleksa Radonjić** imao je izlaganje na panelu „Green and Just Transition Pathways in the EU" na konferenciji „European Law Unbound: What Kind of Europe Can We Reach For?", koja je održana od 25. do 27. oktobra 2025. godine u Pragu u organizaciji European Law Unbound Society.
- **Doc. dr Mila Petrović** učestvovala je 17. i 18. septembra na dvodnevnom sastanku eksperata ETUI (*European Trade Union Institute*), koji je održan u Briselu. ETUI je nezavisni istraživački centar Evropske konfederacije sindikata (*European Trade Union Confederation – ETUC*). Sastanak je održan u okviru projekta „Right to Strike National Profiles (Pravo na štrajk – nacionalni profili)". Eksperti i ekspertkinje su razmenili iskustva svojih zemalja u pogledu regulisanja i ostvarivanja prava na štrajk kao prava koje trpi izrazite pritiske kako na nacionalnom tako i na međunarodnom nivou.
- **Doc. dr Iva Tošić** predavala je na Studijama za inovaciju znanja iz osiguranja u organizaciji Pravnog fakulteta Univerziteta u Beogradu i Udruženja osiguravača Srbije.
- **Doc. dr Iva Tošić** izlagala je na temu „Poslovanje u digitalnom okruženju – izazovi i regulatorni okvir sa posebnim fokusom na finansijski sektor" na međunarodnom naučnom skupu „Izazovi i perspektive razvoja pravnih sistema u XXI vijeku", koji je održan 11. aprila 2025. godine u Banjaluci.
- **Doc. dr Iva Tošić** izlagala je na temu „Pravo na odustanak kao vid zaštite potrošača usluga osiguranja kod ugovaranja na daljinu" na međunarodnom naučnom skupu „Savremeni izazovi u ostvarivanju i zaštiti ljudskih prava", održanom 23. i 24. maja 2025. godine u Kosovskoj Mitrovici.
- **Doc. dr Iva Tošić** i **asistentkinja Jovana Popović** izlagale su na temu „Od klika do polise – pravni aspekti zaštite potrošača usluga osiguranja kod ugovaranja na daljinu" na XXXIII Susretu pravnika u privredi Srbije, koji je održan od 25. do 28. maja 2024. godine na Zlatiboru.
- **Msr Ankica Dragin** učestvovala je na tribini „Književnost i mentalno zdravlje" u svojstvu profesorke jezika i književnosti koja radi s mladima, aktivistkinje i u slobodno vreme rekreativne spisateljice na Festivalu mentalnog zdravlja, koji je održan 16. oktobra 2024. godine u Novom Sadu.
- **Msr Ankica Dragin** izlagala je na temu „Gynecological Treatment or Gender Based Oppression? – An Autoethnographic Case Study in Menstrual Health" na međunarodnoj radionici „What Stands for Menstrual (In)justice – International Workshop", koja je održana 22. novembra 2024. godine u organizaciji Pravnog fakulteta Univerziteta Union u Beogradu.

- **Msr Ankica Dragin** učestvovala je na Regionalnoj partnerskoj konferenciji Ekumenske inicijative žena, „Stvaranje veza, kreiranje mogućnosti", koja je održana od 28. do 30. novembra 2024. godine u Omišu, Hrvatska.
- **Msr Ankica Dragin** izlagala je na temu „Ekumenski pristupi za izgradnju mira – iskustva žena iz Vojvodine" na međunarodnoj konferenciji „Rod i mir na Balkanu: Trasiranje puta naprijed", koja je održana od 25. do 27. februara 2025. godine u Sarajevu u organizaciji UN PEacebuilding FUND, UN BiH, Žene vode na putu mira i solidarnosti BiH, UNIGeRC, UNIGEM, TPO fondacije i Centra za ljudska prava Univerziteta u Sarajevu.
- **Msr Ankica Dragin** prisustvovala je sastanku volontera u okviru ekspertske grupe iskusnih mirovnih aktivistkinja i aktivista projekta YMCA Europe „Koreni mira", koji je održan od 12. do 15. septembra 2025. godine u Novom Sadu.
- **Msr Ankica Dragin** izlagala je na temu „Poznavanje mađarskog jezika kao kriterijum za sticanje dvojnog državljanstva Republike Mađarske u pojednostavljenom postupku" na naučnom skupu „Savremene migracije manjina iz Srbije", koji je održan 26. septembra 2025. godine u Beogradu u organizaciji Odbora za proučavanje nacionalnih manjina i ljudskih prava SANU.
- **Petar Mitrović**, saradnik u nastavi PFUUB, izlagao je na tamu „On Intuitions in Jurisprudence" na dvodnevnoj međunarodnoj konferenciji u okviru Beogradske nedelje filozofije prava, koja je održana na Institutu za filozofiju i društvenu teoriju i Pravnom fakultetu Univerziteta u Beogradu od 12. do 16. novembra 2024. godine.

IN MEMORIAM

- **Prof. dr Mario Lukinović** preminuo je 16. decembra 2024. godine. Dr Mario Lukinović bio je redovni profesor PFUUB i istaknuti član Udruženja pravnika Srbije. Iako nas je rano napustio, iza sebe je ostavio izuzetan naučni doprinos iz oblasti zaštite prava intelektualne svojine, ekološkog prava i informacionih tehnologija. Komemoracija posvećena našem uvaženom prof. dr Mariu Lukinoviću održana je 22. januara 2025. godine na PFUUB.
- **Prof. dr Zoran Ivošević**, dugogodišnji sudija Vrhovnog suda Srbije i osnivač i prvi predsednik Društva sudija Srbije, preminuo je 18. avgusta 2025. godine. Profesor Zoran Ivošević ostavio je dubok trag u radu našeg fakulteta u obrazovanju brojnih generacija studenata, kao i u razvoju naučne misli u oblasti kojom se bavio. Njegova posvećenost, znanje i ljudske vrline ostaće u trajnom sećanju kao inspiracija svima nama. Komemoracija posvećena našem uvaženom prof. dr Zoranu Ivoševiću održana je 24. septembra 2025. godine na PFUUB.

Dostavljeno Uredništvu: 26. oktobra 2025. godine

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PRAVILA CITIRANJA

Članci

Salacuse, J., Sullivan, N., 2005, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, *Harvard International Law Journal*, Vol. 46, No. 1, p. 109.

U popisu literature potrebno je navesti broj strana na kojima je objavljen članak, a ne stranu koja se citirala u radu:

Salacuse, J., Sullivan, N., 2005, Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, *Harvard International Law Journal*, Vol. 46, No. 1, pp. 100–132.

Monografije

Jedan autor/autorka:

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija, str. 25.

Dva autora/dve autorke:

Mitrović, D., Kumpan, A., 2010, *Osnovi međunarodnog privatnog prava*, Beograd, Pravni fakultet Univerziteta Union, str. 50.

Ako ima više od tri autora:

Varadi, T. *et al*., 2007, *Međunarodno privatno pravo,* Beograd, Pravni fakultet Univerziteta u Beogradu, str. 55.

Upućivanje samo na monografiju (bez navođenja stranica):

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija.

U popisu literature monografije se navode:

Poznić, B., 1993, *Građansko procesno pravo*, Beograd, Savremena administracija.

Prilozi u zbornicima i serijskim publikacijama

Dimitrijević, N., Militantna demokratija, konstitucionalna demokratija i osnovna prava: da li su prijatelji demokratije neprijatelji slobode?, u: Beširević, V., (ur.), 2013, *Militantna demokratija – nekada i sada*, Beograd, Pravni fakultet Univerziteta Union & Službeni glasnik, str. 31.

U popisu literature zbornici i drugi kolektivni radovi (npr. komentari) se navode:

Beširević, V., (ur.), 2013, *Militantna demokratija – nekada i sada*, Beograd, Pravni fakultet Univerziteta Union & Službeni glasnik

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Propisi

Zakon o izvršnom postupku, *Sl. glasnik RS*, br. 125/04 (u daljem tekstu: ZIP)

Ako se pomenuti zakon citira i kasnije: ZIP

Ako je propis menjan i dopunjavan:

Zakon o društvenoj brizi o deci, *Sl. glasnik RS*, br. 49/92, 29/93, 53/93, 67/93, 8/94.

Ako se citira zakon koji više ne važi:

Zakon o opštem upravnom postupku, *Sl. list SRJ*, br. 33/97, 31/01.

Prilikom ponovljenog citiranja treba navesti godinu: ZUP, 1997.

Označavanje člana/članova, stava/stavova i tačke/tačaka propisa **u tekstu**: član 7. stav 2. tačka 4. Zakona; član 8. st. 3– 4. Zakona; član 9. stav 5. tač. 6–7. Zakona.

U fusnotama: čl. 3–5. i 7. Zakona; čl. 5–9. Zakona; čl. 5, st. 1–3, čl. 7, 9. i 12. itd.

Dokumenti UN

Naslov dokumenta, odrednica da je u pitanju dokument UN (UN doc.) posle koje sledi službena numeracija UN, a potom u zagradi navesti datum kada je dokument usvojen.

UNSC Resolution 1244, UN doc. S/RES/1244 (10 June 1999).

Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Serbia*, UN dok. CCPR/C/SRB/CO/2 (20 May 2011).

Dokumenti EU

Commission Decision 93/42/EEC of 21 December 1992 concerning additional guarantees relating to infectious bovine rhinotracheitis for bovines destined for Denmark.

Praksa međunarodnih sudova

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ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, *ICJ Reports 1986*, p. 14, p. 62, para. 109.

Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion of 20 December 1980, *ICJ Reports 1980*, p. 73, pp. 89–90, para. 37.

U slučaju pozivanja na izdvojeno mišljenje sudije, posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije.

ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, *ICJ Reports 1986*, p. 259, p. 388, para. 257.

Stalni sud međunarodne pravde

Npr. PCIJ, *Status of Eastern Carelia*, Advisory Opinion of 23 July 1923, Series B, No. 5, p. 7.

Međunarodni krivični tribunali

Navođenje tribunala u engleskoj skraćenici (ICTY, ICTR), puno ime predmeta u kurzivu, veće, broj predmeta, vrsta odluke, datum, u zagradi internet adresa na kojoj se nalazi odluka posle koje sledi datum pristupa stranici (u skladu s pravilom o citiranju tekstova s interneta) i broj stava na koji se poziva.

ICTY, Appeals Chamber, *The Prosecutor v. Dusko Tadic*, IT-94–1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 (http://***, DATUM), para. 17.

ICTR, Trial Chamber, *The Prosecutor v. Ignace Bagilishema*, ICTR-95–1, Judgment of 7 June 2001 (http://***, DATUM), para. 85.

Evropski sud za ljudska prava

Navođenje ovog suda u engleskoj skraćenici (ECtHR), puno ime predmeta u kurzivu, broj predstavke, vrsta odluke, datum i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

ECtHR, *Osman v. the United Kingdom*, no. 23452/94, Judgment of 28 October 1998, para. 116.

Ako je u pitanju odluka Velikog veća (Grand Chamber) navesti njegovu englesku skraćenicu u uglastoj zagradi [GC], nakon datuma.

Lautsi and Others v. Italy, no. 30814/06, Judgment of 18 March 2011 [GC], para. 70.

U slučaju pozivanja na izdvojeno mišljenje sudije, shodno primeniti pravilo navedeno u citiranju presuda Međunarodnog suda pravde (posle datuma odluke navesti i vrstu izdvojenog mišljenja i prezime sudije) i navesti tačku mišljenja na koje se poziva.

Lautsi and Others v. Italy, no. 30814/06, Judgment of 18 March 2011 [GC], Concurring Opinion of Judge Bonello, point 3.5.

Sud pravde EU

Navođenje ovog suda u engleskoj skraćenici (CJEU), broj predmeta, puno ime predmeta u kurzivu, vrsta odluke i datum, referenca za identifikovanje i stav u kojem se pojavljuje konkretan deo teksta na koji se poziva.

CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, Judgment of 26 February 2013, ECLI:EU:C:2013:107, para.11.

Kod navođenja mišljenja opšteg pravozastupnika ili mišljenja CJEU ne treba navoditi vrstu odluke.

Opinion of AG Tanchev to CJEU, case C-619/18, *European Commission v. Republic of Poland*, 11 April 2019, ECLI:EU:C:2019:325, para. 8.

Case Opinion 2/13, *Opinion of the Court*, Opinion of 18 December 2014, ECLI:EU:C:2014:2454, para. 79.

Citiranje tekstova sa interneta

Gajin, S., 2012, *Ljudska prava, Pravno-sistemski okvir*, Beograd, Pravni fakultet Univerziteta Union u Beogradu, (http://www.pravnifakultet.rs/images/2012/Sasa_Gajin_-_Ljudska_prava_E_izdanje.pdf, 1. 1. 2013).

Walter, M., Konaguchi, J., *Multicriteria analysis*, (http://www.gigabook/multicriteriaanalysis.pdf, 5. 5. 2005).

ili

http://www.echr.coe.int/echr/homepage_EN.

Prilozi iz dnevne štampe (štampana izdanja)

Milikić, M., 2013, Sudije već tri godine niko ne ocenjuje, *Danas*, 12–13. januar, str. 4, stubac a.

Prilozi iz dnevne štampe (dostupni na internetu)

Derikonjić, M., 2011, Apel stručnjaka zbog propusta u reformi pravosuđa, *Politika Online*, (http://www.politika.rs/rubrike/Hronika/Apel-strucnjaka-zbog-propusta-ureformi– pravosudja.lt.html, 12. 1. 2011).

Master radovi i doktorske disertacije

Karamarković, L., 2003, *Poravnanje i medijacija*, doktorska disertacija, Pravni fakultet Univerziteta Union u Beogradu.

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Ostale napomene

Prilikom navođenja literature na stranom jeziku, koristiti odgovarajuće skraćenice za strane (p. 5; pp. 2–8).

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International Court of Justice

The name of the court should be given in its English abbreviation (ICJ), with the full title of the case *in italic* and in the case of interstate disputes with determination of

parties to the dispute in parentheses, type of decision, date, publication in *italic*, the first page in which the case appears, page and paragraph in which the referenced part of the text appears.

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