Pravna fakulteta
Univerza v Ljubljani

Zbornik znanstvenih razprav, LXXXIII. letnik, 2023
Ljubljana Law Review, Vol. LXXXIII, 2023

Izdala / *Published by*
Pravna fakulteta Univerze v Ljubljani,
za Založbo Pravne fakultete v Ljubljani Irena Kordež, direktorica

Zbornik je izšel s finančno pomočjo Javne agencije za raziskovalno dejavnost RS.
The publication is financially supported by Slovenian Research Agency.

Oblikovanje naslovnice / *Cover design*
Rok Marinšek

Jezikovni pregled in grafična priprava / *Proofreading and layout*
Dean Zagorac

Tisk / *Printed by*
Litteralis, d.o.o.

Cena zvezka skupaj z DDV / *Price (VAT incl.)*
41,30 EUR

Prvi natis / *First press run*
170 izvodov, Ljubljana 2023

Naročila / *Orders*
telefon: 01 42 03 113, faks: 01 42 03 115, www.pf.uni-lj.si

UDK34(497.4)(05)
Zbornik znanstvenih razprav
Ljubljana Law Review

ISSN 1854-3839
ISSN (spletna izdaja / *on-line edition*): 2464-0077

Spletni strani / *Web pages*
http://zbornik.pf.uni-lj.si
http://journal.pf.uni-lj.si

Pravna fakulteta
Univerza v Ljubljani

ZBORNIK ZNANSTVENIH RAZPRAV

Ljubljana Law Review

2023

LETNIK LXXXIII

Kazalo
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Article reuse guidelines:
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DOI: 10.1177/13882627221095105
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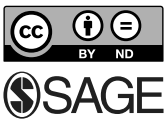

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Scientific article
UDC: 347.9:340.1(438)
DOI: 10.51940/2023.1.7-34

Maciej Wojciechowski[*]

Interpretational Oppositions between the Majority Opinion of the Court and the Dissenting Opinion

Abstract

This article aims to identify the reasons for disagreement in interpretive judgments by examining selected cases from the Polish Supreme Administrative Court. The analysis focuses on the traditional triad of linguistic, systemic, and teleological interpretive canons. The study distinguishes interpretive disputes in a weak and strong sense (axiological disputes) and explores the utilisation of interpretive canons in the examined cases. The values used to characterise specific interpretive positions do not necessarily align with the intended purposes of the interpreted provisions. The analysis of opposing opinions, initially expected to reveal easily describable interpretive oppositions, proved challenging due to the complex nature of argumentation used to justify positions. While classic opposition between linguistic and teleological rationales was occasionally observed, it was difficult to discern such oppositions solely based on the justifications provided. In conclusion, the article tentatively posits that interpretive canons serve a more justificatory than heuristic function, providing limited explanation for occurrence of interpretive disagreements.

Key words

Canons of interpretation, judicial dissent, interpretive disagreement, legal argumentation, reasons for disagreement.

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1. Introduction

Judicial dissent captivates the legal community, prompting a fundamental inquiry: why does it occur? However, it is essential to distinguish between why a judge decides to submit a dissenting opinion (reasons for dissenting) and why a judge disagrees with the other judges on the panel (reasons for disagreement). A disagreement among judges is probably a necessary but often insufficient condition for judicial dissent. This is because not every judge who finds themselves in the minority elects to articulate a dissenting view.[1]

The subject of interest in this article pertains to the "reasons for disagreement" between the majority of the court and the dissenting judge or judges. The primary sources to understand these reasons are the court's opinion and dissenting opinions. This research thus focuses on the judges' practice of justifying interpretative claims when they form part of a dissenting faction. The fundamental method of legal reasoning involves interpretative canons, and it is assumed that the manner in which they are employed in the justification process may serve as a means to comprehend the reasons for interpretative disagreement. The inquiry focuses on whether such disagreements arose from applying divergent canons of interpretation within a given method.

2. Terminology and Status of Canons of Interpretation

The concept of canons of interpretation is a central category within the theory of legal interpretation. The term "canons of interpretation" is not the sole designation used for them. In the common law legal culture, they are also referred to as "maxims of interpretation"[2] or "canons of construction".[3] In Polish legal culture, the term "directives of interpretation" gained popularity during the second half of the 20th century.[4] MacCormick

[1] Some authors explain this fact by a factor they call 'dissent aversion', the source of which is the effort a judge must expend in the form of, for example, time to write reasons (Epstein, Landes and Posner, 2013, p. 255). Other authors draw attention to the interactional aspect, which they label as the "interpersonal environment" (Donald, 2019, p. 328) "internal dynamics of the court" (Kelemen, 2013, p. 1346). However, this aspect will not be the subject of this article.

[2] Brudney, 2005, p. 8.

[3] "Lawyers have been known to make the embarrassing linguistic gaffe of talking about *constructing* a statute when they refer to deriving meaning from it". Scalia and Garner, 2012, pp. 39–40.

[4] This term was introduced into the Polish legal language by Jerzy Wróblewski in his work from 1959, titled *Zagadnienia teorii wykładni prawa ludowego* (Issues of the Theory of Interpretation of People's Law). Wróblewski based his theory of interpretation on Kazimierz Ajdukiewicz's concept of meaning from the 1930s, which characterised language by its dictionary, syntactic rules, and directives of meaning. As Wróblewski (1959, p. 145) stated, "it seems that every normative theory of interpretation must assume that the interpreter uses directives of meaningfulness of the language in which the norm was formulated.".

and Summers expressed their doubts regarding such terminology because "a 'directive' may be thought to presuppose some 'director' who issues it," which raises the question about the status of canons of interpretation. In other words, what function do they serve? They have been variously described in the literature as "presumptions about what intelligently produced text conveys"[5], "forms of legal argument [...] by which lawyers show the truth and falsity of legal propositions"[6], "linguistic habits of mind"[7], and "concepts and tools of statutory interpretation"[8]. The diversity in terminology stems from the question of whether canons constitute a tool that judges use to determine the meaning of legal texts (heuristic function) or merely serve as a reservoir of arguments to reason their decisions (rationalisation function).

Within the heuristic function, a distinction should be made between the sequentiality of the interpretative process[9] and the concept of canons of interpretation as heuristics[10]. According to the latter, canons of interpretation are not rules but heuristics in the sense that they represent "ways of coping with the complex enterprise of statutory interpretation"[11] Sequentiality—whether actual or postulated—of the interpretative process signifies a specific sequence of interpretative activities.[12]

The difference between the sequentiality of the interpretative process and treating "concepts and tools of statutory interpretation" as heuristics lies in the usage of canons. In the sequential concept of interpretation, the interpreter should consider the application of each interpretative canon. In the concept of canons as heuristics, only some of them are utilised. This is precisely where the distinction between algorithmic and heuristic action lies. To draw an analogy to a game of chess, algorithmic action involves considering every possible move, while heuristics are simplifying strategies aimed at problem-solving. Staying true to the chess analogy, heuristics mean limiting consideration to only a portion of the moves.[13]

5 Scalia and Garner, 2012, p. 73.

6 Paterson, 2005, p. 693.

7 Baude and Sachs, 2017, p. 1088.

8 Mullins, 2003, p. 5.

9 Zieliński, 2008.

10 Mullins, 2003.

11 *Ibid.*, p. 68.

12 In legal education in Poland, the proper interpretative process is often presented in this manner. It starts with distinguishing three methods of interpretation: linguistic, systemic, and teleological. A similar organisation of interpretative stages is presented by MacCormick and Summers in their model of the interaction of interpretive arguments. MacCormick and Summers, 2016, p. 530.

13 Saks and Kidd, 1980, p. 131.

3. Legitimacy of Canons of Interpretation

The legitimacy of interpretative canons in European legal culture is generally considered unquestionable.[14] However, in the ongoing discussion within the common law culture, the validity of canons is being challenged. K. Llewellyn's famous compilation demonstrated that "there are two opposing canons at almost every point"[15], resulting in the indeterminate nature of their application. Other authors express scepticism about the effectiveness of canons as a method, claiming that "no magical formula can guide the interpreter in applying them".[16] Similarly, Cross argues that the canons cannot resolve most interpretive disputes but remain useful on occasion.[17] Richard Posner contends that the style of judicial opinions pretends that the interpretation of statutes is a mechanical application of canons.[18] Moreover, according to Posner, canons allow a judge to create the appearance that his decisions are constrained.[19] Baude and Sachs point out that canons of interpretation are often disconnected not only from the everyday way of speaking of non-lawyers but also from lawyers. Frequently, legal practitioners are not familiar with canons.[20] Additionally, canons are sometimes used in an instrumental manner.[21]

Defenders of canons emphasise their relative clarity, neutral character, common-sense virtues, and their ability to render statutory meaning more predictable.[22] Sets of canons shape what Eskridge and Frickey refer to as "interpretive regimes".[23] These regimes serve the purposes of the rule of law by making interpretation more predictable, regular, and coherent.[24] According to this perspective, a higher level of predictability can be achieved through coordinating canons of interpretation with legislators' knowledge about them. In other words, if legislators are aware of the rules operating within a particular interpretive regime, they will be able to anticipate the results of different statutory interpretations.[25] For instance, if the approving attitude of a specific court towards the canon *expresio unius*

14 Dyrda and Gizbert-Studnicki, 2020, p. 22.
15 Llewellyn, 1950, p. 401.
16 Manning, 2012, p. 180.
17 Cross, 2009, p. 89.
18 Posner, 1983, pp. 805–806.
19 Ibid., p. 816.
20 Baude and Sachs, 2017, p. 1089.
21 Brudney and Ditslear, 2005, p. 7.
22 *Ibid.*, p. 5.
23 Eskridge and Frickey, 1994, p. 66.
24 *Ibid.*
25 *Ibid.*

est exclusio alterius (known in Europe as *argumentum e contrario*) is known[26], the legislator will be aware that any enumerations in the text of the statute should be exhaustive.[27]

Criticism seems to be primarily directed at canons perceived as tools that guide the interpretive process, rather than as arguments used to support one's position. Regardless of the debate over the legitimacy of canons, their presence in the judicial discourse is a fact. Various compilations of canons exist both in common law culture[28] and in civil law countries.[29] Poland, being part of the state law culture, was the subject of a large-scale research project in the early 1990s that examined canons of legal interpretation in selected countries, which revealed the existence of a similar set of interpretive rules consisting of 11 arguments.[30]

The situation that calls into question the canons' capacity to enhance consistency is the submission of a dissenting opinion. When the judicial panel is unanimous, interpretative canons can increase the predictability of the court's decisions. However, in cases where the judges on the panel are not unanimous, and a dissenting opinion is submitted, the effectiveness of canons in ensuring predictability becomes questionable (Brudney and Ditslear, 2005, p. 102).

4. Judicial Dissent

Judicial dissent is

> "any of the acts undertaken by an individual in a judicial or quasi-judicial capacity [...] that expresses that individual's disagreement with the decision of the decision-making body of which he or she is a member of, as determined by the majority."[31]

A useful distinction can be made between a judicial dissent and a dissenting opinion. A judicial dissent is a disclosed objection to the decision of the majority of the panel. In Poland, such an objection is typically conveyed by judges through an appropriate annotation on the judgment, often using the abbreviation "v.s." derived from the Latin term *votum separatum*. On the other hand, a dissenting opinion refers to a set of reasons that a dissenting judge is obligated to provide in writing.

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26 See: Jansen, 2005.

27 Eskridge and Frickey, 1994, p. 66. However, it is worth noting that one judge remarked, when he was in Congress, "the only 'canons' we talked about were the ones the Pentagon bought". Cross, 2009, p. 97.

28 Scalia identified as many as fifty-seven canons. Scalia and Garner, 2012.

29 Macagno, Sartor and Walton, 2021, p. 44.

30 Summers and Taruffo, 2016, p. 462.

31 Mistry, 2023, p. 3. In international courts, a dissenting opinion is a type of minority opinion along with concurrence, individual opinion, or separate opinion. Dunoff and Pollack, 2022, p. 340.

The judicial dissent allows multiple research perspectives to be addressed. Scholars from fields such as political science and economics employing quantitative research methodologies aim to explain the fact of submitting a dissenting opinion[32]. They accomplish this by considering various factors, such as political or ideological preferences in the case of an attitudinal approach[33] or structural elements, such as the level of workload and the number of judges on the panel as relevant in an institutional approach[34]. However, these studies often overlook the reasons explicitly stated in the court's opinion. This omission appears rooted in doubts concerning the cognitive relevance of the officially stated reasons, which can be traced back to the tradition of American legal realism and its assertion that the reasons presented by judges merely serve as a facade, concealing the true motives behind a given decision.[35]

Such quantitative studies allegedly disregard the internal legal perspective, which recognises the content of legal norms as a genuine factor influencing judges' decisions. Furthermore, participating judges in the discourse express concern that the significance of collegiality in decision-making has been overlooked.[36] However, when examining dissenting opinions, the central focus of the discussion shifts toward the issue of the legitimacy of judicial dissent.[37] Matters under consideration include the impact of dissenting opinions on legal doctrine or future legislative decisions[38] and the jurisprudence of the court.[39]

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32 Brace and Hall, 1993.

33 Segal and Spaeth, 2002.

34 Lamb, 1986, p. 182.

35 Schauer, 1991, p. 192.

36 Edwards, 1998, p. 1359.

37 The ongoing debate has witnessed the reiteration of similar arguments over the course of several years, at times employing the same values to support opposing viewpoints. An example of such a value is judicial independence, which can be invoked both to endorse and contest the permissibility of judicial dissent. Advocates of the right to dissent argue that it represents an expression of a judge's internal independence from their colleagues and superiors (Keleman, 2021, p. 1359). Conversely, opponents contend that dissents, by revealing a judge's position, may exert influence on the state's decision-making process regarding reappointments in the case of international judges (Dunoff and Pollack, 2022, p. 348). Notably, certain esteemed dissenting judges have expressed reservations about this right. For instance, in the dissenting opinion of *Northern Securities vs. United States* (1904), Oliver Wendell Holmes declared his general position on judicial dissent as 'useless and undesirable' (Holmes, 1904).

38 In common law culture, the impact of dissenting opinions on doctrine and future rulings is emphasised. A famous example is the words of Benjamin Cardozo: "The dissenter speaks to the future" (Cardozo 1938, p. 36) or Judge Charles Hughes: "[a] dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." (Hughes, 1928, p. 68)

39 Dunoff, Pollack 2022, p. 345. Judges claim that dissent may lead the majority opinion's author to "refine and clarify her initial circulation" (Ginsburg, 2010, p. 3). Justice Antonin Scalia outlines

The aforementioned approach perceives judicial dissent as an inherently individual act that distinguishes a judge from other panel members.[40] However, the submission of a judicial dissent actually signifies a disagreement among judges. It is the legal disagreement itself that Ronald Dworkin focuses on in his well-known argument against legal positivism. Dworkin discerns disagreements in three categories: matters of fact, matters of law, and matters of political morality and fidelity.[41] His primary emphasis lies on disagreements regarding the law, particularly theoretical disagreements.[42] In theoretical disagreements, lawyers and judges "disagree about whether statute books and judicial decisions exhaust the pertinent grounds of law."[43] In essence, these disputes revolve around the criteria for legal validity,[44] that is, what should be regarded as law.[45] Lawyers from a continental legal culture may find it perplexing to view these disputes as criteria for legal validity, as they tend to apply such criteria to legal acts rather than legal propositions. A more comprehensible explanation, as provided by Leiter, is that when judges engage in theoretical disagreements, they are actually disagreeing about the interpretation of legal sources.[46] Lawyers and judges who debate whether courts discover or create law may not be fully aware that they are engaged in such a dispute.[47] Dworkin attributes their adherence to what he terms the "plain fact" perspective on the foundation of law

ways in which a dissenting opinion can improve the quality of the majority opinion: mobilising the author of the majority opinion when he or she knows that the dissenting opinion will be filed, changing or even altering the outcome of the vote so that the dissenting opinion becomes the majority opinion (Scalia, 1998, p. 22). Justice Brennan claims that judicial dissent forces "the prevailing side to deal with the hardest questions urged by the losing side." (Brennan, 1986, p. 430) Similar remarks are made by Polish judges. One stated: "If someone submits a dissenting opinion, it works both ways. He has to prepare better. But it also forces the judge who will write the reasoning to make sure that it is prepared very carefully." Wojciechowski, 2019, p. 121.

40 Donald, 2019, p. 323.

41 Dworkin, 1986, p. 3.

42 The second type of disagreement Dworkin mentions are empirical disagreement. For instance, such disagreement may be about what words are in the statute books (Dworkin, 1986, p. 5) or "Did a majority really approve the legislation?" or "Didn't the executive veto the legislation in a timely manner?" (Leiter, 2009, p. 1219). In case of empirical disagreements, the parties agree about the conditions of validity but disagree on whether those conditions apply in a given case (Marmor, 2015, p. 3). Dworkin describes them as "hardly mysterious" (Dworkin 1986, p. 5).

43 Dworkin, 1986, p. 5.

44 Leiter, 2019, p. 250.

45 Plunkett and Sundell, 2013, p. 243.

46 Leiter 2009, p. 1222.

47 Dworkin, 1986, p. 6

> "they appear to be disagreeing in the theoretical way about what the law is, they are really disagreeing about what it should be. Their disagreement is really over issues of morality and fidelity, not law".[48]

Dworkin argues that legal positivism cannot explain such disagreements. Under the positivist approach, the parties to the dispute are disingenuous, meaning that they are really trying to tell what the law should look like, or they remain in error.[49] In the latter scenario, they hold the belief that there exists a correct legal answer, despite the absence of any supporting social rule.[50]

5. Assumptions

Addressing purpose of this article necessitates making several methodological assumptions. Firstly, it assumes that canons of interpretation serve as tools for providing reasons supporting an interpretative standpoint and play a role in the decision-making process. These functions of canons align with Hans Reichenbach's distinction between the context of discovery and the context of justification.[51] Building upon this foundation, Polish legal theorist Jerzy Wroblewski introduced a distinction between explanation and justification of court's decision in the 1970s.[52] Wroblewski argued that the court's opinion does not explain the decision but aims to provide a persuasive rationale.[53] Contemporary research suggests that the separation between the context of discovery and the context of justification is not a rigid boundary.[54] Consequently, it is reasonable to assume that canons of interpretation also serve a heuristic function to some extent.

The second assumption was that the linguistic canons include: the plain meaning rule, the rule of legal language, the rule of special meaning, the prohibition of ascribing the same meaning to different terms (synonymous interpretation), the prohibition of giving different meanings to the same phrases (homonymous interpretation), prohibition of interpretation *per non est*, a prohibition of differentiation unless carried out

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48 *Ibid.*, p. 7.

49 Leiter, 2009, p. 1224

50 *Ibid.*

51 Reichenbach aimed at narrowing the focus to the context of justification and recognising questions in the context of discovery as unphilosophical (Howard, 2006, p. 8). Context distinctions have temporal and logical dimensions. In the case of the temporal version, the process of discovery is followed by the process of justification. In the logical version, the justification is separated as its objectives are logical reconstruction, explication, and assessment. Schickore and Steinle, 2008, p. viii.

52 Wróblewski, 1976, p. 7.

53 *Ibid.*

54 Novak, 2018, p. 81.

by the legislator.[55] Systematic interpretation encompasses the obligation to interpret in accordance with the constitution and international norms, the prohibition of interpretation leading to gaps, the prohibition of interpretation leading to contradictions, and the argument from the structure of the act.[56] Teleological interpretation includes the rule to consider the legislator's intentions, to consider the consequences of a particular interpretation, and the prohibition of interpretation leading to absurdity.[57]

The third assumption pertains to the identification of sentences that can be regarded as manifestations of the interpretation of the law. The choice lies between asserting that every sentence in the majority or dissenting opinion reflects some form of interpretation and asserting that only specific sentences manifest the judge's interpretation. It is posited during analysis that not all sentences within the opinions of the court serve as manifestations of the interpretation of law. Even if we assume that interpretation occurs in every case (rejecting the doctrine of *claritas*), it is not always readily discernible within the written justification. A distinction can be made between an explicit declaration of the mode of interpretation and an ascribed method of interpretation. In the former case, the author of a given opinion explicitly declares the adoption of a particular mode of interpretation. In the latter case, the interpreter does not explicitly declare the use of a specific method of interpretation, but it is possible to attribute the application of a particular method based on the articulated rationale within the written justification.

The fourth assumption is that both the written opinion of the court and the dissenting opinions are susceptible to interpretation. M. Tushnet similarly argues that understanding a judge's dissenting opinion relies not only on the author's intention but also on the reader's interpretation.[58] In this context, notion of "interpretation" is used broadly, referring to the act of understanding.[59] The interpretation objective may resemble that of interpreting a legal text, such as discerning the lawmaker's intention, in this case, the judge's intention. However, when interpreting a judge's statement, the focus shifts from what the judge precisely meant to the cultural significance of the judgment and the values it embodies. The key point is that a judgment can be perceived to align with specific values that may not necessarily align with the explicit purpose attributed to the text of the law. An example of this broad concept of interpretation can be seen in a judgment where the court advocates for a formalistic interpretation of the law. From the perspective discussed here, this formalism may be regarded as a manifestation of a lack of trust or a unique desire for security.

55 Morawski, 2002, pp. 115 ff.

56 *Ibid.*, pp. 161 ff.

57 *Ibid.*, pp. 217–222.

58 Tushnet, 2008, p. XXIII.

59 Marmor, 2005, p. 9.

6. The Object of Study and Methodology

Dissenting opinions in Polish courts, including the Constitutional Court, are rare occurrences[60]. However, the significance of these sentences is not determined by their frequency. As observed in the United States during discussions on methodological standards in legal science and the issue of representativeness, there are cases that hold importance beyond statistical significance.[61] It can be reasonably presumed that situations where the court decides in an enlarged panel are key for the issue to be decided. Hence, the analysis focuses on a sample of 24 resolutions from the Supreme Administrative Court (SAC, *Naczelny Sąd Administracyjny*) to which 48 dissenting opinions were submitted.[62] Those resolutions were chosen because of their accessibility in the Central Database of Administrative Court Rulings at the time of the analysis (convenience sampling). The resolutions of the SAC are judicial decisions made by panels in an enlarged composition. The standard practice at the SAC involves delivering judgments by three-member panels. However, resolutions are made by seven-member panels or judges from the respective chamber(s), or in the case of *en banc* sessions, all judges from the court participate[63]. These resolutions are issued to clarify the application of legal provisions that have led to inconsistencies in case law (abstract resolutions), or to address significant legal issues in specific administrative court cases (specific resolutions). Judicial disagreements in the SAC are mainly interpretive, whereas in the Provincial Administrative Courts (PAC, *Wojewódzki Sąd Administacyjny*), one can speak of disputes concerning the determina-

[60] Since 1997, when the current Constitution was enacted, the annual percentage of cases in which at least one dissenting opinion to the judgment of the Tribunal was submitted is 14%. According to the Central Database of Administrative Court Rulings, the percentage of dissenting opinions in Polish administrative courts from 2004 to 2023 did not exceed even 1% of the total number of judgments issued in any year. In absolute numbers, it ranged from 3 in 2004, the first year of judging in Provincial Administrative Courts, to 61 in 2014. Between 2017 and 2023, there were 190 dissenting opinions in Provincial Administrative Courts (sixteen PACs) and 90 in Supreme Administrative Courts]. If one were to consider that judicial disputes resulting in the submitting of dissenting opinions constitute a manifestation of theoretical disagreement, then B. Leiter is right writing that "massive agreement about the law – not disagreement – is the norm in modern legal systems" (Leiter, 2009, p. 1228). The submission of dissenting opinions, however, is not necessarily the only determinant of a finding of theoretical disagreement. Another may be, much more frequent and more difficult to empirically identify, inconsistency of case law.

[61] Goldsmith and Vermeule, 2002, p. 160.

[62] Number of 24 resolutions represents 34% of all SAC resolutions for which a separate opinion was submitted according to the Central Database of Administrative Court Judgments available online (accessed on 29 May 2023).

[63] In the Supreme Administrative Court (SAC), there are three chambers: the Financial Chamber, the Economic Chamber, and the General Administrative Chamber.

tion of the facts of the case, their qualification, or the scope of the normative basis, i.e. which provisions of the statute should be applied in the case.[64]

The qualitative analysis of the majority and dissenting opinions involved assigning specific methods of interpretation to particular passages in both texts. Additionally, the created database included a rubric for the "subject of the dispute", which provided a descriptive characterisation of the factors that, according to the researcher, divided the judges in their decision-making. The excerpts from both opinions were encoded as manifestations of linguistic, systemic, and functional (teleological) interpretation. The encoding was in the form of binary code (0s and 1s). Schematically, an exemplary situation where the all three methods of interpretation were present in opinion of the court were described as "majority_(1,1,1)". A corresponding situation regarding a dissenting opinion was presented as "dissent_(1,1,1)". However, it was already established at the preliminary stage that merely registering the utilisation or declaration of a specific method of interpretation in this form did not adequately reflect its significance for the entire reasoning or the nature of the opposition formed. It was necessary for the researcher to "immerse" himself in the disputed matter discussed by the parties. Naturally, this did not reach the level of understanding of the intricacies of the case by the adjudicating judges.

The method employed, in which the cited excerpts serve as support for the researcher's theses, can be described as an intermediate approach combining elements of content analysis and argumentation from paradigm cases. This approach, referred to as interpretive, is subjective in nature and shares similarities with the work of literary critics or social activists critiquing the public speeches of politicians.[65] Within this framework, researchers focus on key judgments, seeking out similarities and differences between them.

In the initial segment, I introduce one of the primary concepts that arose during the preliminary phase of acquainting myself with the material, namely the concept of interpretive opposition. Subsequently, I proceed to delineate two variations of this form of opposition, weak and strong. The latter is referred to as axiological opposition and can manifest itself in either a bipolar or unipolar fashion. Subsequently, I proceed to illustrate the oppositions present within each mode of interpretation.

7. The Concept of Interpretive Opposition

The fundamental conceptual category that I intend to employ in analysing the dynamics of a panel dispute is the notion of opposition. This concept can manifest itself in either an "axiological" or an "interpretive" manner. Axiological opposition refers to a scenario wherein the opposing positions of the dispute can be attributed a specific interpretation based on a given value. This alignment does not imply a causal relationship. In

[64] Wojciechowski, 2019, p. 316.

[65] Hall and Wright, 2008, p. 78.

other words, the fact that judges make decisions that can be interpreted as favourable to the taxpayer does not mean that they make such decisions solely because they are advantageous to the taxpayer. This kind of opposition does not necessarily revolve around the methods of functional or teleological interpretation. Alignment with a particular value, such as legal certainty, can be expressed by emphasising linguistic arguments. In other words, safeguarding a specific value does not necessarily entail a particular method of interpretation. For instance, legal certainty can be protected in one case by emphasising linguistic arguments, while in another case, provisions can be interpreted purposively. A similar idea is expressed by Scalia when he states that "a textualist reading will sometimes produce 'conservative' outcomes, sometimes 'liberal' ones."[66] The interpretive opposition signifies a situation where conflicting positions arise from the adoption of different canons of interpretation or the same canons applied in distinct ways.

It should be noted that interpretive opposition and axiological opposition are not mutually exclusive concepts, provided one accepts the premise that values are invariably present in the process of interpretation. "The presence of values in the process of interpretation" denotes a certain degree of inclination toward a particular method of interpretation. This presence can be substantiated through either empirical or analytical means. Empirical demonstration entails the researcher's ability to cite or attribute arguments from either the majority or dissenting opinion that justify the use of a specific method of interpretation. Analytically, the presence of values emerges as a consequence of adopting a particular conception of specific methods of interpretation. For example, systemic interpretation, by virtue of referencing legal principles, possesses an axiological nature since principles are intrinsically linked to values.[67] This connection with values becomes even more apparent in purposive interpretation since the objectives denoted by legal texts typically correspond to values.

Regarding the presence of values in the process of interpretation (referred to as "axiological saturation"), there are two discernible positions derived from the aforementioned approaches. The first claim asserts that values are always present in the process of interpretation, while the second claim posits that values are only present in some cases. The second claim suggests that in technical-legal interpretive problems, the reconstruction of the values at stake is either impossible or so dubious that the claim of their presence is relinquished. In such instances, proponents of this claim argue that maintaining the presence of values would amount to an outright metaphysical assertion—an assertion that may be true but cannot be proven as such. Consequently, advocates of this claim would recognise only the empirical method to demonstrate the thesis of value presence.

The first claim can be formulated in stronger and weaker versions. In the stronger version, the justification for the presence of values is empirical, as the content of the majority

[66] Scalia and Garner, 2013, p. 43.

[67] Avila, 2007, p. 29.

or dissenting opinion allows for the identification of the values that determine a mode of interpretation. Values are present in the interpretation process in the weaker sense when their presence is analytical, meaning they are not explicitly invoked by the interpreter in the justification but rather result from the mere preference for linguistic arguments. In such cases, the concept of the "axiological capacity of linguistic interpretation" emerges, referring to the question of whether favouring this method can be viewed as a manifestation of alignment with a specific value. Recognising that it may be motivated by the pursuit of objectivity or legal certainty supports the adoption of the first claim for further analysis. Embracing the assumption of value presence in the process of interpretation enables the presentation of the proposed categorisation of interpretive disputes in this article.

Interpretive disputes can be typologically classified into disputes over "second-level rules of interpretation,"[68] which are axiological disputes based on the assumption (1) in its weaker version (referred to as "weak interpretive oppositions"), and disputes with a pronounced "presence" of the axiological element (known as "strong interpretive oppositions"). Strong interpretive oppositions can take the form of bipolar disputes involving the opposition of two conflicting values or unipolar disputes in which both sides acknowledge the same value but differ in the legal mode of its realisation.

7.1. "Weak" Interpretive Oppositions

Interpretive opposition in the weaker sense corresponds to a situation that can be considered a classic example, where one side of the dispute adopts a position based on linguistic arguments while the opposing side favours a purposive interpretation. An illustrative case of an interpretive dispute in legal theory and philosophy is the opposition surrounding Herbert Hart's rule of "no vehicles in the park".[69] A key characteristic of this type of opposition is that the attribution of values to the disputed position relies solely on the choice of a specific mode of interpretation, such as textualist or consequentialist.

The practice of providing reasons for a particular interpretation is intricate and typically follows a cumulative argument form, wherein multiple arguments support the same conclusion.[70] Due to this complexity, recognising the nature of interpretive opposition necessitates meticulous analysis and cannot be reduced to a simplistic binary classification. For instance, consider the case of a resolution that can be schematically coded as majori-

[68] Wróblewski, 2016, p. 282.

[69] Hart, 1958, p. 607 The example is widely regarded as fictional, but F. Schauer argues that Hart most likely drew it from the 1931 case *McBoyle v. United States*, in which the issue arose as to whether an aircraft was a vehicle within the meaning of a federal law prohibiting the transportation of stolen vehicles across state borders. It is interesting to note Schauer's suggestion that Hart became aware of this case at Harvard University in 1956–1957, where he may even have learned about it from L. Fuller. Schauer, 2008, p. 1115.

[70] MacCormick and Summers, 2016, p. 526.

ty_(1,0,1) – dissent_(0,1,1),[71] indicating that the majority justification invoked linguistic and purposive rationales, while the dissenting opinion invoked systemic and purposive rationales but not linguistic. However, such schematic coding fails to adequately capture the intricacies of the oppositions observed in this case. Utterances coded as manifestations of teleological interpretation in both the majority and dissenting opinions did not pertain to the same provision of the statute. Furthermore, the declared purposive interpretation in the majority opinion was actually confined to a single sentence which may illustrate that not all invoked interpretive arguments carry equal weight or significance. The majority opinion predominantly revolved around arguments of a linguistic nature, particularly applying argument from a legal definition. In contrast, this case's dissenting opinions clearly emphasised teleological arguments. Dissenting judges criticised the resolution for relying on linguistic interpretation and excluding purposive interpretation "more appropriate [...] in view of the EU subject matter of the regulation."[72]

7.2. "Strong" Interpretive Oppositions – Bipolar and Unipolar

Strong interpretive oppositions can manifest in either a bipolar or unipolar form. In the bipolar form, a dispute arises between a majority and a dissenting opinion, presenting an opposition between two conflicting values. Unipolar disputes, on the other hand, involve parties deriving different consequences from shared values. These situations resemble what Cass Sunstein calls "incompletely theorized agreement on general principle", where individuals who accept a principle may not agree on its specific implications in a particular case.[73]

Within the analysed group of the Supreme Administrative Court resolutions, those categorised as manifestations of bipolar disputes can be framed as a clash between the values of individual interest and public interest. However, this opposition of two values is a simplification that reduces various factors to a common denominator, and in practice, the fit between these factors and the description may vary. In the interpretation of tax law, undoubtedly, this tension is particularly apparent due to the nature of obligations towards the state. This applies not only to substantive tax law but also to procedural rules. An illustrative example of how the interpretation of tax procedural rules can align with the interests of the taxpayer or the Treasury is the case of interpreting the phrase "failure to issue an individual interpretation" by a tax authority. The subject of the dispute was whether the deadline for issuing a decision is considered met at (1) the moment the authority issues the decision or (2) when the decision is delivered to the taxpayer. The interpretation favouring (1) was in support of the taxpayer, while (2) favoured the tax

[71] Resolution II GPS 1/09.

[72] Dissenting opinion of Judge K. Stec to resolution II GPS 1/09.

[73] Sunstein, 2018, p. 35.

authorities and the interest of the Treasury. Notably, the Supreme Administrative Court delivered two conflicting judgments in this case.[74] In the first one, majority took holistic approach using three types of interpretation methods (majority_(1,1,1) while dissenting judge limited his argumentation to reference to one legal principle (dissent_0,1,0).[75] In the 2009 resolution, both sides of the dispute employed a holistic approach in terms of the modes of interpretation used (majority_(1,1,1) – dissent_(1,1,1)), yet the conclusions derived from these arguments remained divergent.

This case is particularly interesting because the values underlying a specific method of interpretation appear to determine the choice of interpretation method. The names of these values were also mentioned in the justifications provided. The judge who presented the dissenting opinion in the 2009 resolution emphasised the value of legal security for individuals. Notably, this judge also served as the judge rapporteur in the 2008 resolution. Conversely, in the position favouring the tax authorities, the value at stake was the certainty of the authority regarding compliance with the deadline as a result of its own action, namely, the issuance of the interpretation.[76] Indeed, a possible consequence of the position favourable to the taxpayer would have been the uncertainty for the authority regarding whether it had issued the decision within the legal deadline, considering the taxpayer's evasive behaviour.[77] Taking into consideration the issue of certainty/uncertainty allows for an alternative depiction of this dispute, namely in terms of trust. This means that the dispute can be described not only as an opposition between the interests of the individual and the State Treasury but also as a conflict related to the level of trust. One of the justifications for adopting a particular interpretive stance is rooted in a lack of trust toward potential actions of the tax authority or towards the taxpayer, who is suspected of potentially attempting to evade receiving the directed interpretation.

An illustrative instance of opposition that resists easy categorisation within the framework of the axiological tension between individual and general interests is the dispute surrounding the legitimacy of foundation to act as a social organisation in administra-

[74] First, a seven-judge panel issued a resolution on 11 April 2008, I FPS 2/08 with an interpretation favourable to the taxpayer. One judge dissented. However, a year later, the full panel consisting of 29 judges interpreted the same phrase unfavourably for the taxpayer. Resolution of 14 December 2009, II FPS 7/09, with six judges submitting dissenting opinions.

[75] Dissenting opinion of Judge B. Gruszczynski to resolution I FPS 2/08.

[76] This is stressed in the majority opinion of the resolution II FPS 7/09: "If the taxpayer is to gain, through the delivery of an interpretation, certainty about the law, then the same certainty, as to the end of the deadline for issuing a decision, should have the tax authority. The protective function of the law is not one-sided. The deadline in question sets the limits of security for both the interested party and the tax authority."

[77] This aspect was raised in a dissenting opinion to the resolution I FPS 2/08, in which it was written: "Regardless of the fact that people also work in the body, no entity can be imposed an obligation whose deadline for performance ends on a day that is unforeseeable to it."

tive proceedings pertaining to the legal interest of another individual.[78] The Supreme Administrative Court classified the foundation as a social organisation based on the principle of citizen participation in the functioning of the state. A dissenting opinion argued that foundations should not be classified as social organisations. The dissenting judges claimed that the resolution favoured social interests over individual interests, violating the right to a fair judicial procedure. While it may seem like a clear opposition between pro-social and pro-individual positions, the situation was more nuanced. The pro-social interpretation of the resolution is derived from the dissents rationale rather than explicit statements in the resolution itself. The dissenting opinion's view of social interest appears influenced by past ideologies, which valued social interests over individual ones. Examining the specific case that led to this resolution, involving the Helsinki Foundation for Human Rights participating in refugee status proceedings, further complicates the understanding of the dispute. The depiction of a pro-social resolution versus a pro-individual dissent loses clarity in this context. It raises questions about whether the dissenting opinion represents doctrinal conservatism rather than a strict opposition between individual and social interests. It becomes a clash between flexibility and a willingness to re-evaluate existing legal categories versus defending the status quo in reasoning.

The second category of disputes that can be recognised within the realm of strong oppositions pertains to unipolar disputes. Such disputes revolve around disagreements regarding the implementation of teleological interpretation. The designation "unipolar disputes" is subordinate to the broader classification of "disputes regarding the method of purposive interpretation." As demonstrated in the paragraph 6.3, the disputes examined in the context of the analysed administrative court resolutions do not primarily concern the objective of the interpreted provisions, but rather focus on the manner in which the legal text should be interpreted to achieve this objective.

8. Interpretive Oppositions in SAC Resolutions Applying the Same Method of Interpretation

During the analysis, it was observed that conflicting interpretive conclusions could be supported by the same method of interpretation. Considering that a method of interpretation encompasses multiple interpretive directives, this finding should not be surprising. Nonetheless, it seemed pertinent to examine instances where the same method of interpretation was employed to determine whether judges, who held differing opinions in each case, relied on distinct arguments within that method of interpretation, as initial intuition would suggest. Additionally, it is important to establish a distinction between interpretive oppositions in the pragmatic and non-pragmatic sense.[79] Pragmatic interpre-

[78] Resolution II OPS 4/05.

[79] MacCormick, 1978, p. 207 pointed out the antinomic nature of rules and canons of interpretation.

tive oppositions occur between arguments of interpretation, while non-pragmatic interpretive oppositions arise between statements resulting from applying interpretive rules. In the case of non-pragmatic interpretive oppositions, the specific type of interpretive arguments employed may remain undisclosed, as they are not explicitly stated in the opinion text.

8.1. Oppositions Within the Framework of Linguistic Interpretation

The following types of interpretive opposition could be found in terms of linguistic interpretation:

(1) The positions of the majority of the panel and the dissenting opinion refer to different canons of linguistic interpretation;
(2) The positions of the majority of the panel and the dissenting opinion refer to the same linguistic canons of interpretation;
(3) The dispute is over the meaning of the legal term in question, but no interpretation canons are invoked or attributable.

Situations in which parties to a judicial dispute use different arguments belonging to the canon of linguistic interpretation were expected. One of the sources of divergent judicial rulings in Poland, for example, is the issue of the scope of application of legal definitions. This involves determining whether the statutory definition of the word "A" should solely apply to the word "A" as used in the specific statute containing the definition or whether this legal definition can be applied to the word "A" used in another statute. Such sources of judicial disagreements can be identified in interpretive oppositions occurring within the Polish provincial administrative courts.[80] When the interpreter believes that the legal definition from another act cannot be applied in a particular case, they generally resort to the rule of the plain meaning. This creates an opposition between the canon of plain meaning and legal language. This kind of situation occurred in the cited resolution II FPS 7/09, where the majority opinion analysed the meanings of the word "to issue" as found in other legal acts. The judge writing a dissenting opinion referred to the plain meaning of the interpreted word.[81]

A less typical and thus perplexing situation arises when both parties to a dispute refer to the same interpretive canon. For instance, the resolution and the author of the dissenting opinion agreed on the result of the linguistic interpretation conducted using the legal language canon but differed in their assessment of the outcome of this interpretation. The majority opinion considered this result sufficient, labelling the alternative approach using functional interpretation as "law-making". On the other hand, the dissenting opinion

[80] Wojciechowski, 2019, p. 329.

[81] Dissenting opinion of Judge M. Dożynkiewicz to resolution II FPS 7/09.

acknowledged the necessity of functional interpretation.[82] In another case, both parties relied on the same canon of legal language but arrived at different results. The application of the legal language canon in resolution II FPS 7/09 was illustrated above. The approach of the second judge who wrote a dissenting opinion to this resolution can also be characterised as employing the canon of legal language, albeit in a different manner. The judge referred to the provision to which the interpreted provision made reference, considering it to be a kind of legal definition constructed to "emphasise the essential feature of the action taken", and concluded that this very provision "contains indications reflecting the sense (meaning) of the autonomous concept of 'issuance of an interpretation'."[83]

8.2. Oppositions within the Framework of Systemic Interpretation

In cases involving disputes where systemic interpretations were identified, it was confirmed that, in most instances, the parties involved do not employ the same canons of interpretation under this method. Examples of discrepancies within the framework of systemic interpretation can be observed in the following pairs:

- Divergent assessment of the regulation in question to its compliance with EU law (resolution)[84] versus allegations of inconsistency with other laws and moral principles (dissenting opinion);[85]
- Emphasis on the primary principle of taxpayer liability (resolution)[86] versus a declaration to refrain from interpreting the provision without considering provisions on the tasks of the administrative judiciary (dissenting opinion);[87]
- Interpretation of a legal provision with reference to constitutional regulations (resolution)[88] and the application of the *in dubio pro tributario* principle, along with the rejection of the relationship between the statutory institution and the constitutional principle of property protection (dissenting opinion);[89]
- Rejection of the interpretation outcome due to a violation of the equality principle (resolution)[90] and the speediness of proceedings principle as the criterion for assessing the correctness of the interpretation made (dissenting opinion).[91]

[82] Majority opinion to resolution I FPS 4/09

[83] Dissenting opinion of Judge Kmieciak to the resolution II FPS 7/09. The provision that the judge considered to be a kind of legal definition read: "Notice of a revised individual interpretation shall be served on the entity to which the interpretation was issued in a given case."

[84] Resolution I FPS 4/09.

[85] A dissenting opinion of Judge M. Kołaczek to the resolution I FPS 4/09.

[86] Resolution I FPS 7/07.

[87] A dissenting opinion of Judge M. Niezgódka-Medek to the resolution I FPS 7/07.

[88] Resolution I GPS 1/11.

[89] Dissenting opinion of Judge R. Batorowicz to the resolution I GPS 1/11.

[90] Resolution I OPS 4/09.

[91] Dissenting opinion of the Judge J. Runge-Lissowska to resolution I OPS 4/09.

The above juxtapositions, resulting from the pairing of these manifestations of systemic interpretation, may imply that they are mutually incompatible. However, in most cases, this is not the case, as the displays are considered "out of context", meaning their incompatibility may stem solely from the contrasting conclusions they aim to justify. It also appears that the incompatibilities between manifestations of systemic interpretation conducted by different interpreters are less pronounced compared to those seen in linguistic and purposive interpretation.

8.3. Interpretive Oppositions within the Framework of Teleological Interpretation

The number of canons governing teleological interpretation, as examined in most legal theory studies, deviates significantly from the number of rules pertaining to linguistic and systemic interpretation. There is a notable scarcity of rules in the former category at least in Polish discourse on legal interpretation. Consequently, it was anticipated that within the context of teleological interpretation, interpretive oppositions would arise not due to the adoption of distinct canons within this type of interpretation, but rather in terms of teleological reasoning. This mode of reasoning comprises of two premises: first, the reasoner possesses a goal (referred to as "g") and believes that a particular tool (denoted as "α") is a suitable means of achieving goal g. Based on this foundation, the reasoner chooses α.[92] With regard to a legal text, the reasoning unfolds as follows: premise 1 (P(1)) asserts that legal provision R is directed towards goal P, while premise 2 (P(2)) posits that the meaning M of the legal provision represents the means to attain goal P (teleological premise). Consequently, the conclusion (C) is that meaning M should be adopted. Disagreements that arise within this framework usually concern not the varying purposes ascribed to the legislator, but rather the question of which meaning of a legal provision most effectively realises that purpose.

The resolution of such a question often takes the form of a pair of assertions. One assertion contends that a particular interpretation of a provision of a statute violates its intended purpose, while the other maintains that the purpose remains intact. For example, such a situation occurred in a resolution (reference) where the divergence between the majority opinion and the dissenting opinion centred around whether a specific procedural action contravened the provision's purpose of objective and impartial adjudication.[93] In cases where the judicial dispute does not revolve around ascertaining the *ratio legis* of a given provision but rather the teleological premise, it may be possible to classify the opposing positions as "liberal" or "restrictive". In this context, "liberalism" denotes a tendency to gradually relax the requirements stemming from a particular value, while a

[92] Sartor, 2010, p. 183.

[93] Resolution I OPS 3/05.

"restrictive" approach entails upholding and reinforcing the existing requirements emanating from a given value.[94]

In some instances, determining that judges do not actually differ on the first premise of teleological reasoning necessitates additional reconstructive procedures. Take, for instance, a dispute over the interpretation of procedural rules. Here, the majority opinion posited that the purpose of the interpreted statutory provisions was to safeguard the right to a fair trial. In contrast, the dissenting opinion argued that the purpose of those provisions were "the efficiency of the proceedings" and "the discipline of the body". Yet, if one accepts that "streamlining the pending proceedings" and "disciplining the state authority" are manifestations of the right to a fair trial, then the incompatibility between the reasoning of the resolution and the dissenting opinion becomes evident at the level of the second premise of practical reasoning, namely the teleological premise.

9. Unitary and Bipolar Disputes and Teleological Interpretation

By considering the concepts of bipolar and unipolar disputes discussed earlier in relation to disputes involving the teleological premise, it might initially appear that the latter are always unipolar in nature. However, it becomes evident that the presence of a dispute concerning the interpretation of a teleological premise does not automatically classify it as unipolar. In certain cases, despite the agreement between the majority opinion and the dissenting judge regarding the *ratio legis*, the dispute can still be categorised as bipolar. For instance, in one resolution (II OPS 1/10), the majority opinion and the dissenting judge concurred on the purpose of the interpreted provisions, which was the protection of agricultural and forest land.[95] Nevertheless, the dispute can be understood as a clash between the value of safeguarding the independence of local self-government (represented in the resolution) and the value of upholding an individual's property rights (expressed in the dissenting opinion). Thus, a bipolar dispute does not necessarily arise solely from a divergence in the *ratio legis*. The values that enable the classification of a particular interpretive position as compatible or incompatible with a given dispute may differ from the interpreters' stated objectives for a given legal text. Additionally, it should be emphasised that no discernible increase in the significance of purposive argumentation was observed in cases considered as interpretational in the strong sense.

[94] The study had a purely qualitative nature and was conducted on a small sample, but it is worth noting that in those cases where such descriptions could be applied, dissenting judges acted as "advocates" of a particular value, while the majority opinions tended to be more "liberal".

[95] Resolution II OPS 1/10.

10. Conclusion

The article attempted to identify reasons for disagreement in selected Polish Supreme Administrative Court resolutions. The analysis focused on the rules of interpretation encompassing the traditional triad of linguistic, systemic, and teleological arguments. The initial outcome of the study was the distinction between interpretive oppositions in a weak and strong sense (axiological opposition). However, this differentiation did not translate into a discernible pattern of utilising canons of interpretation within the examined sample.

An explanation for this could be the limitation of the study to the administrative court, where cases with a clear ideological significance are considerably fewer compared to, for instance, the constitutional court. By distinguishing between types of interpretative opposition, hypotheses can be formulated for potential future research, such as investigating whether the frequency of references to linguistic canons increases in cases of a technical nature. Another research question that could be formulated in future research is whether the number of teleological arguments rises in other courts where strong interpretative opposition takes place.

In cases labelled as manifestations of axiological opposition, no increase was observed in the significance of teleological interpretation. However, it is crucial to note that the study was qualitative one, and a significant outcome of the analysis is the observation that the values used to characterise a particular interpretive position may not necessarily align with the objectives of the interpreted provisions. The explanation for this differentiation can be attempted by distinguishing between an external and internal perspective. The external perspective entails an outlook from an entity that may not necessarily be concerned with the manner of resolving a particular case. Their attitude is descriptive and cognitive. Law, from this standpoint, is perceived as a cultural phenomenon. In contrast, the internal perspective is typically legal and practical, focused on the objective of ascertaining the legislator's intentions and resolving the case.

Before analysing the opinions justifying divergent conclusions, it was expected that clear interpretive oppositions would emerge. However, this expectation was not confirmed. While instances of classical opposition between linguistic and teleological rationales were identified, articulating such oppositions proved challenging due to the manner in which the positions were substantiated. The study did not identify cases in which both the court's position and the dissenting judge's position were solely supported by a single type of rationale. Nonetheless, there were instances in which one interpreter justified its stance through cumulative-form arguments, while the opposing view could be reduced to a single-form argument. MacCormick and Summers argue that the reasons for presenting all the arguments in full may be stylistic, institutional, or political/constitutional when courts aim to demonstrate that their decision is grounded in robust legal rationales

rather than ideological preferences of the judges.[96] In the case of administrative courts in Poland, it is difficult to speak of political/constitutional reasons since the vast majority of cases they handle are of a technical nature.[97] Nevertheless, the manner of constructing justifications depending on the type of interpreted provisions (e.g., tax, construction, procedural) could be an interesting subject for further research.

Another significant challenge in describing interpretive oppositions arises from the assumption that not every argument equally supports the conclusion. In other words, the mere observation of teleological or linguistic interpretation does not imply that each carries the same weight.[98]

The proposition concerning the relative force of individual argumentation in justifying an interpretive position necessitates stronger empirical evidence. If confirmed, this would constitute a significant argument in the ongoing discussion within the Polish legal theory concerning the so-called sequentiality of interpretation. There are two stances in Polish legal theory in this regard. The first postulates a specific order of interpretive steps as an antidote to the inconsistency of canons.[99] Such an approach to interpretation can be likened to a path where successive stages are delineated by distinct canons of linguistic, systemic, and teleological interpretation.[100] The second position, ascribed to J. Wróblewski's theory of legal interpretation, distinguishes canons of the first and second degree. The canons of the first degree encompass linguistic, systemic, and teleological canons of interpretation. The role of the canons of the second degree is to resolve situations where the application of the canons of the first degree leads to divergent outcomes. Adopting the distinction between the two levels of canons leads to interpretation as a discursive process.[101] The observation of the relative weight of individual arguments presented by judges would constitute further confirmation that the sequential vision of interpretation remains merely a maximalist postulate, and a more appropriate depiction involves considering competing reasoning and argumentative rationales.

The thesis regarding the variable weight of interpretative arguments is also consistent with the concept of interpretative canons as heuristics.[102] Let me recall that, according

96 MacCormick and Summers, 2016, p. 527.

97 In the context of the ongoing crisis in the Polish judiciary since 2016, characterised by issues at the level of the Constitutional Tribunal (see: Bricker 2020) and the activities of the National Council of the Judiciary, deemed to be established in an unconstitutional manner, cases have emerged within administrative courts where echoes of this crisis resonate.

98 Mullins, p. 73.

99 Zieliński, 2008, p. 296.

100 Traces of sequentiality can also be observed in Mullins, 2003, p. 6-9, who discusses a "two-step framework", where the initial step entails the analysis of the statutory text, and if the text is not deemed clear, "then a court must go further". *Ibid*. p. 9.

101 Płeszka, 2010, p. 167.

102 Mullins, 2003, p. 50.

to the heuristic strategy, an entity considers only certain possibilities that it believes will help in problem-solving. Legal interpretation, however, is an exceedingly intricate activity involving numerous variables. Consequently, judges often operate under conditions of uncertainty.[103] Mullins explicitly discusses the diverse potency of individual concepts and tools of statutory interpretation, which changes depending on the case.[104] The heuristic strategy of selectively employing canons stems from the understanding of interpretation as a mental processing endeavour. According to this concept, this cognitive activity does not adhere to rigid artificial rules akin to legal statutes and is likely beyond the control of such rules.[105] For this reason one cannot expect high level of predictability in the process of interpretation.

The varying weight of interpretative arguments is not an element of justification easily accessible in the reading. It demands a thorough analysis and methodology. This fact alone may support the criticism of canons as failing with limiting of judicial discretion.[106] The most frequently repeated criticism aimed at interpretative canons pertains to their indeterminacy and the possibility of applying different canons to the same provision.[107] The compilation made by Llewellyn encompassed maxims cited by courts in various cases. Their inconsistency was thus potential in the sense that the aim was to demonstrate that a judge could choose one of two mutually incompatible canons. It can be argued, therefore, that every interpretative regime contains the potential for disagreement. The situation of submitting a separate opinion is an exemplary instance of disagreement, and one could expect that in the analysed sample, similar "thrusts and parrys" could be identified, as Llewellyn indicated in reference to his legal system. However, the practice of judicial disagreement analysed in this article turned out to be more complex. Indeed, cases were identified where an application of a different rule of linguistic interpretation (e.g., the classic opposition between plain meaning rule and legal meaning rule) was probably the reason for disagreement. Inconsistencies were also recognised in the realm of teleological interpretation and the underlying teleological premise.

Nevertheless, a cautious conclusion suggests that there is another reason for interpretive disagreements. It lies not in different canons within the same interpretive method but in distinct sets of legal provisions and principles that form the basis for interpretive positions. Even if these sets are similar for both sides of the dispute, the reason of disagreement seems to lie in the emphasis one side puts on the different provisions of a statute, that he/she eventually interprets. To describe this situation, it will be useful to employ Wróblewski's category of "decision of validity", which refers to a fractional deci-

[103] *Ibid.,* p. 54.

[104] *Ibid.,* p. 72.

[105] *Ibid.*, p. 42.

[106] Brudney and Ditslear, 2005, p. 7.

[107] Llewellyn, 1950, p. 401.

sion at his model of the judicial application of law. This type of decision (not in formal sense) determines which rules the court treats as valid and can be utilised as arguments justifying a decision.[108] It means that disagreeing judges adopt different premises, i.e. the content of their validation decisions differ, and these premises are justified through interpretive canons. Such a practice of justifying their positions may lead to the conclusion that judges are more focused on the outcome of their decision rather than the interpretative methodology through which they arrived at it.[109] Viewing this situation from a different, broader perspective, it can be regarded as an example of the circumstance described by Descartes in "Discourse on the Method", where "diversity of our opinions" arises "solely from this that we have different ways of directing our thoughts, and do not take into account the same things".[110] To the extent that differences in opinions stem from varying premises, such as utilising slightly different provisions of the statute, the plausibility of the thesis of indeterminacy of interpretative canons diminishes somewhat.

In conclusion, it is worth noting that the manner of utilising interpretative canons may vary depending on the problem being addressed. This applies not only to cases where the role of linguistic canons increases due to the technical dimension of the matter.[111] The role of linguistic canons may also diminish in situations where the legal issue cannot be formulated as questions such as "what does word X mean?" or "does word X signify situation Y?" In such cases, there is a significant probability that maxims of linguistic interpretation will not play a pivotal role. An exemplary question that appears to trigger alternative lines of argumentation, including methods of interpretation other than linguistic, could be one concerning the procedural consequences of a particular action or its legal character. Identifying such situations and creating their typology is one of the many topics that can be explored in future research.

This work was supported by the Polish National Centre of Science. Grant number 2014/13/D/HS5/03399.

[108] Wróblewski, 1992, p. 85.

[109] Cross, 2009, p. 141.

[110] Descartes, 2006, p. 5.

[111] Brudney and Ditslear, 2005, p. 71.

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Ljubljana Law Review
2023, Vol. LXXXIII

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Znanstveni članek
UDK: 343.97:159:94(4)"1939/1945"
DOI: 10.51940/2023.1.35-58

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Pravnik kot notranji emigrant v hudodelskem pravnem sistemu

Povzetek

Avtorja analizirata vprašanje, kakšno je oziroma bi moralo biti delovanje pravnika v hudodelskem pravnem sistemu. Pri tem kot vidik uporabljata po drugi svetovni vojni pogosto uporabljan izgovor »notranjega emigranta«. Notranji emigrant je oseba, ki fizično ostane na svojem mestu, vendar se zato, ker ne odobrava okolja, v katerem je, od njega »odmakne navznoter«. Pri tem je lahko njegovo notranje neodobravanje navzven izraženo na različne načine: od konformnega delovanja do pasivnosti. Pravi notranji emigrant čuti napetost zaradi notranjega konflikta med svojimi vrednotami in pravnimi zahtevami, vendar navzven kljub notranjemu konfliktu deluje konformno. Tudi visoki nacistični sodelavci so se po drugi svetovni vojni pogosto proglasili za notranje emigrante, ker so oziroma naj bi imeli zadržke do nacističnega sistema. Prek analize zagovorov treh obsojencev v povojnem nürnberškem sojenju pravnikom (*Juristenprozess*) avtorja analizirata, kakšne so bile drže pravnikov do zločinskega pravnega reda. Avtorja ugotavljata, da lahko celo pri nekaterih vodilnih nacističnih pravnikih najdemo elemente notranje emigracije. Jih to dela manj krive? Za konec se s Thomasom Mannom vprašata, kakšno je moralno delovanje pravnika v takih časih. Ali ni morda (poleg upora) edino moralno dejanje – nedelovanje?

Ključne besede

Notranji emigrant, hudodelski pravni sistem, sodnik, nacistična Nemčija

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V kakšnih groznih časih živimo, ko pogovor o
drevesih skorajda predstavlja kaznivo dejanje,
ker je enak tišini o toliko (vojnih) grozodejstvih.
B. Brecht, 1938 (*An die Nachgeborenen*)

1. Uvod

Še pred nekaj leti je bil pojem notranjega emigranta zgodovinska kurioziteta, ki se je nanašala na razprave iz časa med drugo svetovno vojno in po njej, danes pa ta pojem postaja vnovič aktualen. Ne samo, da nas je zadela epidemija, ki nas je izolirala in vsaj deloma potisnila v notranjo emigracijo, priča smo tudi vnovičnemu vzponu populističnih gibanj, ki mnoge silijo, da ostanejo v okolju, ki ga ne odobravajo.

Emigrant je nekdo, ki se izseli iz svoje države in odide v tujino (lat. *ex* + *migrare*: iz + seliti se).[1] Razlogi za izselitev so lahko različni (ekonomski, verski, politični), praviloma pa gre za željo izboljšati svoj življenjski položaj. Vendar se lahko emigrant, praviloma drugače kot begunec, v svojo izvorno domovino vedno vrne.[2] Besedna zveza »notranji emigrant« (angl. *inner emigrant*, nem. *der innere Emigrant*) pa označuje nekoga, ki geografsko sicer ostane na svojem mestu, vendar se od svojega okolja, pa najsi bo to domovina ali ožje družbeno okolje, preseli oziroma »umakne navznoter«.[3] Gre torej za osebo, ki fizično sicer ostane v določeni realnosti, vendar pa se od nje disociira in do nje vzdržuje kritično distanco.

Pojem notranjega emigranta se na prvi pogled lahko zazdi kot oksimoron, saj, kot pravi Klapper, odraža kontradiktornost. Opisuje namreč nekoga, ki se je na neki način izselil iz svoje države, čeprav je fizično še vedno v njej.[4] Izraža torej fizično prisotnost in duhovno nasprotovanje. Cilj take notranje emigracije je ohranitev notranje moralne in osebne integritete kljub življenju v »tujem« okolju. Po drugi strani pa je ta navidezni paradoks teoretsko zanimiv tudi za pravo in kriminologijo, saj kaže globljo resnico odnosa naslovnikov do pravne norme oziroma pravnega reda. Predvsem pa je relevanten za pravnike kot nosilce in izvrševalce pravnega reda. Postavlja nam namreč vprašanje, kakšne so pravnikove moralne dolžnosti v hudodelskih pravnih redih.

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1 Slovar slovenskega knjižnega jezika emigranta definira kot osebo, ki se izseli v tujino, zlasti iz političnih vzrokov.

2 Drugače kot emigranti so begunci prisiljeni zapustiti svojo domovino zaradi nevarnosti, ki jim grozi. Glej recimo UNHCR viewpoint: ‚Refugee' or ‚migrant' - Which is right? - World | ReliefWeb, <https://reliefweb.int/report/world/unhcr-viewpoint-refugee-or-migrant-which-right?gclid=EAIaIQobChMIraj3lcTY_AIVREiRBR3G5gBtEAAYAiAAEgIpLPD_BwE>.

3 Zdi se, da je ta izraz prva uporabila francoska pesnica in pisateljica Delphine de Girardin, ko je leta 1839 v svojih pismih opisovala preobrat v odnosu francoske aristokracije do konservativnih vrednot. Girardin, 1860, str. 249.

4 Klapper, 2015, str. 32.

2. Zgodovinski kontekst: pisatelji kot notranji emigranti

Oglejmo si najprej paradigmatični primer, ki bo zaradi svoje zgodovinske umeščenosti v okoliščine, ki so bile prignane do skrajnosti, jasno izrisal, za kaj gre. Polemiko o notranjem emigrantu je maja 1945 nehote sprožil nemški nobelovec Thomas Mann, ki je pred nacisti leta 1933 najprej pobegnil v Švico in potem v ZDA.[5] Prek londonskega BBC je iz svoje nove domovine od jeseni 1940 pošiljal svoje nagovore nemškemu ljudstvu. Ob koncu vojne leta 1945 je, pretresen ob fotografijah nagrmadenih trupel, ki so jih zavezniki našli v osvobojenih koncentracijskih taboriščih, svoje sonarodnjake opozoril na to, da vse to dogajanje ni moglo biti delo peščice zločincev, temveč da krivda zadeva vsakega od njih, »vse, kar je nemško, vsakega, ki govori nemško, piše v nemškem jeziku, in vsakega, ki je (takrat) živel v Nemčiji«.[6]

Sledili so polemični odgovori nekaterih danes pozabljenih nemških pisateljev,[7] ki so, čeprav niso bili nacisti, ostali v Hitlerjevi Nemčiji in še naprej objavljali svoja literarna dela.[8] Pozneje je iz tega izšla vsaj leto dolga intenzivna razprava o vprašanju, kdo je bil pravi domoljub, ki je imela posledice za vprašanje nemške (kolektivne) krivde še desetletja.[9]

Za naš namen je zanimiv odgovor, ki ga je v svojem odprtem pismu na Manna naslovil nemški pisatelj Frank Thiess. Zavzel je namreč povsem nasprotno stališče kot Mann – tiste, ki so ostali, in s tem tudi sebe, je opredelil kot moralno superiorne in jih razglasil za »notranje emigrante«.[10] V tej polemiki je izraz notranji emigrant postal osrednji predmet razprav.[11] Mann je na te trditve odgovoril zelo ostro in izjavil, da vsa dela, ki so izšla pod Hitlerjevim režimom, zaudarjajo po krvi in sramoti (nem. *Blut und Schande*).[12]

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5 Mann je že leta 1933 emigriral v Švico, leta 1939 pa v ZDA. Kot že v uvodu knjige poudarja Palmier, je v letih od 1933 naprej potekal pravi eksodus pisateljev, pesnikov in intelektualcev iz Nemčije. Nekateri niso zapustili svoje domovine zgolj zato, ker so bili ogroženi, temveč zato »ker niso hoteli postati sostorilci, čeprav samo s tišino« (prevod, če ni drugače označeno K. Š. S.). Palmier, 2006, str. 1–2.

6 Andrei S. Markovits, Beth Simone Noveck, West Germany, (T. Mann, BBC, 8. maj 1945), cit. po Wyman in Rosenzveig, 1996, str. 413.

7 Pozneje je razprava zajela tudi pisatelje, kot so Alfred Döblin, Herman Hesse, Richard Huch in Max Frisch.

8 Podrobneje o tem glej Brockmann, 2003.

9 Prav tam, str. 21–22.

10 T. Mann, Genesis of a Novel, Secker & Warburg, London, 1961, str. 114, cit. po Palmier, str. 384.

11 Nikakor pa ni bil takrat ta koncept prvič uporabljen. S podobnimi izrazi so sami sebe imenovali številni pisatelji, ki so v Nemčiji ostali po letu 1933 in so že takrat izražali to odtujenost od nacističnega režima. Pisatelj Jochen Klepper je na primer zase dejal, da se v Nemčiji počuti v duševnem izgnanstvu, Ernst Barlach pa je svoje življenje v nacistični Nemčiji opisal kot »življenje emigranta v svoji lastni deželi«. Cit. po Palmier, 2006, str. 125. Glej tudi Grimm, 2003, str. 30–32.

12 T. Mann, »Warrum ich nicht zurückkehre«, Augsburger Anzeiger, 12. oktober, 1945, cit. po Pamier, 2006, str. 123. Od te trditve se je pozneje sicer distanciral.

Vidimo torej lahko, da je vsak dopisovalec oblikoval radikalno različno podobo pisateljev, ki so ostali v nacistični Nemčiji. Thiess jih je videl kot superiorne junake, ki niso zapustili bolne domovine, so se pa od te bolezni ogradili in šli v notranjo emigracijo. To, da so ostali v Nemčiji, naj bi bilo bolj moralno in pošteno kot fizična emigracija.[13] Njihovo notranje stanje naj bi do sistema vzdrževalo distanco, ki je podobna zunanji, fizični emigraciji, kar naj bi nakazovalo na distanciranje od zločinskega režima. S tem, ko so ostali, pa so vendarle delili trpljenje svoje domovine in njenih prebivalcev, fizični emigranti pa naj bi se temu izmaknili.[14] Drugi, Mann, pa vidi vztrajanje v nacistični Nemčiji oziroma celo kulturno delovanje v takih časih kot delovanje, ki je okuženo s krvjo in sramoto. Po njegovem mnenju bi torej pisatelji morali bodisi emigrirati ali pa vsaj ne bi smeli ustvarjati in združiti svoje ustvarjalnosti z zločinskim sistemom. Morali bi se zagrniti v kulturni molk, saj je bila po njegovem mnenju umetniška nedolžnost v tistih časih nemogoča.[15]

2.1. Odnos sistema do pisateljev in pogled pisateljev na sistem

Na pravni red praviloma gledamo z vrha navzdol, kar pomeni, da zavzamemo gledišče pravnega reda oziroma njegovih pravil in gledamo na njegove naslovnike s ptičje perspektive. S tega zornega kota se mora posameznik pač ukloniti pravnemu redu. Tak pogled v teoriji prevladuje. Pogled notranjega emigranta pa je nasproten. Gre za pogled s subjektivne, žabje perspektive in za vprašanje, kako naslovnik zakona gleda »navzgor« na pravni red.

S stališča pravnega sistema (ptičja perspektiva) lahko mnenjske voditelje, kot so pisatelji, umetniki, znanstveniki, filozofi in javne osebnosti, ki niso emigrirale iz Hitlerjeve Nemčije, v grobem razvrstimo v tri skupine:

1. tiste, ki so bili želeni kot avtorji, saj so s svojo literaturo aktivno podpirali nacistični režim in njegovo ideologijo;
2. tiste, ki so lahko objavljali neideološko klasično beletristiko (na primer biografije);
3. tiste, katerih dela niso smela izhajati.[16]

Ker pa nas bolj zanima notranji odnos avtorja do sistema, lahko s stališča subjekta (žabje perspektive) ugotovimo, da so obstajale v tem pogledu različne skupine pisateljev (in, analogno, drugih javnih osebnosti).

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[13] Brockmann, 2003, str. 15.

[14] F. Thiess, cit. po Brockman, 2003, str. 18.

[15] Mann zapiše: »Prepovedano je bilo, nemogoče je bilo ustvarjati ‚kulturo' v Nemčiji, ko smo vsi naokoli vedeli, kaj se dogaja; to je pomenilo polepševanje pokvarjenosti in olepševati kriminal.« T. Mann, Die Lager, Gessamelte Werke, Vol. 12, Fischer, Frankfurt na Majni, 1960, str. 958, cit. po Brockmann, 2003, str. 20. Podobno so se slovenski avtorji med drugo svetovno vojno zagrnili v kulturni molk.

[16] Glej Klieneberger, 1965.

V prvo kategorijo lahko razvrstimo tiste pisatelje, ki so se poistovetili z nacistično ideologijo, jo tudi notranje podpirali in hkrati tudi navzven delovali tako, da je bilo njihovo stališče razvidno (pisali knjige, prežete z nacistično ideologijo ipd.). Pri njih ni bilo nikakršnega neskladja med notranjim stanjem in zunanjo manifestacijo tega stanja (pisanjem, delovanjem). Bili so notranje in zunanje konformni z režimom.

V drugi kategoriji so tisti avtorji, ki so imeli nekakšne zadržke do oblasti, pa so kljub temu objavljali dela, v katerih so (bolj ali manj zavzeto) pritrjevali nacistični ideologiji. Pri njih je sicer (včasih in na nekaterih področjih) prihajalo do neskladja med njihovimi notranjimi stališči in zunanjim delovanjem, vendar pa je bilo njihovo navzven opazljivo delovanje konformno. Zunanji opazovalec, ki ne bi imel vpogleda v njihovo psiho, ne bi mogel razlikovati med njimi ter tistimi, ki so nacizem tudi intimno podpirali (prva skupina).

V tretji skupini so avtorji, ki so imeli zadržke do oblasti in njene ideologije, pa so se zunanji manifestaciji tega izognili tako, da so sicer objavljali svoja dela, vendar so se v njih izogibali ideološkim temam (pisali so recimo lirično poezijo, neideološko leposlovje).[17] Včasih so poskušali skozi taka dela izražati kritiko nacizma.[18] Notranje vrednostne konflikte so ohranili zase in delovali na nevtralnem območju neideološkega pisanja. Nanje bi lahko naslovili moralni očitek, češ da so *tacite*, s tem, ko so še vedno delovali, dajali legitimnost celotnemu sistemu.[19]

Četrto kategorijo sestavljajo tisti pisatelji, ki so svoje nestrinjanje z režimom izražali tako, da so obmolknili.[20] Imeli so notranje vrednostne zadržke do režima, njihovo nestrinjanje pa je bilo izraženo s pasivnostjo. Zagrnili so se v samozapovedani kulturni molk, se zabubili v nekakšen notranji eksil. Čutili so notranji konflikt in ker niso mogli izraziti svojih pravih misli in vrednot, so molčali.

V peti skupini pa so tisti pisatelji, ki so se v svojem pisanju aktivno upirali nacistični ideologiji – odporniški pisatelji. Pri njih ni bilo nikakršnega notranjega konflikta med vrednotami in delovanjem, saj so tvegali svoja življenja, da so živeli v skladu s svojimi vrednotami.

Kot vsako kategoriziranje je tudi najina razdelitev nekakšno nasilje nad realnostjo. V resnici so se pisatelji znašli v različnih okoliščinah: nekateri sploh niso smeli objavljati, nekateri so pisali samo zase, spet drugi so poskušali objavljati v tujini, pod psevdonimom, tretji so se poskušali preživljati z nekakšno eskapistično literaturo in podobno,

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17 Glej recimo Schäfer, 2003.

18 Riordan, 2003, str. 152–167.

19 Glej Riordan, 2003, str. 152–167. V prispevku opozarja na omejene možnosti literatov, ki so pisali nenacistično literaturo, da skozi taka dela izražajo svoj odpor do režima.

20 Avtorja, kot sta bila Gottfried Benn in Ernst Jünger, sta preživela vojna leta v Nemčiji z občutki žalosti, osamljenosti in sovražnosti do režima. Palmier se sprašuje, ali je to bilo dovolj, da ju lahko imenujemo notranja emigranta. Palmier, 2006, str. 129. Brechtova prijateljica Marieluise Fleisser skozi celotno nacistično obdobje iz sovraštva do nacistov ni objavila niti besede. Palmier, 2006, str. 133.

nekateri so morda bili avtentično neideološki in so pisali podobno literaturo kot pred vzpostavitvijo režima.[21]

2.2. Kdo je notranji emigrant?

Odgovor na vprašanje, kdo od zgoraj naštetih je notranji emigrant, ni preprost. Tudi v teoriji se je razumevanje, koga zajema ta pojem, spreminjalo.

Brekle je denimo trdil, da lahko notranje emigrante med pisatelji delimo na tiste, ki so pisali tako imenovano notranje[22] nemško nefašistično literaturo (naša tretja skupina), in tiste, ki so bili aktivni uporniki in pisali notranje nemško protifašistično literaturo (naša peta skupina).[23] Grimm je trdil, da je taka kategorizacija preozka, saj pisatelje lahko razvrščamo na drsno lestvico, ki zajema vse: od aktivnega upora do pasivnega zavračanja nacizma in molka. Hkrati je pokazal, da so protifašistično literaturo v resnici lahko pisali samo pisatelji v fizični emigraciji, medtem ko je bilo znotraj Nemčije to skorajda nemogoče.[24] Prepričan pa je, da lahko med notranje emigrante štejemo samo tiste, ki so svoje nestrinjanje aktivno izražali, torej samo našo peto kategorijo avtorjev.[25] Tudi za Klapperja je »zunanji kriterij« ključen. Da bi lahko uvrstili nekega pisatelja med notranje migrante, se zahteva nedvoumna in izkazljiva zavrnitev oportunizma; zanj samo molk ni dovolj.[26]

Berghahn je bil precej blažji. Preučeval je novinarje, ki so delovali v Nemčiji. Tiste, ki so se deklarirali kot notranji migranti, je razvrščal na spekter med nejevoljnim sodelovanjem in pasivnim odporom; vštel je torej tudi našo drugo skupino.[27] Glede na stališče Thomasa Manna naj bi veljalo, da je vsakdo, ki je kakorkoli objavljal v nacistični Nemčiji, deloval v zločinskem sistemu in ga s tem na nek način legitimiral. Molk (in seveda upor) je bil zanj edino moralno dejanje, saj, kot je bilo že rečeno, zanj s krivdo neomadeževana umetniška nedolžnost v tistih časih ni bila mogoča.[28] Njegova kritika je seveda letela predvsem na tiste, ki so v času nacizma kljub vsemu objavljali, pa čeprav neideološka besedila.[29] Tako

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[21] Klapper opozarja na poznejše raziskovalce, ki so v te, dokaj preproste enačbe začeli vnašati tudi realne dejavnike, ki so vplivali na pisatelje v tretjem rajhu. Klapper, 2015, str. 40–41.

[22] Notranje se v tem kontekstu nanaša na to, da so pisatelji ostali v Nemčiji in delovali »znotraj« Nemčije.

[23] Cit. po Grimm, str. 33. Podobno Schnell, glej Riordan, 2006, str. 152.

[24] Glej Palmier, 2006, str. 129–132.

[25] »Kdorkoli je preprosto ostal tiho in se obrnil stran, na noben način ni izražal upora […] Le prepoznavna opozicijska drža si zasluži ime notranje emigracije.« Grimm, str. 33. Glej tudi Klapper, 2015, str. 38.

[26] Klapper, 2015, str. 38.

[27] Volker, 2019, str. 11.

[28] Brockmann, 2003, str. 20.

[29] Kot analizira Brockmann (2003, str. 20), je v svoji jezi popolnoma zanemaril odporniško literaturo, ki je tudi v tistem času obstajala.

bi Mann med notranje emigrante verjetno štel samo četrto in peto kategorijo pisateljev. Nekateri pa v celoti zanikajo pojavnost fenomena notranjega emigranta.[30]

Upoštevajoč samo »notranji kriterij«, bi lahko med notranje migrante uvrstili avtorje iz druge, tretje ter tudi četrte in pete skupine. Vsak od njih je trdil, da je imel notranje zadržke do režima. Pa ni morda tako gledanje preveč benigno, ker so med temi skupinami bistvene razlike? Za notranjega emigranta je v resnici značilna neka notranja napetost, ki nastaja zaradi konflikta med njegovimi vrednotami in zahtevami zunanjega sveta, zato se nedvomno za ta status lahko poteguje samo tisti, ki je imel v času nacističnega režima *v resnici* zadržke do vladajoče ideologije in je ni podpiral. Kako pa se je to izrazilo navzven, pa je povsem drugo vprašanje.

Očitno je notranji kriterij težko izkazljiv, izmuzljiv in zlahka retrospektivno reinterpretiran. Med prvo in drugo skupino avtorjev je gotovo težko razlikovati. V njihovem navzven vidnem delovanju ni nikakršne razlike. Razlika naj bi bila samo v njihovem (praviloma samozatrjevanem) notranjem stanju. Nekateri so svoje dvome morda izrazili svojim bližnjim,[31] nekateri pa morda nikoli, spet tretji pa jih morda sploh niso imeli. Tako so nekateri avtorji, ki so objavljali v tistem času, po padcu Hitlerjevega režima celo trdili, da so v svojih delih prikrito oziroma subtilno kritizirali vladajočo ureditev.[32] Glede tega je Hannah Arendt sarkastično pripomnila, da je bila pri nekaterih ta »kritika« tako subtilna, da je bila v celoti neprepoznavna. Hkrati je okrcala tudi tiste, ki so imeli visoke položaje v tretjem rajhu, pa so po vojni sami sebi in svetu začeli dopovedovati, da so v sebi ta režim ves čas zavračali. Spomnila se je tudi na znanca, ki se je identificiral kot notranji emigrant. Zanj je sarkastično pripomnila, da je gotovo verjel lastni iskrenosti, ko je trdil, da so se bili taki kot on prisiljeni izkazovati kot še bolj zagreti nacisti kot pa zgolj običajni nacisti. Samo tako so lahko obdržali »svojo skrivnost«.[33] Tudi zanjo je bila edina mogoča moralna drža za notranjega migranta drža popolne pasivnosti.[34] Danes se lahko ta pozicija zdi res najblažja mogoča oblika upora, vendar je bil lahko v času nacističnega režima že molk (brez aktivnega izkazovanja pripadnosti) poguben.[35]

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30 Recimo Berendsohn in Schonauer. Grimm, 2003, str. 28.

31 Zanimiv primer je bil nekdanji oficir in aristokrat Reck-Malleczwesen, ki je ostal v Nemčiji in je svoj odpor do nacističnega režima izražal v svojem zasebnem dnevniku. Palmier, 2006, str. 125–126.

32 Eden takih je bil recimo Hans Blunck, ki je po vojni svoja dela, ki so simpatizirala z nacizmom, skušal prikazati kot subtilno kritiko režima. Glej Klapper, 2015, str. 36.

33 Arendt, 1963/1965, str. 126–127, cit. po Parvikko, 2021, str. 201.

34 Prav tam, str. 202–203.

35 Grimm podrobno opisuje, kako malo je bilo dovolj, da je bil nekdo ubit ali interniran: ne dovolj zavzet dvig roke v hitlerjanski pozdrav, v literarnih delih pa najmanjša aluzija na kritiko sistema. Grimm, 2003, str. 34 in naslednje. Nekateri pisatelji so celo končali v taboriščih ali so bili preganjani. Palmier, 2006, str. 129–131.

2.3. Notranji emigrant in njegov odnos do prava

Gotovo lahko pod dežnikom ideje o notranjem emigrantu najdemo veliko različnih položajev in drž. Kot pokaže zgornja delitev v skupine, je prva razsežnost tega vprašanja notranji odnos do posameznega vprašanja (na primer ideologije), druga pa navzven viden (ali neviden) odraz tega notranjega odnosa. Morda je najbolj pravilno, da se osredotočimo na definicijo notranjega migranta kot nekoga, ki ima notranji odpor do režima, ki pa ga ne izraža navzven. Kot je bilo že rečeno, je namreč za notranjega emigranta najbolj značilna napetost, ki nastaja zaradi konflikta med njegovimi vrednotami in zahtevami zunanjega sveta. Pri uporniku (peta kategorija) namreč te napetosti ni. Upoštevajoč zgornjo definicijo, dobimo zanimiv pojav nekoga, ki navzven deluje povsem konformno. Notranji emigrant ima »intimni« problem s pravnim redom, obratno pa ne drži. Pravni red pasivnega notranjega migranta namreč ne zaznava kot kršitelja zapovedi, ker teh kršitev preprosto ni. Pusti ga pri miru. Včasih pa ga za tako držo celo nagrajuje.

V kakšnih položajih se lahko tako znajde pasivni notranji emigrant? Najhuje mu je takrat, ko sistem od njega zahteva nekaj, česar notranje ne odobrava. Lahko gre za zelo aktivno delovanje, kot je recimo spravljanje ljudi v plinske celice ali obsojanje Judov na smrtno kazen, ali pa za subtilnejše zahteve izražanja pripadnosti, kot je na primer izvajanje simbolnih gest: pozdravljanje, izobešanje zastav ipd.[36] Ko država od svojega državljana zahteva neki zunanji izraz njegovega notranjega odnos do veljavnega pravnega reda, doživlja notranji emigrant intimni konflikt. Izbirati mora med tem, da se bodisi podredi zunanjemu pritisku in ohrani notranjo distanco do tega dejanja ali pa sledi svojemu notranjemu imperativu in se upre zahtevi pravnega reda. V takem primeru opusti držo notranjega emigranta in postane upornik.[37]

Pravi notranji emigrant v primeru, ko sistem od njega zahteva aktivno dejanje pripadnost, ohrani masko konformnosti. Če tega ne bi naredil, bi odvrgel krinko notranjega emigranta, saj bi pokazal svoje prave vrednote. V primeru zapovedanega pozdrava bi se notranji emigrant, vreden svojega imena, podredil zakonu in položil dlan na svoje (sicer boleče) srce. V primeru nacistične Nemčije pa bi skupaj z drugimi dvignil roko v nacistični pozdrav.

3. Pravnik kot notranji emigrant

Za nas je morda bolj kot razprava o tem, kako naj v primeru bolne družbe deluje pisatelj, zanimiv razmislek o tem, kako naj v takem sistemu deluje pravnik. V teoriji

[36] Poznamo države, ki izvajanje neke simbolne, na zunaj prepoznavne geste prisilno zahtevajo. V ZDA na primer poznajo *The Flag Code*, ki ga je Kongres sprejel leta 1942. Ta med drugim predpisuje gesto, ko si med državno himno naslovniki z desno dlanjo prekrijejo prsni koš, kjer je srce.

[37] V zadnjih letih je prav protestno nespoštovanje zapovedane drže in namesto tega protestno klečanje ob igranju državne himne v ZDA predmet številnih kontroverz. S to potezo je začel Colin Kaepernick, igralec ameriškega nogometa.

glede na legitimnost in odnos do moralnih norm razlikujejo med tako imenovanimi hudodelskimi pravnimi sistemi[38] (angl. *wicked legal system*)[39] in legitimnimi pravnimi sistemi.[40] Kot paradigmatični primer hudodelskega pravnega sistema v literaturi nastopa pravni sistem nacistične Nemčije.[41] Gre za pravni sistem, v katerem je pravo uporabljeno kot instrument nemoralne politične ideologije.[42] Ti pravni sistemi so bili v svojem času praviloma formalnopravno legalni, tudi njihovi nosilci so na oblast prišli legalno, pa bi jim kljub temu danes velika večina človeštva odrekla vso legitimnost.[43]

Če se notranji emigrant, ki je umetnik, brez težav umakne v notranji eksil in bodisi ne deluje ali pa deluje na nekem ideološko nespornem področju, je realnost za pravnike, predvsem sodnike, v takem sistemu drugačna. Če hočejo opravljati svoje delo, se morajo podrediti pravnim normam hudodelskega pravnega sistema in k temu siliti tudi druge. Če ostanejo v sodnem poklicu, so torej prisiljeni v neke vrste kolaboracijo s hudodelskim režimom.[44]

Kakšne so torej implikacije položaja notranjega emigranta za sodnike? Če ne izstopijo iz svojega poklica in se torej ne zagrnejo v »pravni molk«, se lahko s hudodelskim pravnim redom bodisi identificirajo in pri tem ne čutijo nobenih notranjih konfliktov, ali pa bolj ali manj zvesto uporabljajo hudodelske zakone, vendar se od njih notranje distancirajo.[45] Ravnanje v skladu z zločinskim zakonom kljub zadržkom kaže na morebitnega notranjega emigranta, sledenje zunanjemu, zločinskemu pravnemu zakonu »po črki in po duhu zakona« pa pomeni prepričanega nacista, ki zločinske zakone izvaja, jih želi izvajati in je prepričan o njihovi vsebinski pravilnosti.[46]

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38 Lahko bi seveda uporabili tudi izraz totalitarni sistemi.

39 Glej recimo Dyzenhaus, 2010; in Ten, 1989.

40 Po kriterijih znamenite Radbruchove formule, bi to lahko izrazili kot zahtevo, da mora pravni sistem izpolnjevati vsaj neke minimalne kriterije pravičnosti, če si lahko zasluži oznako pravni in legitimen. Radbruch celo trdi, da je nacistični sistem uspešno uporabil pravni sistem za kriminalne namene. Cit. po Mertens, 2003, str. 279. Zanimivo pa je, da tudi Radbrucha označujejo kot nekoga, ki se je zatekel v notranji eksil, ko je bil odpuščen kot profesor prava v Heidelbergu. Haldemann, 2005, str. 164.

41 Podobno kot apartheid v Južni Afriki, sužnjelastniški sistemi, stalinistični režim ipd.

42 Dyzenhaus, 2010, str. vii.

43 Kot pravi Dyzenhaus, *rule by law* ne more obstajati brez *rule of law*. Slednji namreč vedno temelji na (demokratičnih) moralnih načelih, ki so značilnost legitimnih pravnih sistemov. Prav tam.

44 O tem puščamo ob strani vprašanje, ali so neki deli nacističnega pravnega sistema še vedno delovali »normalno«. Glej razpravo o dvojni državi v Fraenkel, 2010.

45 Glej zanimiv prispevek Graverja, ki opisuje konkretne primere sodnikov, ki so še vedno delovali v nacističnem sistemu, pa so poskušali militi ali celo bojkotirati sporne zakonske norme. Identificira celo osem različnih načinov upora. Graver, 2018, str. 850 in naslednje.

46 V Mertonovi teoriji bi bila to razlika med konformistom in ritualistom. Glej Merton, 1938.

3.1. Nacistični pravni sistem in položaj sodnikov v njem

Nobenega dvoma ne more biti o tem, da je nacistični režim odpravil temeljna demokratična načela, na katerih temelji pravna država. Namesto načela delitve oblasti je bila uvedena enotnost poveljevanja in koncentracija oblasti v rokah firerja.[47] Večinsko glasovanje v parlamentu je bilo nadomeščeno z diktatom po vodstvenem principu. Sistem je temeljil na rasizmu[48] in protiliberalnosti, individualna dobrobit pa je bila v celoti podrejena narodni.[49] Loewenstein navaja, da je bila legalistična, natančna in formalno pozitivistična zakonodaja spremenjena v nejasno, pogosto metaforično, ki je bolj ustrezala preroku kot zakonodajalcu.[50]

Čeprav Weinmarska ustava ni bila nikoli odpravljena, je nacistični režim njen pomen minimiziral. Leta 1933, ko so nacisti prevzeli oblast, je bil sprejet zakon (*Ermächtigungsgesetz*), ki je omogočal, da sta Hitler in njegov kabinet lahko vladala z dekreti, leta 1934 pa zakon, ki je dal vladi polna ustavodajna pooblastila (IV. člen *Gesetz über den Neuaufbau des Reichs)*.[51] Sodniki so imeli pooblastilo, da lahko prezrejo katerikoli člen ustave, če ocenijo, da ni v skladu z režimskimi pravnimi vrednotami. Kot je zapisal eden od takratnih pravnikov:

> »Sodnik je dolžan raziskati svojo najglobljo dušo in ugotoviti, če je v skladu z vodjo […] Pravo je in ostaja najbolj pronicljiva vrsta ukaza vodje, in njegovo povelje je nedvomno najbolj plemenit in zanesljiv izkaz zahtev ljudske vesti.«[52]

Položaj sodnikov in državnih uradnikov pa je bil sploh podrejen ideologiji. Ob prevzemu oblasti (1933) je bilo v nacionalsocialistični stranki zelo malo sodnikov.[53] Še istega leta je bil sprejet zakon, po katerem so bili iz sodniških in tožilskih vrst odpuščeni vsi ne-arijci (predvsem Judi), pa tudi vsi politični nasprotniki (na primer socialni demokrati, komunisti).[54] Drugi sodniki se temu niso uprli. Ne samo to, istega leta se je Nemška zveza sodnikov zlila z leta 1928 ustanovljeno Zvezo nacionalsocialističnih sodnikov, ki so priznali primat Hitlerja.[55]

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47 Hitler je menil, da je parlamentarna demokracija uvod v katastrofo in da lahko voljo ljudstva začuti in udejanji samo neizprosen in daljnoviden vodja. Glej Lippman, 1997, str. 203.

48 Glej ideje, na katerih je temeljilo arijsko pravo, v recimo Preuss, 1934, str. 269–280.

49 Loewenstein, 1936, str. 779–781.

50 Prav tam, str. 781

51 Lippman, 1997, str. 207–208; Sfekas, str. 196.

52 *Jahrbuch des Deutschen Rechts* (ur. F. Schlegelberger, W. Hoche in E. Staud), l. 33, 1935, str. 523, cit. po Loewenstein, 1936, str. 803.

53 Sfekas, 2015, str. 195.

54 Samo v Prusiji je bilo razrešenih 643 sodnikov, ki so bili Judje, med 122 sodniki Vrhovnega sodišča pa je bil samo en socialdemokrat; tudi ta je bil razrešen zaradi politične nezanesljivosti. Lippman, 1992, str. 269; in Sfekas, 2015, str. 197.

55 Lippman, 1992, str. 269; in Lippman, 1993, str. 275.

Leta 1935 je bil sprejet dekret, po katerem Vrhovnemu sodišču ni bilo več treba slediti lastnim precedensom, s čimer jim je bilo omogočeno, da ustvarjajo novo pravo v skladu z novim duhom.[56] Od tega trenutka so lahko kazenski sodniki nekoga obsodili, čeprav sploh ni šlo za kaznivo dejanje, ker so lahko uporabljali analogijo. Z uporabo analogije so lahko določili tudi sankcijo in dopuščeno jim je bilo, da ne upoštevajo načela *ne bis in idem*.[57] Goebbels je celo pozival k temu, da sodniki ne smejo upoštevati domneve nedolžnosti,[58] Carl Schmitt pa je zapisal, da pravo ni več objektivna norma,[59] temveč spontana emanacija firerjeve volje.[60]

Sodniki, katerih položaj je weinmarska ustava opredeljevala kot neodvisen, in po kateri so imeli trajni mandat, so počasi izgubljali tak status. Sodnik, ki je izrekel določeno sodbo, je bil lahko ocenjen kot politično nezanesljiv, kar je lahko vodilo v prisilno upokojitev in izgubo pokojnine. Po izvedeni čistki so se sodniki z daljšim stažem vsemu temu podredili, pri nastavitvi novih pa je bil že upoštevan kriterij politične zanesljivosti.[61]

Pravniki so sodelovali tudi v zloglasnih »ljudskih sodiščih« (nem. *Volksgerichtshof*) in posebnih sodiščih (nem. *Sondergericht*). Pri obeh sodiščih je šlo za nekakšen vzporedni sistem rednemu sodstvu, ki naj bi potekal predvsem zoper sovražnike režima.[62] Sojenje je vodila politika in ne pravo, namen teh sodišč pa je bil iztrebljenje sovražnikov nacizma.[63] V letih od 1937 do 1944 je odstotek smrtnih kazni narastel od približno 5 odstotkov obtoženih do približno 50 odstotkov obtoženih.[64] Poleg vsega pa so obstajala tudi Sodišča za dedno zdravje (nem. *Erbgesundheitsgericht*), ki so skrbela za »čistost arijske rase« in v času svojega delovanja odobrila približno 350.000 sterilizacij »dedno obremenjenih«.[65]

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56 Loewenstein, 1936, str. 804.

57 Sfekas, 2015, str. 201.

58 Drugi člen Kazenskega zakona, sprejetega 28. junija 1935, se je glasil: »Kdor stori dejanje, ki ga zakon določa kot kaznivo ali ki si zasluži kazen v skladu s temeljno idejo kazenskega zakona ali zdravega čuta ljudi, se kaznuje. Če posebnega kazenskega zakona ni mogoče neposredno uporabiti za dejanje, se dejanje kaznuje v skladu z zakonom, katerega temeljno načelo se lahko najlažje uporabi za to dejanje.« (prevod iz angleščine K. Š. S.) Glej Lippman, 1993, str. 295.

59 Sfekas, 2015, str. 203.

60 Citirano po Lippman, 1993, str. 271.

61 Loewenstein, str. 805. Po tem, ko so bila leta 1933 razpuščena vsa pravniška stanovska združenja, se je oblikovalo novo združenje, *Nationalsozialistischer Rechtswahrerbund*, katerega 10.000 članov je oktobra 1933 v Leipzigu priseglo, da bodo sledili Hitlerjevi poti. Lippman, 1997, str. 216.

62 Na ljudskih sodiščih so sodili v senatih petorice, od katerega sta bila dva sodnika profesionalca, trije pa člani SS ali strankarski uradniki. Sfekas, 2015, str. 199.

63 Primeri zajemajo izražanje kritičnih misli ali šal o režimu v zasebnem krogu. Lippman, 1997, str. 252–257. Zoper sodbe ni bilo pritožbe in izvršila se je v 24 urah. Lippman, 1993, str. 283.

64 Sfekas, 2015, str. 218.

65 Lippman, 1993, str. 287–288.

Firer je leta 1942 celo dobil pooblastilo, da se je lahko vmešaval v konkretne primere in da je lahko odstavil vse javne uslužbence – od uradnikov do sodnikov.[66] Še zlasti so ga razburjali kazenski primeri in sankcije, ki so bile po njegovem mnenju pogosto prenizke. Tajno poročilo SS iz septembra 1942 navaja, da se številni sodniki upirajo, ker doživljajo te posege kot politične in da kljub naporom, da bi lahko nadzirali sodniško odločanje, doživljajo neposlušnost in kritične pripombe. Po tem so se začeli še hujši pritiski na sodnike. Vodje SS so pregledovali primere, v katerih naj bi bile izrečene prenizke kazni, ali pa primere, v katerih so bili udeleženi nearijci, in v pismih, naslovljenih vsem sodnikom, kritizirali nekatere primere.[67] Sodniki so se torej zavedali, da je njihovo delo pod stalnim budnim očesom SS, hkrati pa so jih silili, da se včlanijo v stranko.[68]

V nekem primeru so denimo kritizirali sodnika, ker je v nekem kazenskem primeru obdolženca, ki je bil Jud, obravnavali, kot da je nemški državljan, ne pa kot sovražnika države, ker je vendar Jud.[69] V nekem drugem primeru je sodišče odločilo, da starši, ki so bili Jehovove priče, niso bili aktivni nasprotniki režima, samo zato, ker niso imeli niti ene svastike in svojih otrok niso vpisali med Hitlerjevo mladino. Vrhovni nacisti so bili do te odločitve skrajno kritični, češ da taki starši ne morejo primerno vzgajati otrok.[70]

Uveljavila se je doktrina, da sodišča nimajo pristojnosti presojati vladnih zakonov in podzakonskih aktov. To je pomenilo tudi, da sodišče ni smelo presojati ukrepov kot recimo prepovedi izdaje časopisov, zaplembe lastnine in zaprtja v koncentracijsko taborišče.[71] Najbrž ni treba posebej poudarjati, da je vse to vodilo v popolno erozijo tega, kar danes razumemo kot vladavino prava.[72]

Poznejši preučevalci tega časa so razočarano ugotovili, da se sodniki takemu nadzoru in taki politični instrumentalizaciji niso uprli.[73] Zdi se, da je nekaj boja potekalo samo za sodniško neodvisnost. Kot navaja Sfekas, pa je bila to tudi edina pravna vrednota, za katero so se sodniki borili.[74] Sicer so udejanjali vse novosti in izvrševali krute predpise ter izrekali kazni, ki so bile po volji nacistov. Preučevalci so našli samo enega sodnika, Lotharja Kreyssiga iz Brandenburga, ki se je uprl in izdal začasno odredbo, s katero je preprečil umore psihiatričnih pacientov. Pozneje je napisal tudi protestno pismo predsed-

66 Prav tam, str. 270–271.

67 Prav tam, str. 240.

68 Prav tam, str. 243.

69 Prav tam, str. 242.

70 Prav tam.

71 Loewenstein, 1936, str. 810.

72 Prav tam, str. 788 in 802–803. Glej tudi Fountaine, 2020, str. 241.

73 V zadnji letih se pojavljajo raziskave, ki nekoliko milijo to sliko in analizirajo nekatere vrste sodniških uporov ali subverzij. Gotovo pa ni bilo nobene organizirane akcije sodnikov proti nacističnemu režimu. Glej recimo Graver, 2018.

74 Sfekas, 2015, str. 203.

niku pruskega Vrhovnega sodišča, češ da so celotna področja, kot so denimo psihiatrične ustanove in koncentracijska taborišča, cone, v katere pravo ne seže. Upokojili so ga s pravico do polne pokojnine.[75]

3.2. Povojno sojenje pravnikom: ZDA proti Josefu Altstötterju in drugim (Juristenprozess)

V luči našega razpravljanja je zanimivo sojenje šestnajstim vodilnim nemškim pravnikom, ki so jim sodili po vojni. Gre za primer ZDA proti Josefu Altstötterju in drugim (v nemščini znano kot *Juristenprozess,* v angleškem jeziku pa kot *Justice Process*).[76] Sojenje je potekalo po delitvi Nemčije v ameriški coni v mestu Nürnberg leta 1947. Gre za tretjega od dvanajst post-nürnberških procesov. Obtožba se je glasila: »Uničili so pravo in pravico v Nemčiji ter […] uporabili prazne oblike pravnega ravnanja za preganjanje, zasužnjevanje in iztrebljanje v velikem obsegu.«[77]

Izbrala sva tri primere, ki so zanimivi za razpravo o notranji emigraciji.

3.2.1. Primer Schlegelberger

Pravnik Franz Schlegelberger je bil rojen leta 1874 in je bil torej pravniško formiran pred začetki nacizma. Po tem, ko je bil dolgo sodnik, je leta 1941 postal pravosodni minister. Sodeloval je pri pisanju dveh najspornejših zakonov: Kazenskega zakona zoper Poljake in Jude in tako imenovanega Odloka o noči in megli.[78] Cilj prvega zakona je bil redukcija Poljakov na manjvreden sloj, ki bo postopoma »elimininiran«, enaka usoda pa naj bi doletela tudi Jude.[79] Odlok o noči in megli pa naj bi dosegel, da bodo vsi uporniki izginili v meglo in noč, »sojenja« pa so, ker je tako odredil Schlegelberger, izvajala posebna sodišča, ki so delovala v skladu s politično voljo in ne pravom.[80]

Marca 1942 je v pismu firerju obljubil, da bo izobraževal sodnike tako, da bodo »pravilno razmišljali o narodovi usodi«, Hitlerja pa je pozval, naj ga obvesti o vseh sodbah, ki jih ne bo odobraval.[81] Sodnike je s pismi pozival k upoštevanju Hitlerjeve želje, da morajo biti obdolženci, ki so obtoženi kaznivega dejanja motenja javnega reda in miru, obsojeni na smrt, in je osebno odslavljal sodnike, ki teh politik niso uveljavljali.[82]

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75 Lipmann, str. 244.

76 Glej Lippman, 1993, str. 298–305; Lippman 1998, str. 343–434; Wilke, 2014, str. 181–201; in Sfekas, 2015.

77 Wilke, 2014, str. 182.

78 Hitler ga je izdal decembra 1941. Glej Lippman, 1993, str. 290.

79 Lippman, 1993, str. 290.

80 Sfekas, 2015, str. 208–213. Po tem, ko je Schlegelberger odstopil, so jurisdikcijo dobila ljudska sodišča, ki so izrekala še strožje kazni.

81 Sfekas, 2015, str. 213–214.

82 Lippman, 1998, str. 401–402; in Sfekas, 2015, str. 213–215.

Schlegelberger je zapisal tudi, da so Poljaki manj občutljivi na izrek zaporne kazni in da morajo biti zato strožje kaznovani kot drugi obtoženci.[83]

V svojem zaključnem govoru na sojenju je Schlegelberger zanikal kaznivost svojih ravnanj in izrazil grenkobo, da je njegov »trdi boj za pravičnosti nagrajen s sramoto in trpljenjem«.[84] Célo poklicno pot naj bi se boril za vladavino prava in sodeloval z režimom samo zato, da bi preprečil vzpon sil, ki so jo hotele uničiti.[85] Hitlerja je vedno doživljal kot nasprotnika vladavine prava in trdil je, da se mu je večkrat zoperstavil.[86] Sebe je opisal kot otok v nacionalsocialističnem viharju.[87] Trdil je, da so ga v nacionalsocialistično stranko vabili že leta 1933, pa ni želel vstopiti, da pa se leta 1938 Hitlerjevemu osebnemu povabilu, da se včlani v stranko, ni mogel upreti. Vendar naj bi se bil tudi po tem izogibal vsakršnemu sodelovanju s stranko in sodelovanju članov stranke pri odločanju o personalnih vprašanjih. Izrazil je gnus do nacistične protisemitske politike in trdil, da je rešil judovskega kolega sodnika pred usmrtitvijo ter da je njegov osebni zdravnik pol Jud. Naredil naj bi bil vse, kar je lahko, da bi blažil protisemitsko nacistično politiko.[88]

Zagovarjal se je, da je moral sklepati kompromise in se zadovoljiti s tem, da je dosegel vsaj nekaj izboljšav ali preprečil najhujše. Poskušal naj bi vzpostaviti občutljivo ravnotežje: vzdržal se je nasprotovanja tistim pobudam, ki so bile neizogibne, hkrati pa si je prizadeval za spremembo tistih, ki so ostale odprte za pogajanja.[89] Tako naj bi Poseben kazenski zakon zoper Poljake in Jude sprejel zato, ker je ta zagotavljal vsaj minimalno pravno varstvo naslovnikov, ki bi drugače zapadli popolnemu brezpravju.[90] Hitlerja naj bi bil prepričal, da je dovolil vsaj nekaterim judovskim pravnikom, da lahko delujejo.[91]

Trdil je, da je skušal kar najbolje izrabiti svoj položaj, tako da si je prizadeval služiti pravici.[92] Hkrati pa je trdil, da bi njegov odstop vodil v še bolj krut režim.[93] Še bolj odkrito nasprotovanje nacizmu bi ga spravilo v nevarnost ter bi ogrožalo cilje, za katere se je boril – to je neodvisnost sodstva in vladavina prava.[94] Boril se je tudi zoper to, da bi policija dobila pristojnost ukrepati in soditi v kazenskih zadevah. Vse svoje ministrovanje je poskušal

[83] Hkrati so bile uvedene drakonske kazni, z možnostjo izreka smrtne kazni za izredno široko opisana dejanja, prepovedano jim je bilo vlagati civilne tožbe in kazenske ovadbe ipd. Sfekas, 2015, str. 205–208.

[84] Citirano po Lippman, 1998, str. 403.

[85] Lippman, 1998, str. 398.

[86] Prav tam, str. 399–400.

[87] Prav tam, str. 402.

[88] Prav tam, str. 399.

[89] Prav tam, str. 402.

[90] Sfekas, 2015, str. 221.

[91] Lippman, 1998, str. 400.

[92] Prav tam, str. 415.

[93] Prav tam, str. 404.

[94] Prav tam, str. 403.

blažiti nacistične kritike, usmerjene zoper svoje mile poteze, in iskati kompromise.[95] Na to naj bi kazala tudi Hitlerjeva skepsa do njega (čeprav ga je postavil za ministra).[96]

Čeprav je težko sprejeti take navedbe nacističnega ministra za pravosodje, pa je v njih mogoče prepoznati tudi zrnce resnice. Paradoksalno je Schlegelbergerjevo delovanje resnično predstavljajo nenehen boj med sodstvom, gestapom, SS in nacisti.[97] Leta 1942, po tem, ko je Hitler dobil pooblastilo, da se lahko vmešava v vsak kazenski proces in odstavlja sodnike, je namreč Schlegelberger res protestiral in po tem odstopil.[98] Po njegovem odstopu je Hitler postavil še bolj radikalnega ministra Thieracka, ki je pravosodje v resnici prepustil policiji.[99] Poleg tega je Thierack dejansko opustil tudi skrajno minimalne standarde pravnega varstva za Poljake in Jude, ki jih je dajal Poseben kazenski zakon zoper Poljake in Jude. Od tedaj so jih brez sojenja predali neposredno Gestapu, zoper kar se je Schlegelberger boril.[100]

Schlegelbergerjevo ravnanje bi lahko (vsaj deloma) prepoznali kot pozicijo notranjega migranta. V svojem zagovoru je kazal vsaj nekolikšno kritično distanco do nacizma in trdil, da je poskušal militi nekatere njegove ekscese. Zdi se, kot da ni sprejemal nekaterih ciljev nacizma (na primer antisemitizma, omejevanja neodvisnosti sodnikov, omejevanja načel vladavine prava kot recimo prepustitev kazenskega sodstva policiji). Čeprav je deloval znotraj nacističnega sistema, ni delil (nekaterih) njegovih ciljev in zdi se, da je za nekaj časa preprečil še hujše zlorabe prava.

Vendar je neizpodbitno dejstvo tudi, da je s svojim delovanjem omogočil veliko drugih zlorab pravnega sistema. Dejstvo je, da je pisal pisma sodnikom in jih pozival, naj upoštevajo Hitlerjeve želje, da je podpisal Odlok o noči in megli in tako dalje. Za svoje zasluge je dobil tudi izredno visoko odpravnino in posebne pravice za nakup zemljišč.[101] Vse to je, po mnenju tribunala, kazalo na zvesto služenje režimu.[102] Tribunal je tudi poudaril, da je pripomogel k zlu, za katerega je trdil, da ga je hotel preprečiti, in da je morda res preprečil nekatere izredno krute postopke, vendar pa je kljub temu omogočil druge, ki jih nikakor ni mogoče imenovati humane. Kljub temu so ga označili kot

95 Prav tam, str. 400–401.

96 Prav tam, str. 399.

97 Sfekas, 2015, str. 204 in 221.

98 Sfekas, 2015, str. 221.

99 Thierack ni bil eden od obsojencev, ker je leta 1946 naredil samomor. Dovolil je, da tistim, ki so bili osumljeni manjših prestopkov, sploh ne sodijo, ampak gredo neposredno v koncentracijsko taborišče, hkrati pa je gestapo za nedoločen čas lahko pridržal vsakega osumljenca. Glej Lippman, 1998, str. 405; in Lippman, 1993, str. 285.

100 Lippman, 1993, str. 290.

101 Sfekas, 2015, str. 221.

102 Lippman, 1998, str. 403.

tragičen lik.[103] Zdi se, da je tudi tribunal v njem prepoznal nekatere lastnostni notranjega emigranta. Sfekas ga v svoji klasifikaciji tipov pravnikov, ki so delovali v nacističnem režimu, imenuje za tistega, ki je sistem omogočil (angl. *enabler*). Točno to drži za notranje emigrante: kljub morebitnim zadržkom, ki jih imajo do vrednot sistema, ki ga ne odobravajo, z njim sodelujejo ter ga s tem omogočajo in legitimirajo.

3.2.2. Primer Rothenberger

Drug zanimiv primer je bil pravnik Curt Rothenberger (rojen 1896), ki je bil član stranke že od leta 1933 ter je bil predan nacističnim vrednotam in ciljem. Kot član partije se je povzpel visoko v sodni hierarhiji in bil pod Thierackom nekaj časa državni sekretar na Ministrstvu za pravosodje.[104] Ko je bil še predsednik sodišča, je varnostni policiji ovajal svoje kolege, ki naj bi bili politično sumljivi, in se vpletal v zadeve, ki so bile ideološko pomembne.[105] Tako je bil osebno udeležen pri etničnem in političnem čiščenju pravosodja ter je skrbel za njegovo nacifikacijo.[106] Osebno se je zavzemal za »omejevanje družbene in kulturne vloge Judov«[107] in bil odgovoren za izvrševanje Odloka o noči in megli.[108]

Zavzemal se je za reforme sodstva v skladu z nacistično ideologijo. V tem pogledu se je videl kot reformatorja.[109] Ob bojazni, da bo sodstvo ukinjeno, pa se je boril za njegovo neodvisnost in o tem pisal memorandume Hitlerju.[110] V več pismih je izražal zaskrbljenost nad tem, da bi sodniki izgubili nadzor nad svojim delom. Ironično pa je rešitev pred vmešavanjem politike v sodstvo videl v tem, da bi vsi sodniki delovali kot firer in da bi mu bili tudi v celoti odgovorni.[111] S tem naj bi zagotovil njihovo neodvisnost od strankarskih interesov.[112] Ker je tako zelo hotel udejanjiti svoj načrt, so ga strankarski kadri leta 1943 odstranili iz funkcij.[113] Boril se je tudi proti temu, da so nekatere obdolžene v sodnih postopkih brez sojenja predali Gestapu.[114]

V prisotnosti poznejšega šefa varnostne policije Kaltenbrunnerja in drugih sodnikov je zaradi pritožb interniranih celo obiskal koncentracijsko taborišče Mauthausen. Vendar

[103] Prav tam, str. 405; in Sfekas, 2015, str. 222. Izrekli so mu kazen dosmrtnega zapora, izpustili pa so ga leta 1950.

[104] Lippman, 1998. str. 405.

[105] Lippman, 2000, str. 191.

[106] Sfekas, 2015, str. 198 in 200.

[107] Prav tam, str. 223.

[108] Prav tam, str. 220.

[109] Lippman, 2000, str. 136–137.

[110] Prav tam, str. 237.

[111] Sfekas, 2015, str. 217; Lippman, 1997, str. 237–238.

[112] Sfekas, 2015, str. 215–216.

[113] Lippman, 1998, str. 407–408.

[114] Prav tam.

je v poročilu zapisal, da ni opazil nobenih zlorab.[115] Pozneje pa je bil najbolj odgovoren, da Judi sploh niso mogli sodelovati v sodnih postopkih.[116]

V svojem zagovoru je obžaloval, da ni prej opazil, da je bil Hitler tiran. Trdil je, da je bil postavljen v nevzdržen položaj, v katerem so bila njegova dejanja v nasprotju z njegovimi težnjami in stališči. Trdil je, da je bilo njegovo delovanje strastno posvečeno zaščiti zakonitosti in ne doseganju osebnih koristi. Svoj položaj naj bi bil izrabil za to, da je zavrnil napade proti pravosodju in da je hotel o tem prepričati Hitlerja, dokler je le videl možnost, da bo lahko vplival nanj.[117] Prepozno je videl, da Hitlerja ne more prepričati o ničemer in da je njegov memorandum služil popolnoma nasprotnim ciljem – rušenju neodvisnosti sodstva.[118]

Tribunal ga je označil kot osebnost polno notranjih konfliktov. Deloma je pomagal nekaterim pol-Judom, vendar jim je tudi odvzel kakršnokoli možnost dostopa do sodišča. Protestiral je proti objavam časopisov SS, ki so napadali sodstvo, vendar pa je kritiziral sodstvo, če niso sodili v prid pripadnikom partije. Ko je služboval na ministrstvu, je uvidel brutalnost režima ter se zameril Himmlerju in Thieracku. Tribunal je presodil, da je bil zavajan in zlorabljen s strani svojih nadrejenih in da ni bil dovolj brutalen za zahteve režima.[119] Najbolj blagohotna razlaga njegovega ravnanja bi bila, da je Rothenberger vse druge premisleke podredil svojemu cilju, da pravosodja izolira od strankarskih in političnih vplivov.[120] Vendar pa je sodeloval pri sprevračanju pravnega sistema in pri rasnih čiščenjih ter prostituiranju ministrstva v strankarske namene.[121]

Rothenberger je bil očitno predan nacist z nekaterimi kontradiktornimi lastnostmi. Morda nekoliko omejen naivnež, ki je šel s svojimi idejami na živce velikim avtoritetam, Hitlerju pa se je skušal prikupiti s svojo rešitvijo, da bi bil on vrhovni *Law Lord*. Hkrati je zagovarjal neodvisnost pravosodja, sam pa je skrbel za njegovo etnično in politično očiščenje, kritiziral pritiske medijev SS na sodstvo, hkrati pa na sodišču favoriziral partijske člane. Sfekas ga je označil kot pravega vernika (angl. *true believer*), ker naj bi bil naivno verjel, da je nacizem združljiv z racionalnimi pravnimi vrednotami in načeli.[122]

Začel je kot konformist, nekdo, ki je povsem predan nacističnim ciljem. Deloval je v skladu s svojimi vrednotami, ki so bile nacistične: ovajal je kolege sodnike in podobno. Vendar pa je sčasoma ugotovil, da nekateri zanj pomembni cilji, za katere je mislil, da so v skladu z vladajoči ideologijo, v resnici niso: recimo neodvisnost pravosodja od politike.

115 Lippman, 1998, str. 407.

116 Sfekas, 2015, str. 223.

117 Lippman, 1998, str. 407–408 in 410–411.

118 Sfekas, 2015, str. 223.

119 Prav tam, str. 223–224.

120 Sfekas, 2015, str. 224. Obsojen je bil na sedem let zapora.

121 Lippman, 2000, str. 193.

122 Sfekas, 2015, str. 190.

Trdil je, da se je znašel v položaju, v katerem so bila njegova dejanja v nasprotju z njegovimi težnjami in stališči.[123] S tem je verjetno hotel reči, da je bil prisiljen delovati v skladu z nacističnim programom, čeprav njegove vrednote tega niso podpirale. Taka notranja razklanost gotovo označuje nekoga, ki je vsaj deloma notranji emigrant. Nekoga, ki se distancira od vrednot sistema, pa je prisiljen izvajati neka dejanja, ki jih ne odobrava.

Morda je postal zagrenjeni notranji emigrant. Sistem ga je razočaral in obratno: on je očitno razočaral svoje nadrejene na ministrstvu in bil razrešen ter ponižano postavljen na funkcijo notarja. Zmotno je mislil, da delijo iste cilje, pa jih niso; ali pa vsaj ne ves čas. Na to (morebitno) distanciranje od nacističnih ciljev bi kazalo tudi dejstvo, da je, ko se je v petdesetih letih prejšnjega stoletja spet začelo govoriti o njegovi vlogi, naredil samomor.[124] Zdi se, kot da se je oddaljil od nacističnega projekta in se ga vsaj deloma sramoval; vendar so to samo špekulacije. Če verjamemo njegovi zgodbi, lahko vidimo tudi to, da lahko nekdo čez čas preide iz vloge konformista v vlogo notranjega emigranta.

3.2.3. Primer Rothaug

Eden najbolj zadrtih nacističnih pravnikov Oswald Rothaug (rojen 1897)[125] je bil najprej tožilec, potem pa sodnik pri ljudskem in posebnem sodišču v Nürnbergu. Ta sodišča so bila pooblaščena za pregon kaznivih dejanj izdaje in spodkopavanje javne morale, kar so bila ohlapno opredeljena kazniva dejanja, ki so pogosto vodila do smrtne kazni.[126] Bil je predan nacističnim idejam in odobraval je njihove cilje. Sovražil je Jude in Poljake ter goreče sodeloval v pregonih zoper njih.[127] Zavzemal se je za strožje zakone zoper Poljake, ker jih je imel za manj vredno nacionalnost, ki jo je treba iztrebiti tako kot Jude.[128] Ves čas, ko je bil sodnik posebnih sodišč, je prevzemal primere od rednega sodstva, pri čemer je sodeloval s tajno policijo SS,[129] pri kateri je dobil celo status prikritega častnega sodelavca.[130] Preganjal je tudi katoliškega duhovnika, ki je pokopal Poljaka.[131] Duhovnik je pozneje pripovedoval, da je Rothaug med sojenjem pripomnil, da bi pobeg-

[123] Lippman, 1998, str. 407.

[124] Sfekas, 2015, str. 225.

[125] Obsojen je bil na dosmrtni zapor, vendar je bil izpuščen leta 1956.

[126] Lippman, 1998, str. 412; in Lippman, 1993, str. 281–282.

[127] V nekem procesu zoper Juda je dejal: »Judje so naša nesreča. Judje so krivi za to, da je prišlo do te vojne. Tisti, ki so v stiku z Judi, bodo propadli [...] [R]asno oskrunjenje je hujše od umora in zastruplja več generacij« in podobno. Citirano po Lippman, 1998, str. 413.

[128] Sfekas, 2015, str. 205–206. V nekem procesu se je zavzemal za smrtno kazen nekega Poljaka, ki naj bi bil »degenerirana osebnost […], njegova inferiornost pa temelji na njegovem značaju, razlog za to pa je očitno v tem, da pripada poljski podčloveški rasi«. Citirano po Lippman, 1998, str. 414.

[129] Sfekas, 2015, str. 201.

[130] Lippman, 1998, str. 412.

[131] Prav tam, str. 414–415.

nil iz krste, če bi ga pokopali poleg Poljaka, in se skliceval na to, da je ta sovražnost božansko določena v Svetem pismu.[132]

V svojem zagovoru je trdil, da je zgolj služil svojemu narodu in da ni bilo nobenih znakov, ki bi kazali, da bo država, ki ji je bil tako predan, nekega dne označena kot zločinska. Njegov edini zločin naj bi bil ta, da je vztrajno sledil zakonom svoje države.[133] Čeprav je bil prepričan, da so bili v procesu preobrazbe družbe nekateri kaznovani po nedolžnem, naj bi bilo to potrebno za zaščito nemške družbe. Trdil je, da ni vedel za holokavst. Za konec je obžaloval, da je poraz, ki je vodil do demonizacije nacističnega režima, povzročil, da je nemogoče razložiti humane impulze, ki so vodili številne nacistične politike.[134]

Tribunal je presodil, da Rothaug pooseblja nacistično krutost in da je spremenil sodišča v instrument terorja. Zavestno je udejanjal nacistično politiko pregona, mučenja in iztrebljanja Judov, Poljakov in katolikov. Ocenili so, da je zloben, sadističen človek, ki bi moral biti v vsakem civiliziranem sistemu takoj odstranjen z vseh funkcij in kaznovan zaradi zlonamernosti, s katero je »delil krivico«.[135]

Rothaug je po naši klasifikaciji popoln konformist v hudodelskem pravnem sistemu. Poosebljal je vrednote nacistične politike, bil z njimi povsem identificiran in predano je uporabljal njene metode. Ne v svojem delovanju ne na sojenju ni pokazal nikakršnega distanciranja ali obžalovanja za to, kar je delal. Še več, obžaloval je, da je zato, ker so izgubili vojno, prišlo do demonizacije nacističnega režima. V njem ni niti sledu notranjega emigranta.

4. Zakaj so pravniki ravnali konformno?

Kateregakoli od navedenih treh zgoraj opisanih pravnikov bi težko v celoti označili za avtentičnega notranjega emigranta. Nihče od njih namreč ni bil prisiljen delovati v fašističnem režimu. Nedelovanje bi seveda tudi zanje lahko imelo posledice: nezmožnost opravljanja svojega poklica in posledično težave preživljati sebe in družino; morda celo grožnje in kazni. Zanimivo pa je, da lahko celo pri dveh od vodilnih pravnikov najdemo prvine notranjega emigrantstva. Kot pokažejo zgornji primeri, je bil samo Rothaug popolnoma konformen z zločinskim pravnim redom. Za druga dva se zdi, da sta res imela nekakšne pomisleke zoper (vsaj) nekatere politike nacizma. Kot bi dejal Goldhagen, pa so bili konec koncev vsi vendarle Hitlerjevi voljni eksekutorji, ki so odraščali v kulturi in duhu rasizma ter antisemitizma in so ga vsaj deloma odobravali.[136]

Zaradi opisane moralne predaje in kolaboracije so se po drugi svetovni vojni razvnele razprave o tem, zakaj so pravniki tako zvesto sledili nacističnemu pravu, in o tem, kakšne

[132] Prav tam, str. 416; in Sfekas, 2015 str. 224.

[133] Prav tam.

[134] Lippman, 1998, str. 415.

[135] Sfekas, 2015, str. 224.

[136] Goldhagen, 1996.

so dolžnosti pravnika v časih hudodelskih pravnih sistemov.[137, 138] Med pravniki namreč ni prišlo do nobenega večjega cehovskega protesta.[139] Lippman ugotavlja, da je mogoče večino kaznivih dejanj sodnikov pripisati birokratskemu oportunističnemu duhu, ki je vestno izpolnjeval svoje obveznosti. Tako so številni obtoženci pričali, da so pač izvrševali predpise, s katerimi se sicer niso nujno strinjali, da pa so menili, da je to potrebno v korist Nemčije, ker so jim tako naročili nadrejeni. Spet drugi pa so bili prepričani, da so kot pravniki dolžni spoštovati pravo takšno, kot je, in poskrbeti, da se bo izvrševalo, ne pa da dvomijo vanj.[140] Najbolj očitne potencialne nasprotnike so nacisti iz pravnega poklica izločili že leta 1933 (na primer Jude, socialdemokrate in komuniste), preostali pa so podlegli kombinaciji ambicij, pohlepa, pragmatizma, pritiska kolegov, ideologije in strahu.[141] Gotovo tisti, ki so ostali, niso bili vsi trdovratni nacisti. Nekateri so verjetno skrivaj celo prezirali nacizem in ga vsaj niso odobravali. Pa so kljub temu sodelovali v tem zločinskem sistemu. Dnevno so uporabljali zločinsko in rasistično pravo, izrekali diskriminatorne drakonske kazni in pošiljali ljudi v smrt.

Kaže, da smo v določenih družbenih okoliščinah vsi nagnjeni k temu, da se uklonimo in delujemo konformno, čeprav imamo večje ali manjše notranje zadržke. Psihološke in sociološke odgovore na to so dali Milgram s konceptom poslušnosti avtoriteti,[142] Bandura z idejo moralne deangažiranosti,[143] Matza in Sykes s svojimi tehnikami nevtralizacije[144] in Zimbardo s svojim zaporniškim poskusom.[145] Sistem nedvomno vpliva na nas in usmerja naše vedenje, čeprav je zločinski, pri racionalizaciji našega početja pa delujejo številni psihološki mehanizmi. Pravniki nikakor niso bili edini, ki so podlegali tem mehanizmom.

Zanimivo je, da po izgubljeni vojni tako rekoč ni bilo več mogoče najti zagrizenih hitlerjancev. Velika večina preživelih nacistov se je v kazenskih procesih branila tako, da so se razglasili za to ali ono različico notranjega emigranta. Eichmann se je denimo na sodišču predstavljal kot nekakšna kantovska različica notranjega emigranta. Njegova zaveza veljavnemu, čeprav zločinskemu pravnemu redu, je bila – po načelu *Gesetz ist Gesetz* – nujna. Trdil je, da so nadrejeni zlorabljali njegove najboljše lastnosti, njegovo

137 Gre za slovite polemike med Radbruchom, Hartom in Fullerjem, ki pa so vsebovale tudi implicitne kritike Kelsnove teorije. Nekateri so razloge za vedenje nemških pravnikov iskali v krčevitem oklepanju pozitivizma (po Kelsnu) in iskali rešitve v naravnem pravu (Radbruch), drugi spet so videli za tako vedenje razloge v zgodovini Nemčije. Glej recimo Paulson, 1994; in Haldemann, 2005.

138 »Ogromna večina pravnikov je neceremonialno opustila svojo neodvisnost in prepustila svoj prestiž, moč in ugled Hitlerjevemu režimu.« Lippman, str. 233.

139 Graver, 2018, str. 864.

140 Lippman, 1998, str. 420–421.

141 Lippman, 1993, str. 306.

142 Milgram, 2009.

143 Bandura, 2016.

144 Matza, 1964.

145 Zimbardo, 2007.

lojalnost pravu in pravnemu sistemu, njegov položaj poslušnega državljana, ki se je vedno pripravljen odzvati dolžnostim.[146]

5. Sklep

Kakšna je torej moralna dolžnost pravnika, še zlasti sodnika (če ta ne deli režimskih vrednot) v hudodelskem sistemu? Ali naj odstopi že ob prvih znakih, da neki sistem postaja hudodelski, ali naj nadaljuje svoje delo?[147] Kot pravi Graver, sodnik v vsakem sistemu čuti številne lojalnosti: do države, do prava, do svoje družine in seveda do sebe in svojih vrednot. Katera od teh lojalnosti in realnosti prevlada? Skoraj vsi nemški sodniki so ostali.[148] Ena od zanimivih izjem so bili denimo norveški vrhovni sodniki, ki so leta 1940 odstopili kot dejanje protesta zoper nemško okupacijo.[149] Če se sodnik odloči, da ne odstopi, pa hkrati ne deli (vseh) vrednot režima, potem je gotovo v nekem delu notranji emigrant in doživlja stisko. Kako se na to stisko odziva?[150] Se podredi hudodelskemu sistemu ali se kot nekateri nemški sodniki vsaj nekoliko upira?[151]

Kje, če sploh, nastopi točka, ko bi sodnik moral izstopiti iz tega vlaka in odvreči masko notranjega emigranta?[152] Je to trenutek, ko vodja dobi skorajda absolutno oblast, ko je razpuščen parlament, ko politika začne odpuščati judovske kolege, ali morda točka, ko je treba uporabiti rasistično pravo in uporabljati analogijo pri kaznivih dejanjih, ki zahtevajo smrtno kazen? Na kateri točki lahko človek še ohrani moralno integriteto? Na kateri točki je prepozno in so vsi sodelujoči samo še kolaboranti, ki nosijo odgovornost za vse posledice hudodelskega režima?

Tudi koncept notranjega emigranta morda odpira več vprašanj kot podaja odgovorov. Kaže nam pa na zelo pogosto vrednostno in moralno notranjo razcepljenost ljudi, ki so pod pritiskom sistema, pa kljub temu sodelujejo. Ta pojav je še zlasti izrazit pri pravnikih, ki morajo vrednote pravnega sistema in njegove norme udejanjati, prav zato pa imajo tudi večjo odgovornost do družbe.[153] Kot nam govori ta prispevek, je zgodovina

146 Arendt, 2007, str. 205.

147 Graver prikazuje samorefleksivne zapise nemškega sodnika, ki se je to spraševal. Graver, 2018, str. 851.

148 Prav tam, str. 852.

149 Prav tam, 851.

150 Nekateri sodniki so dokumentirali svoje notranje stiske, poskuse odstopa, ki niso bili sprejeti, ipd. Prav tam, str. 863.

151 Graver navaja nekaj primerov, ko sodniki niso hoteli uporabljati hudodelskega prava ali pa so ga zavestno razlagali mileje. Glej Graver, 2018.

152 Podobno se sprašuje Graver. V totalitarnih okoliščinah se mora sodnik najprej odločiti, ali bo ostal ali odstopil. Če ostane, lahko tudi izraža svoj protest in ne uporabi zločinskega prava ali pa ga uporabi na najbolj benigen način. Graver, 2018, str. 840.

153 Seveda lahko do tega notranjega razcepa pride tudi v nezločinskih sistemih, ko se posameznik ne strinja z neko vrednoto sistema, tako da je vprašanje notranje emigracije vrednostno nevtralno vprašanje.

že dala odgovore, ki za pravnike gotovo niso laskavi. Čeprav so osebne zgodbe številnih posameznikov,[154] številnih pravnikov zelo različne in jih je deloma človeško mogoče celo razumeti, se za konec postavlja Mannovo vprašanje: ali ni v takih časih edino moralno dejanje, poleg upora – zgolj nedelovanje? Ali ni vsakršno sodelovanje v takem sistemu, celo vsak nevtralen pogovor, če se vrnemo k uvodni Brechtovi misli, neke vrste kolaboracija?

Prispevek je nastal v okviru raziskovalnega projekta "Vzpon neliberalnih demokracij: kriminološka in socio-pravna analiza", št. pogodbe J5-50174, ki ga sofinancira Javna agencija za raziskovalno dejavnost R Slovenije (ARIS).

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[154] Za literarno različico ene od takih kolaboracij, ker sicer ne gre za pravnika, glej recimo roman Bralec (Schlink, 2001).

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Ljubljana Law Review
2023, Vol. LXXXIII

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Scientific article
UDC: 349.2:341:347.791.3
DOI: 10.51940/2023.1.59-77

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The International Ship-Registers in Europe: An Analysis from the Labour Law Perspective

Abstract

The article underlines the issues surrounding international (second) ship-registers from a labour law perspective. The registers specifically analysed are the French, German, and Italian registers. The spread of international registers in the EU is bringing the working conditions onboard European ships into line with those prevalent in developing countries. Moreover, these registers can lead to wage dumping and pay discrimination, creating challenges for the employment prospects of European seafarers. Consequently, on a few occasions their legitimacy in relation to constitutional principles and European law has been questioned. Given their impact on workers, the author believes international registers cannot be considered a viable solution to the shipping crisis affecting the European Union Member States.

Key words

Globalisation, maritime sector, ship-registers, wage dumping, pay discrimination, European law.

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1. Introduction

With the rise of globalisation, certain countries have embraced the practice of allowing the registration of ships belonging to any shipowner, regardless of their connection with their territory. To attract more shipowners, these countries usually provide attractive fiscal incentives and low social and labour requirements. This phenomenon is commonly referred to as "flags of convenience" or, more recently, "open registers"[1]. Consequently, European shipowners started to reflag their vessels to these more advantageous jurisdictions[2].

This development has not only resulted in general worsening of working conditions onboard, but has also sparked a crisis within the European shipping industry. Indeed, the European traditional maritime countries (TMCs) found it increasingly difficult to cope with the commercial challenges arising from the expanding global market and the proliferation of open registers[3].

More precisely, these countries grappled with the national shipowners' disinterest in flying their flag, resulting in loss of ships, personnel, and, ultimately, relevance of the national merchant fleet[4]. Therefore, European TMCs sought ways to bolster their shipping industry. At one point, the only viable option to regain the lost competitiveness seemed to be the establishment of their own open registers. These were conceived as supplementary to the classic national registers and were commonly referred to as second or international registers.

2. Research Purpose and Method

The research analyses the functioning of international ship registers in Europe, with a particular focus on the Italian, French, and German international registers. The primary objective is to underline the challenges behind these registers from a labour law perspective. Specifically, it seeks to illuminate the issues related to the wage dumping and pay discrimination stemming from these registers. The overarching aim is to understand whether these registers can genuinely serve as a solution to the internationalisation of the maritime labour market and its consequences.

The research methodology encompasses comprehensive examination of legislative texts that have introduced the international registers within the considered legal systems. Additionally, it involves a thorough review of the scientific literature available on the subject in the various countries. Furthermore, the research purpose will be pursued by ana-

1 *Ex multis*, see: Boczek, 1962.

2 Basedow even refers to a 'decimation' referring to the German fleet. Basedow, 1990, p. 213.

3 Romagnoli, 2006, p. 116.

4 *Ibid.*, p. 122.

lysing judicial decisions rendered by national courts and the European Union Court of Justice (hereinafter ECJ) on the legitimacy of the laws establishing international registers.

3. International Registers in Europe

3.1. History and Functioning of International Registers in Europe

Since the 1990s, many EU Member States have established second registers that are laxer than national ones. These second registers are typically designated for ships sailing transnational routes, hence earning the appellation "international registers".

The introduction of international registers in Europe is linked to the flags of convenience phenomenon. As previously noted, flags of convenience have led to a deterioration of working conditions within the maritime sector. During the initial stages of the phenomenon, which pales in comparison to its current state extent, flags of convenience were primarily associated with three countries: Panama, Liberia, and Honduras, and their registers were frequently collectively referred to using the acronym "Panlibhon"[5].

Subsequently, the need of other maritime states to compete with these flags prompted them to engage in a race to the bottom, resulting in widespread deterioration of working conditions onboard. The flags of convenience phenomenon increased and evolved into that of open registers. Open registers are those available for any ship, regardless of the nationality of the shipowner or operator and the vessel's place of construction. They provide very favourable registration conditions to attract more shipowners, sacrificing safety and adequate working conditions[6].

Some second registers are today considered as open registers in every respect. For example, both the French and German second registers were officially included in the list of open registers drawn up by the International Transport workers' Federation (ITF)[7].

3.2. Main Issues of International Registers

The criticality of the proliferation of international registers in Europe can be attributed to two main problems.

First, these registers allow the employment of workers from labour-supplying countries, and the law chosen to regulate the employment relationship is that of the seafarer's country of residence[8]. This implies that if, for example, an American shipping company

5 See: Shaughnessy and Tobi, 2006.

6 Aloupi, 2020, pp. 208 ff.

7 The ITF is the global union of maritime workers. On its website, a periodically updated list of flags of convenience (as the union still calls them) can be found. See: <https://www.itfseafarers.org/en/focs/current-registries-listed-as-focs>.

8 Charbonneau, 2016, pp. 268, ff.

registers a ship in the French second register and hires personnel from the Philippines, it may treat the crew under the Philippine law labour protection. This can result in very severe forms of wage dumping.

Also, usually the crew does not come from a single country. In that case, each crew member is subject to the regulations of their respective country of residence. This can lead to discrimination among workers performing the same tasks on board the same ship, above all pay discrimination. The maritime sector suffers from a generalised problem of pay discrimination because of the legal status of ships. Despite bearing the nationality of the flag state, they are not part of its territory[9]. As some courts have adjudicated, this can justify a different treatment among the crew of the same ship[10].

The problem of pay discrimination was only partly solved by the International Maritime Labour Convention (MLC)[11] and the action of the ITF. As far as the MLC is concerned, it provides through a non-binding guideline a minimum wage for all seafarers. The amount is set periodically by the Joint Maritime Commission[12]. However, this is a very low wage, based on labour-supplying countries' pay levels[13]. As far as the ITF is concerned, the MLC allows collective agreements between shipowners and seafarers' organisations to set higher wage levels[14]. The ITF succeeded in imposing a higher international minimum wage, but it applies only to seafarers embarked on ships flying flags of convenience[15].

Secondly, ships registered in second registers, because of bareboat contracts, are operated by shipowners who temporarily register them in even more lenient registers. In that way, shipowners have an even easier and more *tranchant* way of circumventing the enforcement of national labour law.

Normally, it would not be allowed to sail simultaneously under two different flags. However, the use of a bareboat contract facilitates the evasion of this principle, since the

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9 In this sense, see: Chaumette, 2006, pp. 283–285: Cabeza Pereiro and Rodriguez Rodriguez, 2015, pp. 11 ff.

10 In this sense argued, for example, the French Constitutional Court : "*Il résulte des règles actuelles du droit de la mer qu'un navire battant pavillon français ne peut être regardé comme constituant une portion du territoire français. Dès lors, les navigants résidant hors de France qui sont employés à bord d'un navire immatriculé au registre international français ne peuvent se prévaloir de toutes les règles liées à l'application territoriale du droit français*". French Constitutional Court (Conseil Constitutionnel), Decision No. 2005-514, 28 April 2005, in Official Journal of 4 May 2005, para. 33.

11 International Labour Organization (ILO), Maritime Labour Convention, 23 February 2006.

12 MLC, Guideline B2.2.4, para. 1.

13 The amount is in the range of USD 600/700 per month. Moreover, this minimum wage is not strictly enforced, as the monitoring of its implementation is, unfortunately, quite difficult.

14 MLC, Guideline B2.2.4, para. 2.

15 Lillie, 2004, pp. 51 ff.

lessee can re-register the ship under a new provisional flag[16]. This stratagem is employed to exploit European reserved markets while reaping the advantages of an open register[17]. The using of a provisional flag serves the interests of both the company and the European states. It enables shipping companies to obtain more remunerative conditions, while allowing European states to avert an exodus of their fleets[18]. This practice was also acknowledged by UNCTAD, the UN body responsible for regulating trade and economic development, in the 1986 Geneva Convention (although this Convention never achieved the requisite number of ratifications for it to become enforceable)[19]. In Italy, the bareboat contract was also regulated by Law No. 234 of 1989 concerning the temporary suspension of the Italian flag[20].

The international registers system also impacts European seafarers' employment chances. Shipowners can hire non-EU seafarers while maintaining the European flag, leading to a reduction in the prospects for recruitment among EU-resident seafarers. This situation almost exclusively affects ordinary seafarers (able seamen), while officers and commanders face less competition from their counterparts in labour-supplying countries. Indeed, the maritime labour market can be more accurately divided into two distinct sub-markets: one comprising ordinary seafarers and the other composed of officers. EU-resident ordinary seafarers are those who are gradually being replaced by non-EU seafarers due to the new opportunities opened up by second registers. Conversely, when it comes to officers, there is currently a shortage in Europe, with shipowners struggling to find qualified personnel[21]. The situation has been even further exacerbated by war resulting in a reduced availability of Ukrainian and Russian officers. In general, younger individuals are increasingly disinclined to pursue a career as a navigation officer, which is unsurprising, given the risk of abandonment and criminalisation[22], the separation from their families, and the constant need for professional updating. It is also noteworthy that

16 See: Caliendo, 1989, pp. 379 ff.

17 Sisto and Valenti, 1996, pp. 909 ff.

18 Sia, 2001, p. 599.

19 Romagnoli, 2006, p. 118; Zunarelli, 1986, pp. 853 ff.

20 Law No. 234/1989, Provisions concerning the shipbuilding and shipowning industry and measures in favour of applied research in the naval sector (*Disposizioni concernenti l'industria navalmeccanica ed armatoriale e provvedimenti a favore della ricerca applicata al settore navale*), 14 June 1989.

21 For data on crew shortage at European level, see: <https://transport.ec.europa.eu>.

22 The term criminalisation refers to the circumstance where seafarers are charged with criminal offences following incidents involving the ship. They are often held hostage pending the resolution of the dispute and, in some cases, the reasons for detention are not made clear to the seafarers themselves or to the international community. Sometimes, detention conditions violate their basic human rights. See: IMO Guidelines on fair treatment of seafarers in the event of maritime accident, Resolution A.987, 1 December 2005.

since the onset of the Covid-19 pandemic, which precipitated the crew change crisis, even among the most motivated officers, some have opted for alternative career paths.

3.3. The French International Register

The French international register (RIF)[23] was established in 2005 by Law No. 412, with the primary aim of halting the decline of the French merchant fleet and rendering it more appealing to ships involved in long-distance trade or international traffic. As regards the crew composition, the Law mandates shipowners to maintain a minimum of 25% of European seafarers on RIF-flagged ships that are not eligible for, or no longer receive, tax incentives. For those ships that do benefit from such incentives, the requirement is elevated to 35%[24].

A hard core of labour rights, encompassing freedom of collective association, right to collective bargaining, right to strike, protection of health and safety at work, protection in case of dismissal, applies uniformly to the entire crew[25] on the French international register. Nevertheless, this register permits different wage levels for French residents compared to foreign seafarers. In fact, Law No. 2005-412 does not apply to French seafarers, who remain subject to the provisions of the Maritime Labour Code (*Code du Travail Maritime*)[26]. Therefore, as noted by Chaumette, it can be argued that "the principle of 'equal work, equal pay' dissolves at sea"[27]. However, it should be mentioned that a ministerial decree, periodically updated, establishes a minimum wage for non-EU seafarers on RIF-flagged ships[28].

In terms of social security, not all crew members employed on RIF-flagged ships are enrolled in the French special scheme for seafarers administered by the National institution for disabled seafarers (*Établissement national des invalides de la marine*). This is due to the fact that the country of residence is an essential criterion for defining the applicable social security scheme[29].

The Law that instituted the RIF underwent a constitutional scrutiny[30]. According to the French Constitutional Court, the different social security and pay treatment among

[23] The reference is not to the TAAF register, whose establishment dates back to 1986 and which is based in the overseas territory of the French Southern and Antarctic Lands, but to the international register based in France established in 2005.

[24] Law 2005-412 of 3 May 2005 (*Loi relative à la création du registre international français*), Article 5.

[25] Chaumette, 2015, p. 9. For seafarers residing outside Europe, this hard core is supplemented by France's international and Community commitments.

[26] Guadagna, 2006, p. 690.

[27] Chaumette, 2006, p. 276.

[28] Law 2005-412, Article 13.

[29] *Ibid*., Article 31.

[30] French Constitutional Court, Decision No. 2005-514.

the crew is justifiable due to the diversity of situations, taking into consideration the distinct economic conditions of the states in which the workers' interests are located. These different conditions, in the opinion of the Court, allow different wages and social protection rules[31], because "the center of the material and moral interests of the seafarer is located at their family residence, as if they were a home-based worker"[32].

As mentioned, the register's explicit objective is to enhance the standing of the French flag and bolster its competitiveness in the global market. To contend with open registers, the modulation of workers' rights is employed[33]. In this respect, the Court openly argued that the unequal treatment of French and foreign workers is justified by the national interest of advancing the French maritime fleet[34].

Furthermore, the decision was motivated by pointing out that Law 2005-412 explicitly references the obligation to uphold the international and European commitments made by France[35]. According to the Rome I Regulation, the law chosen by the parties may not deprive the employee of the protection guaranteed by the mandatory rules that would apply in absence of a choice[36]. Nevertheless, the residual criterion of the Rome I Regulation in absence of a choice is the one of the law of the country with which the employment contract has the closest connection[37]. In the case of non-EU seafarers, their country of residence could be identified as the country with which the employment contract has the closest connection, even if they are embarked on an EU-flagged ship[38]. In this scenario, the law of the country of residence—which could be a developing labour-supplying country—would serve as the baseline level of protection[39].

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31 French Constitutional Court, Decision No. 2005-514, para. 34. For a comment on this specific aspect, see: Schoettl, 2005, p. 74.

32 Chaumette, 2015, p. 11.

33 Ruozzi, 2005, p. 467.

34 French Constitutional Court, Comment to Decision No. 2005-514 of 28 April 2005, in Cahier No. 19, 2005. For a comment on this aspect, see: Chaumette, 2006, p. 287.

35 Law No. 2005-412, Articles 12 and 13.

36 Regulation No. 593/2008 of the European Parliament and of the Council, of 17 June 2008, on the law applicable to contractual obligations (Rome I), Article 8(1). Before 2008, reference was actually made to the 1980 Rome Convention on the law applicable to contractual obligations, later transposed into the Rome I Regulation. In any case, the Rome Convention, in Article 6(1), already stated the following: "the choice of applicable law by the parties shall not deprive the employee of the protection afforded to him by the mandatory rules of the law which would govern the contract in the absence of choice".

37 Regulation No. 593/2008, Article 8(4).

38 Sia, 2001, p. 615. *Contra*: Basedow, 1990, p. 218.

39 Guadagna, 2006, p. 693.

3.4. The Italian International Register

The Italian international register (R.I.) was established by Decree No. 457 of 1997, subsequently converted into Law No. 30 of 1998. It pursues a twofold objective: preventing the flagging out of Italian vessels and enticing large international shipping companies to hoist the Italian flag[40]. Therefore, the register is exclusively intended for ships engaged in commercial traffic and exclusively employed for international navigation[41].

One of the noteworthy aspects of the Law establishing the Italian international register pertains to the regulations concerning the crew. Prior to its enactment, the rule of the necessary link between the ship's flag and the crew's nationality was generally applied. In contrast, the international register grants shipowners the flexibility to employ non-EU seafarers, thereby deviating from the provisions of Article 318 of the Code of Navigation (*Codice della Navigazione*)[42]. The applicable law for these non-EU seafarers is determined by mutual agreement between the parties[43]. Needless to say, these rules permit a discrimination among the crew members, depending on whether they are nationals of developed or labour-supplying countries, much like in the French international register. Article 3 of Law No. 30/1998 does prescribe a subsidiary criterion in the event that the parties fail to make a choice. In the initial version of the Decree, the subsidiary criterion was based on the nationality of the non-EU worker[44]. However, this provision was removed from the final text due to concerns about its potential discriminatory nature, and the settlement of the question was deferred to collective bargaining agreements[45].

The distinct feature of Italian legislation is its emphasis on the significance of collective bargaining. To be registered in the R.I., ships are required to obtain a specific ministerial authorisation[46] which takes into consideration the national collective agreements

[40] Sia, 2001, p. 602. The author writes that the objective was partially achieved, since the Italian merchant fleet, following the establishment of the R.I., grew by 10% in terms of tonnage (Confitarma data).

[41] Berlingeri, 1998, pp. 532–533.

[42] "The crew of national vessels armed in the ports of the Italian Republic must be entirely composed of Italian nationals or nationals of other countries belonging to the European Union" (Article 318(1) of the Italian Navigation Code). The possibility of employing non-EU personnel in certain circumstances on board ships flying the Italian flag was then stated in general terms with the reform of Article 318 implemented by Law No. 88 of 2001, which established in the second paragraph that this may be provided for by national collective agreements between the most representative trade associations.

[43] Law No 30/1998 converting Decree No. 457/1997 (*Conversione in legge, con modificazioni, del decreto-legge 30 dicembre 1997, n. 457, recante disposizioni urgenti per lo sviluppo del settore dei trasporti e l'incremento dell'occupazione*), Article 3(2).

[44] Firriolo, 2017, p. 156.

[45] Zanobetti Pagnetti, 2008, p. 196.

[46] Romagnoli, 2006, p. 123.

in force[47]. In 1998, trade unions and employers' confederations signed a Memorandum of Understanding stipulating that such authorisation may only be released after trade unions have verified the shipping company's collective bargaining status[48]. This entails verifying whether the shipowner correctly adheres to the national collective agreement applicable to the sector.

As regards the law governing the employment contract of non-EU seafarers aboard R.I.-flagged ships, Law No. 30/1998 stipulates that the law selected by the parties takes precedence, but it must adhere to the minimum wage and social insurance requirements established by collective agreements. In turn, these conditions must align with international standards laid down by the ITF, which serve as a model for national social partners[49]. In simple terms, the minimum conditions negotiated by the ITF at the international level serve as a benchmark for assessing the adequacy of the wages of non-EU seafarers on R.I.-flagged ships[50].

As illustrated, collective bargaining has a pivotal role that extends beyond mere mediation[51]. Social partners have decided that the law of the non-EU seafarers' residence should govern their employment relationship. Shipowners are obligated to provide non-EU seafarers with a bonus to cover their contributions in their country of residence[52]. However, it is evident that European seafarers enjoy superior protection. In essence, since social partners have decided to allow pay discrimination, the Italian legal system bears a striking resemblance to the other systems analysed, albeit with a different route to the same outcome.

A part of Italian doctrine has argued in favour of the compatibility of the R.I. with constitutional principles[53], particularly citing Article 36 of the Italian Constitution. Article 36 states that

> "the worker has the right to a remuneration that is commensurate with the quantity and quality of his work and in any case sufficient to ensure for himself and his family a free and dignified existence".

The proponents of this view contend that the R.I. meets this criterion, asserting that the countries of residence of non-EU seafarers serve as their primary spending markets[54],

47 Decree No 457/1997, Article 1(3).

48 Sia, 2001, p. 604.

49 Decree No. 457/1997, Article 3(3). For a description of the role of the ITF in the maritime sector, see: Lillie, 2004, pp. 47–60.

50 Sia, 2001, p. 613.

51 *Ibid.*, p. 619.

52 Confitarma, Filt-CGIL, Fit-CISL, UIL-Trasporti, Agreement of May 1998.

53 See, for example: Ruozzi, 2021, pp. 192 ff; Guadagna, 2006, pp. 698 ff; Ruggiero, 2000; Flammia, 1999; Lucifredi, 1998.

54 On the principle of sufficient remuneration and the cost-of-living criterion, see: Nogler and Brun, 2018, p. 40 ff; Cataudella, 2013, pp. 86–88; Novella, 2012, pp. 280–324.

and, therefore, their ability to attain a free and dignified existence would not be compromised[55]. According to Italian case-law, the sufficiency of remuneration can be assessed in terms of purchasing power[56]. Nevertheless, the premise of the reasoning appears flawed. The life of a seafarer predominantly takes place on board a ship for many months of the year, making their country of residence not necessarily the primary market for their wages. Nevertheless, the Italian Constitutional Court has not yet had the opportunity to rule on the legitimacy of this particular regulation. It is conceivable that the Court may reach a decision similar to other national courts, relying on the "lesser evil" justification. This outcome would align with the perspective espoused by legal scholars, who argue that

> "it is really difficult to find a solution other than the identification of differentiated legal regimes, which satisfies both the need to contain operating costs and to revitalise the fleet"[57].

3.5. The German International Register

The second German register (I.S.R.) was introduced in 1989 for German-flagged ships engaged in international traffic[58]. To be precise, it functions more as an additional list within the traditional register. The Law establishing the second register is notably brief and concise[59]. It primarily amends the Law on the German flag[60] outlining the registration requirements, designating the competent administrative authority, and, of course, delineating the labour-related implications of the registering in the second register. Regarding the labour aspect, the Law states that employment contracts of seafarers on I.S.R.-flagged ships who are not resident in Germany are not automatically governed by German law. It allows for the application of the employment conditions stipulated by the law of seafarer's country of residence. In practice, these conditions are typically less favourable, both in terms of social security and wages, compared to what German seafarers receive.

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55 Lucifredi, 1998, p. 326.

56 See, above all: Cassation Court (Corte di Cassazione), Decision n. 10260, 26 July 2001, in Il Foro Italiano No. 11/2001, pp. 3087–3094.

57 Guadagna, 2006, p. 689.

58 Law on the Introduction of an Additional Register for Sea-going Ships under the Federal Flag in International Traffic, (*Gesetz zur Einführung eines zusätzlichen Registers für Seeschiffe unter der Bundesflagge im internationalen Verkehr vom 23.3.1989*), 23 March 1989, in Federal Law Gazette, Part I, Article 1.

59 Basedow, 1990, p. 214.

60 Law on the German flag (*Flaggenrechtsgesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe*), in Federal Law Gazette, Part III, No. 9514-1-1.

The Law establishing the I.S.R. underwent constitutional scrutiny in 1995[61], specifically concerning its compatibility with the principles of freedom of association and equality enshrined in the German Constitution. In its deliberation, the German Constitutional Court adopted a "very realistic"[62] approach, reasoning that the alternative to having such a register would be to permit the complete abandonment of the German merchant fleet's national flag in favour of cheaper flags. This, in turn, would potentially enable the circumvention of German labour law in its entirety. The international register, in other words, would be the lesser evil considering the unbridled international competition and the globalised labour market. Therefore, the Court concluded that the general balance of the choices made by the legislator was not contrary to German constitutional principles[63].

Furthermore, regarding the principle of equality, particularly in relation to the pay discrimination, the German Constitutional Court contended that there was no discrimination, as the difference in treatment was based on the residence and not on the nationality of the seafarer[64]. In general, the stance of the German Constitutional Court closely resembled that of the French court. It essentially dismissed the matter by asserting that the situations of European seafarers and non-European seafarers are not comparable, given that wages are spent in two entirely different countries in terms of cost of living. Chaumette astutely noted that the realism exhibited by the German Court appears to stem from a principle of adapting labour law to the demands of international competition[65].

The I.S.R. was also the subject of a ruling by the ECJ, known as the *Sloman Neptun* case[66]. The primary question revolved around the favourable tax and social security regime available to owners of I.S.R.-flagged ships and its compatibility with the European state aid regulations[67]. However, the aspect of particular interest here pertains to the

61 Federal Constitutional Court First Senate (*Bundesverfassungsgericht Ersten Senats*), Introduction of an international maritime register (second register) for merchant ships operating in international traffic under German flag (*Einführung eines internationalen Seeschifffahrtsregisters (Zweitregister) für unter deutscher Flagge im internationalen Verkehr betriebene Handelsschiffe*), 10 January 1995, in Official collection No. 92, pp. 26–53.

62 Chaumette, 2001, p. 65.

63 Actually, the Court did declare one article of the law to be illegitimate – namely Article 21(4), sentence 3 – since it did not allow the German national trade union to negotiate the working conditions of all its members, and not only of German resident workers. This was considered to be incompatible with Article 9.3 of the German Constitution. See: Federal Constitutional Court, 10 January 1995, para. 49.

64 Federal Constitutional Court, 10 January 1995, para. 96. For a comment, see: Zanobetti Pagnetti, 2008, pp. 79–82.

65 Chaumette, 1995, p. 1003. See: Federal Constitutional Court, 10 January 1995, paras. 16, 17, 63 and 64.

66 CJEU C-72/91 and C-73/91 *Sloman Neptun Schiffahrts AG c. Seebetriebsrat Bodo Ziesemer der Sloman Neptun Schiffahrts AG* of 17 March 1993.

67 For an analysis of the concerned ruling, see: Fotinopoulou Basurko, 2023, pp. 34–40.

related question concerning potential discrimination. As previously explained, German law permits the employment of third-country nationals at less favourable wages compared to those applied to German seafarers. This possibility exists with varying degrees in all European second registers. The aim is to "ensure the competitiveness of German merchant ships in the international sphere by favouring the reduction of personnel costs"[68].

The referring court—the labour tribunal of Bremen (*Arbeitsgericht Bremen*)—turned to the ECJ with a preliminary question on the interpretation, among others, of Article 117 of the EEC Treaty. The tribunal argued that the Law establishing the I.S.R. was incompatible with the obligation to implement social protection objectives, including, in its view, the obligation to fight against wage dumping and other distortions of the labour market. The ECJ, on one hand, admitted that Article 117 of the Treaty is not without legal effect, but, on the other hand, recalled its merely programmatic nature and the discretion of the Member States in the choice of measures to improve living and working conditions. Specifically, the ECJ simply dismissed the question by stating that the obligation laid down in Article 117 is not sufficiently precise and unconditional to be relied on by individuals before a national court for their own protection. The ECJ did not dwell on the fact that the coexistence on board the same ship of seafarers who receive very different wages and perform identical tasks is incompatible with the aim of the Union's social policy[69]. The referring court's argument seemed indeed reasonable, given that through the establishment of international registers not only are foreign workers discriminated, but also, indirectly, European workers penalised.

The position of the ECJ appears to be consistent with that of the EU Commission. During the late 1980s and early 1990s, the Commission considered the possibility of establishing an open register for the EU, known as EUROS[70]. However, this proposal never came to fruition[71]. Nevertheless, the Commission did adopt the 'Community guidelines on State aid to maritime transport' (as amended by Communication C(2004)43,58) that support the exemption of shipping companies from certain forms of taxation and social contributions to increase their ability to compete internationally. They obviously include companies that register their ships in international registers[72]. Financially supporting these registers means endorsing their operation and encouraging the establishment of new ones.

68 ECLI:EU:C:1992:130 (*Sloman Neptun*), para. 8.

69 As, on the contrary, advocate general Darmon rightly pointed out. ECLI:EU:C:1992:130 (*Sloman Neptun*), Conclusions of the advocate general, para. 3.

70 Romagnoli, 2006, p. 118.

71 For an analysis of the reasons for the failure of EUROS, see: Fotinopoulou Basurko, 2023, pp. 28 ff.

72 It is true that, to qualify for the benefits, the majority of the workers must be resident in the EU and the company has to show to comply with international and EU safety and working conditions minimum standards. However, some countries within the EU, such as Poland and Romania, are considered labour-supplying countries, as their wages are lower than the EU average and labour law is laxer. Thus, cases of internal social dumping and misuse of freedom of establishment could proliferate.

The EU's position is based on the understanding that the alternative would be to permit the complete flagging out of European ships, which would result in an economic disaster for Europe and its seafarers. It would effectively cede the market to third countries with open registers, leading to crews comprising entirely of residents from labour-supplying countries. The system of second registers and tonnage tax at least guarantees some categories of European seafarers a place in the labour market, since European specialised high-ranking officers are still preferred on board EU-flagged ships.

However, EU policy seems contradictory in this field. On one hand, the EU expresses concern about the diminishing employment opportunities for European seafarers[73] in favour of the massive use of workers from third countries. On the other hand, it encourages and supports the existence of international registers in the EU through the extension of tonnage tax benefits[74].

4. Coping with the Internationalisation of the Maritime Labour Market: Sustainable Solutions

For all the reasons outlined above, the internationalisation of the maritime labour market cannot be tackled by opening European registers. Indeed, the second registers' system is not a sustainable solution from a social and labour perspective, and the EU cannot ignore this matter. The only sustainable solution to the problem of downward international competition in the maritime sector lies in the strengthening of international minimum standards and fostering meaningful social dialogue.

Regarding international minimum standards, it is crucial that the existing conventions are ratified by as many countries as possible. In particular, achieving the large-scale ratification of the MLC could yield multiple benefits, not only in terms of worker protection, but also in ensuring fair and equitable competition among shipowners at a global level. The MLC's implementation is anchored in a port state control system, and its provisions have a universal applicability[75]. Rather than pursuing increased flexibility

[73] The official website of the Directorate-General for Mobility and Transport of the EU Commission opens to this sentence: "The European maritime industry suffers from an increasing lack of European seafarers, in particular officers. […] The main objective of the European maritime policy is to prevent abusive practices on board ships calling at EU ports, improve employment and working conditions for seafarers on board EU-flagged ships, make the maritime profession more attractive and ensure compliance with established training standards." See: <https://transport.ec.europa.eu/transport-modes/maritime/seafarers_en> (accessed 7 June 2023).

[74] Fotinopoulou Basurko, 2017, p. 27.

[75] According to the control system established by the MLC, all ships may be subject to a control, even the ones registered in non-ratifying countries. In fact, the "no more favourable treatment" principle laid down in Article 5(7), states that ships of countries that have ratified the MLC will not be placed at a competitive disadvantage as compared with ships flying the flag of ratifying countries.

of their registers, EU Member States should direct their efforts into securing as many ratifications as possible[76]. To achieve this goal, port authorities, investors, entrepreneurs and trade unions should collaborate, working to influence public opinion on the relevance of this issue and raising its visibility.

Regarding social dialogue, its potential to balance different interests and provide concrete solutions should be valued, especially in the maritime sector, where the ITF holds significant strength and representation. As previously explained, the ITF has an in-depth knowledge of the sector, and it succeeded in providing a minimum wage for workers on ships flying flags of convenience. Ideally, similar achievements could be realised for other seafarers, and the officers' labour market could be divided from that of ordinary seafarers. In general, collective agreements serve as a unique instrument to cope with the maritime sector's challenges. They can be readily modified and updated than legislation and are better suited to distinct submarkets within the maritime labour market. The improvement of working conditions in the maritime sector is only possible through an efficient global social dialogue: ratification of conventions on a global scale is also necessary, but collective autonomy can mitigate negative effects of parties' freedom to select the law governing their employment contracts, particularly when that choice leads to countries with lax control of ships flying their flag[77].

5. Conclusion

The establishment of international registers has aligned working conditions on EU-flagged ships with the inferior standards prevalent on vessels registered in open registers. Moreover, it facilitated wage dumping and discrimination. In this manner, the EU has effectively engaged in a race to the bottom, conforming to the prevailing trend of open registers, when ideally, the process should be the reverse, with European principles extending to third states.

Although the valuation of the law of the seafarers' residential country over the law of the flag is partially consistent with the principle of freedom of ship registration, it should not extend to the point of allowing significantly disparate wages for identical tasks on the same ship. The 'equal pay for work of equal value' principle is enshrined in both the Universal Declaration of Human Rights[78] and ILO Convention No. 111[79]. This princi-

[76] The MLC has received many ratifications, but some important port states are still absent, such as Morocco, whose port of Tanger-Med is in direct competition with many European ports.

[77] Filì, 2007, pp. 783–784; Ruozzi, 2021, p. 212.

[78] United Nations General Assembly, The Universal Declaration of Human Rights (UDHR), New York, 1948, Article 23.

[79] International Labour Organization (ILO), Discrimination Employment and Occupation Convention, No. 111, 25 June 1958.

ple holds even greater significance when the ship bears EU flag. It aligns with various EU provisions, such as Article 157 TEU[80], Directive 2000/78/EC[81], the European Pillar of Social Rights and, in general, the EU's recent focus on social justice and inequalities[82].

Moreover, the aim of second registers does not appear to have been fully achieved. These registers were initially presented as a mean to address the declining competitiveness of the European fleet by replicating the advantages as associated with flags of convenience. Even if they have indeed led to an improvement in competitiveness, it remains more advantageous for a shipowner to register a vessel in a non-European register of a country with a poorly developed labour law[83]. This preference arises because, for the sake of consistency with their legal systems and constitutional principles, EU Member States' legislations often include safeguard clauses aimed at ensuring a minimum level of protection to non-EU workers.

Lastly, in many cases the establishment of second registers was justified by reasons of employment policy[84], but they do not seem to solve the problem of unemployment of EU seafarers. In fact, the vast majority of shipowners can now hire non-EU seafarers while retaining European flags, with the result that the chances of being recruited for EU residents, instead of increasing, have diminished[85].

It is evident that the purported enhancement of EU seafarers' employment opportunities was a simple *ex post* justification[86], and the primary motivations for the establishment of second registers were driven by economic objectives. In essence, the focus of maritime legislators has shifted away from achieving a balance in the relationship between seafarers and shipowners, and instead, their concern primarily revolves around the competitive positioning of the national fleet in the competitive market[87].

In conclusion, EU countries and institutions have justified the introduction of second registers by arguing that the increased flexibility in labour regulations is a lesser evil compared to potential consequences of the internationalisation of the maritime labour

[80] See also the ECJ's case-law on the direct effect of Article 157, lastly confirmed in: CJEU C-624/19 *K. and others c. Tesco Stores Ltd* of 3 June 2021.

[81] Directive of the Council No. 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

[82] The European Pillar of Social Rights Action Plan, <https://www.deepl.com/translator#it/en/Il%20Piano%20d'azione%20del%20Pilastro%20europeo%20dei%20diritti%20sociali%20pu%C3%B2%20essere%20consultato%20al%20seguente%20link%3A> (accessed 7 June 2023).

[83] Basedow also argued in this sense. Basedow, 1990, p. 218.

[84] Consider, for example, the title of the Italian law that established the R.I.: "Urgent provisions for the development of the transport sector and the increase of employment".

[85] See also Firriolo's analysis of the Confitarma data on employment growth in the Italian maritime sector. Firriolo, 2017, pp. 164–165.

[86] Fotinopoulou Basurko, 2017, p. 28.

[87] Ruozzi, 2021, p. 197.

market. However, despite these justifications, the opening of European registers cannot be considered a valid solution to this issue, because it signifies a veritable labour and social deregulation that conflicts with the social objectives of the EU. An alternative approach could involve further development of both public international law and social dialogue. This approach offers the potential to address the challenge of global downward competition without sacrificing seafarers' rights. On one hand, widespread ratification of maritime conventions, primarily the MLC, allows for the establishment of a common baseline of minimum standards to be upheld globally. On the other hand, social dialogue enables the negotiation of balanced arrangements tailored to the various submarkets and allows for rapid adjustments when needed.

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Ljubljana Law Review
2023, Vol. LXXXIII

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Scientific article
UDC: 331.5: 331.106.2(497.11)
DOI: 10.51940/2023.1.79-97

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Sailing through the Fickle Waters of Food Delivery Platform Work in Serbia: In Which Direction Will the Wind Blow?

Abstract

While it is true that food delivery platforms are a novel phenomenon, their presence was barely noticeable until the COVID-19 pandemic struck and a state of emergency was declared. This state of emergency led to various measures, including the imposition of curfews, sometimes extending for days. These restrictions on the freedom of movement rendered it impossible for citizens to leave their homes without special permits. Delivery couriers, equipped with the required movement permits, were seen as a lifeline by the housebound populace. Gradually, necessity evolved into habit, propelling these platforms to become some of the fastest-growing businesses in Serbia. Today, it is almost unthinkable to step outside without encountering a delivery courier from Glovo, Wolt or Mr. D. However, the rise of food delivery platform work in Serbia has not been without challenges. One significant issue is the limited protection afforded to self-employed persons working for these platforms. Additionally, there is a matter of violating the rights of employees in limited liability companies that have entered into "partnership agreements" with the platforms. The problem of informal employment also looms large, often manifesting in unofficial collaborations between entrepreneur-status workers and their colleagues. Despite efforts to address these issues, Serbia has yet to establish a clear definition of what constitutes a platform worker and the rights they are entitled to. This leaves us pondering the crucial question: where do we go from here?

Key words

Food delivery platform work, employer, employee, self-employed person, Serbia.

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1. Introduction

Serbia, while not unfamiliar with the concept of platform work, has traditionally seen a greater prevalence of crowdwork rather than on-demand platform services. Research conducted by the World Bank Group highlights Serbia as one of the countries with the highest per capita number of crowdworkers,[1] the figure that has only increased over time. However, it was not until the onset of the COVID-19 pandemic that on-demand platform work, particularly in the food delivery sector started to gain significant traction. This period was marked by numerous restrictions of daily activities and various liberties that are usually taken for granted, providing a unique opportunity for the on-demand platform business to thrive.

In Serbia, the state of emergency was introduced by the Government and along with it came curfews which, at times, lasted for days. That is when the need for food delivery platforms arose. Food delivery platform workers had permits to move freely and, therefore, they seemed like a saving grace. This need, however, very soon created the habit of using them, making the food delivery platform business one of the fastest growing businesses in Serbia. However, the popularity of the platform work also brought about great issues regarding the status of these workers, their protection, and rights they should, or can, be entitled to. The aim of this article, therefore, is to present the current situation regarding the food delivery platform work in Serbia, as well as to offer possible solutions for current problems that Serbia is facing in that regard.

2. Characteristics and Types of Platform Work

Platform work is a distinct form of remote work, characterised by being conducted outside both the employer's premises and the worker's home, leveraging information and communication technologies (ICT). Its key distinguishing features from traditional remote work include shorter engagement durations with workers and a broader client base. These aspects give arise to complexities in determining the legal nature of such work arrangements and in classifying the legal status of employers who engage workers in this manner.[2] It is important to recognise the diversity within platform work, which varies significantly based on factors, such as the type of services provided, the clientele, who sets the service prices, and the degree of autonomy workers have.[3] This diversity makes it challenging to apply a uniform legal qualification to platform work. The one constant, however, is the central role of the platform itself in these work arrangements.

1 Kuek *et al.*, 2015, p. 30.

2 Kovacs, 2017a, p. 88.

3 Florisson and Mandl, 2018, pp. 48–68.

Platform workers always provide services through the platform connecting them to users. A user is almost always an individual or a group of unknown persons who needs the work of one or more workers in the field of food delivery, accommodation, intellectual services, transportation, etc. Precisely because these are services that are short-term by their nature, platform workers do not establish long-term relationships with the platform and most often perform minor tasks that are often part of a broader work process, and all this during an extremely short period.[4]

Hence, platform work includes three parties: the platform, the user of a particular service (client) and the service provider (worker). The classification of platforms can be based on the type of resources they provide access to. In this context, platforms can provide access to: various information, personal data, goods or services, labour and money, i.e. capital.[5] In principle, however, the most important classification of platforms is of those based on mass work (crowdworking) and those based on the performance of work tasks per request (work on demand).[6] In the literature, crowdwork is often referred to as "white-collar" work, given that in many cases it can consist of complex platform work tasks, as opposed to on demand work tasks, which are usually referred to as "blue-collar" work, and which are most often performed by low-skilled workers.[7] In principle, white-collar work offers better opportunities for decent work, such as higher wages and better opportunities to balance family and work obligations.

Platforms based on mass work (crowdworking) essentially act as employment intermediaries because they allow the user undertaking to access an unspecified group of workers who are ready to perform a specific work task for monetary compensation in return, at any time.[8] These platforms are not directly involved in the worker-client relationship, but they inevitably participate in all or some aspects of the planning, implementation, management or supervision of the distribution of labour among platform workers.[9] It should be emphasised that not all workers who work through the platform are in the same position, because for some it is the only source of income, and for others it is a way of acquiring additional funds. The most vulnerable category of platform workers are those workers whose income depends entirely on the work they do for the platform and who decide to do this type of work because they have no other choice.

4 In this way, the rigid labour law regulative is starting to be too narrow a framework for the modern economy, which became too dynamic for it. Jašarević, 2012, pp. 173–172.

5 Strowel and Vergote, 2019, p. 3.

6 The first category of platforms imply work that is performed in cyberspace in which there is no personal contact between the user/client and the service provider while, by contrast, the second category of platforms imply work that is organised through the application but is performed in the real world. Kovacs, 2017b, p. 2.

7 Urdarević and Antić, 2021, pp. 162–163.

8 Urdarević, 2021, p. 461.

9 Leimeister, Zogaj and Durward, 2016, p. 32.

According to certain statistical indicators, such workers make up about 40 per cent of all platform workers.[10] In that sense, it is also worth noting that Serbia is a country where a great proportion of workers per capita are engaged in crowdwork.[11]

Platforms based on on-demand work usually involve performing low-skilled jobs in the field of transportation, delivery, house cleaning, elderly care, and the like. In contrast to crowdwork, on-demand work through the platform is, accordingly, related to a specific locality, which is why it is spatially significantly narrower than crowdwork, while the nature of work performed through on demand platforms is such that it enables more detailed rules regarding the performance of work.[12] Here, the role of the platform is much more similar to that of the traditional employer, as it simultaneously controls and evaluates the work performance and, based on that, assigns or does not assign future tasks to the worker in question. Namely, although such platforms are often presented as merely a "market-place" for workers, i.e., as an intermediary in hiring workers for the client's needs, they actually often manage workers in the way that an average employer would do.[13] Some authors, therefore, believe that the establishment of work discipline through the digital rating of workers inevitably leads to a relationship of superiority and subordination,[14] and that, in that sense, platforms often speak the language of the market, but behave like traditional employers.[15] Therefore, the key question that emerges in the context of these digital platforms pertains to their true nature: Are these platforms merely neutral technological tools designed solely to connect workers with users, or do they, in fact, assume roles and functions traditionally associated with employers?

The legal nature of the work engagement of all platform workers is different, but, as a rule, they formally work as self-employed persons, while situations in which they have the status of platform employees are rare.[16] The platform worker will thus, in most cases, be exempt from the protective norms of labour legislation, due to the connotation of an "independent and free worker."[17] However, in most cases, there will be some kind of contractual relationship between the platform and the workers, if nothing else, then due

[10] Berg, 2016, p. 19.

[11] Kuek *et al.*, 2015, p. 30.

[12] Božičić, 2020, p. 458.

[13] Ivanova *et al.*, 2018, p. 8.

[14] Klebe and Heuschmid, 2017, p. 199.

[15] Prassl, 2018, p. 5.

[16] Ivanova *et al.*, 2018, p. 3. An exception in this sense is, for example, Spain, where judicial practice has taken the position that platform workers require a case-by-case assessment of the existence of the characteristics of an employment relationship. Adams-Prassl, Laulom and Maneiro Vazquez, 2022, pp. 83–86.

[17] On the other hand, the practice of zero-hour employment contracts also points to the fact that even an employment relationship does not always have to be a guarantee of security. Reljanović, 2020, p. 771.

to the fact that they must register and agree to the terms and conditions of work that the specific platform sets.[18] However, what is noticeable not only in Serbia, but also in the practice of other countries,[19] is the emergence of the quadrilateral nature of on demand platform work. With this form of platform work, in some cases, the standard trilateral nature of work through the platform is lost (platform-user-worker) and another party is added to the equation (in the case of Serbia, a limited liability company). In this sense, specifically in Serbia, the legal basis for working through food delivery platforms can be found in various "partnership agreements", which the platform can conclude both with a self-employed person (trilateral relationship) and also with a limited liability company (quadrilateral relationship) which will then make its employees available to the platform for the purpose of performing the tasks given through it.[20] The quadrilateral nature of this relationship cannot be viewed as intrinsically negative (other than the fact that currently, the food delivery platform is not given the obligations it should have due to the fact that its behaviour is very similar to that of an employer), however, some irregularities have been observed in practice in Serbia. Such complexities manifest in two primary forms. Firstly, when a limited liability company is involved in the relationship, the dynamics can become convoluted. Secondly, even in ostensibly trilateral relationships, an additional layer is often added due to informal alliances between workers who are registered as entrepreneurs and their colleagues. These irregularities, as well as the possible forms of normative action regarding the current practice, will be explained in the following sections.

3. Food delivery platform work in Serbia

Although it cannot be said that food delivery platforms are an absolutely new phenomenon (the first food delivery website was created in 2006 and in 2014, it was turned into an application),[21] the existence of such platforms was almost imperceptible until the COVID-19 pandemic struck, when a state of emergency was declared by the Decision of the Government of Serbia.[22] The state of emergency as such brought about with it various measures, allegedly with the aim of preventing the spread of the disease, and thus the curfew practice followed, which, at times, lasted for days. Such restriction of citizens' freedom of movement, although supposedly necessary at that moment, also made their normal daily life impossible, since they did not have the opportunity to leave their homes even if they needed medicine, unless they were persons to whom special permits were

[18] Risak, 2018, p. 9.

[19] Fairwork Germany Ratings 2021. Labour Standards in the Platform Economy, p. 2.

[20] Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 3.

[21] *Ibid.*, p. 3.

[22] Decision on Declaring a State of Emergency (*Odluka o proglašenju vanrednog stanja*), Official Gazette of the RS, No. 29/2020.

issued. This is precisely the moment in which the delivery of food through the platforms flourished, since the deliverers of the platforms had the mentioned movement permits and were, therefore, perceived by the citizens as a saving grace. Over time, what presented a need at the beginning of the pandemic also created a habit, and thus food delivery platforms relatively quickly became one of the fastest growing businesses in Serbia. Today, it seems simply impossible to leave one's home without seeing a Glovo, Wolt or a Mr. D delivery courier (which is also a company whose origin and way of operating can still essentially only be guessed at). On the other hand, the manner in which these platforms work, as well as the position of their workers in Serbia, is more the subject of newspaper articles than of the interest of the scientific and professional public. Nevertheless, over time, mainly due to the work of non-governmental organisations, a certain picture of the position of workers working through food delivery platforms has been acquired, while the exact picture regarding their number is still impossible to construct.

According to the data available in the 2022 Fairwork Report, in Serbia, the engagement of food delivery platform workers through employment contracts with limited liability companies prevails today.[23] Theoretically, such a variant of engagement should certainly give a slight advantage to such workers, since they have the status of an employed person, and due to the fact that employment carries with it the full scope of labour law protection contained in the Labour Law[24] as the main regulation in the field of labour relations. Hence, it is somewhat logical why the majority of such workers would opt for this form of engagement rather than the status of an entrepreneur (self-employed person) and a direct business relationship with the platform. Furthermore, the status of an entrepreneur entails the obligation to pay taxes, the amount of which is not negligible.[25]

This entrepreneurial aspect has indeed led to the emergence of various informal alliances among workers with entrepreneur status and their colleagues. In such a relationship, workers select a "victim" from among themselves who will be officially registered, conclude the appropriate agreement with the platform and who will then pay compensation for work to other workers in cash. This arrangement allows the registered entrepreneur to enjoy certain benefits, such as social insurance.[26] Additionally they earn a commission for the services provided to their colleagues.

On the other hand, other workers are absolutely legally invisible and, therefore, are not able to count on any legal protection. The reasons for this type of "trade" can be

[23] Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 19.

[24] The Labour Law (*Zakon o radu*), Official Gazette of the RS, Nos. 24/2005 to 95/2018, Article 2.

[25] The Law on Personal Income Tax (*Zakon o porezu na dohodak građana*), Official Gazette of the RS, Nos. 24/2001 to 6/2023, Articles 31–33.

[26] As is the case with pension and disability insurance rights. The Law on Pension and Dissability Insurance (*Zakon o penzijskom i invalidskom osiguranju*), Official Gazette of the RS, Nos. 34/2003 to 138/2022, Article 12(1)(1).

completely different, but the most prominent one is the financial aspect. Namely, Serbia is a country where almost 400.000 inhabitants live on the minimum wage[27] the amount of which, among other things, is calculated on the basis of the minimum labour price.[28] The amount of the minimum labour price, on the other hand, is determined based on several elements, one of which is the minimum consumer basket.[29] In 2022, for example, for the month of June, as much as 400g of beef was included in the composition of this consumer basket (which should feed a family of three), while as much as about EUR 13.5 was set aside for health needs.[30] Not surprisingly, workers thus opt for a larger amount of money that will be paid to them in cash rather than for labour law protection and rights based on social insurance, and this way of doing work enables them to do this.

It is also noteworthy that the income earned by workers on food delivery platforms in Serbia often surpasses the average national income.[31] Given the context, it goes without saying that various bonuses linked to the number of completed orders serve as a significant incentive for workers on food delivery platforms, but this also leads to self-forcing that can push the body to its limits. The stimulant in this sense, however, certainly is the very way of management through algorithms as well, which also includes the supervision of the platform over the work of the delivery courier, and which is inasmuch specific due to the fact that the platform knows every step taken by the courier, starting from the acceptance of the "gig", through picking up the package, until the precise moment when the delivery was made. In this way, not only that the application has a control over the work process itself, but can also collect data that will later be used to evaluate the performance of workers, while it can also influence the behaviour of workers through various automatic messages.[32] And all of this thanks to the simple use of algorithms. In this way, in fact, through the very design of the work process of different food delivery platforms, both supervision and management of the workforce is enabled. Since the mentioned management system implies the use of algorithms, in the literature it is also called algocratic where

> "the algocratic system of governance consists of programming schemes embedded in global software platforms that structure possible forms of work performance."[33]

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27 Bradaš, 2021, p. 7.

28 The Labour Law, Article 111(2).

29 *Ibid.*, Article 112(3).

30 Ministarstvo trgovine, turizma i telekomunikacija, Kupovna moć stanovništva – potrošačka korpa, <https://mtt.gov.rs/extfile/sr/37879/KUPOVNA%20MOC%20avgust%20%2020221.pdf> (accessed 21 December 2022).

31 Medial earnings in September 2022 amounted to around EUR 500. Urdarević and Petrović, 2022, p. 5.

32 Ivanova *et al.,* 2018, p. 7.

33 Aneesh, 2009, p. 349.

It is, simultaneously, indicative that the term "algorithmic disciplining" is also mentioned in the literature,[34] while it was noted that in some cases this type of management can go so far as to be called "algorithmic despotism."[35] The fact that such platforms have such a "digital reputation system", which implies that the platform can evaluate the work of the worker, even when he does not accept tasks, greatly calls into question the real autonomy of the worker, that is, his freedom to accept or not to accept a specific task. Therefore, in other words, it raises the question to what extent such jobs can actually be considered flexible.[36] On the other hand, it is exactly this type of system, which implies the application of various rewards and punishments based on the data available to the application, that leads workers to a state of, relatively speaking, disturbed consciousness, which begins to perceive such a way of doing business as a type of game they must complete. In other words,

> "the combination of responsive data and real-time messaging […] transforms a dry offer into a gamified mission, harnessing the kind of level-up logic and micro dopamine hits that are well understood in the gaming and gambling industries."[37]

That is where the term gamification comes from, due to the fact that, even though the platform does not displace workers from their work environment, the use of various video game-like instruments in day-to-day operations affects the behaviour of delivery couriers.[38]

When all of that is taken into account, it is also visible that this entire organisation of work leads to its commodification, as well as to the commodification of these workers themselves, since they are starting to be considered a kind of service—"human as a service"—and the extended arm of the application while, in addition to that, this kind of work is not even considered as work but as "gigs", "tasks", "services", etc.[39] In other words, in the eyes of the consumer, the performer of work is often not the worker but the application, so a delay due to traffic or bad weather, or any subjective reason for dissatisfaction of the client, can also be a reason for a bad rating that will be assigned to the courier, where, as we have seen, the benefits or the "punishments" that such a worker can receive, will also depend on such a rating. It is, therefore, unnecessary to explain the position of a Serbian food delivery platform worker who performs such tasks in the form of informal employment, bearing in mind that the higher amount of money that he

[34] Gurumurthy, Chami and Bharthur, 2021, p. 4.

[35] Griesbach *et al.*, 2019, pp. 8–9.

[36] In principle, platform work implies the autonomy of workers to choose when will they work, what tasks will they perform and in what way. However, practice has shown that the reality is a little different, as evidenced by Uber's operations and the practice of removing workers from the system due to the small number of accepted rides (about which drivers did not have data that would allow an assessment of their profitability). Choudary, 2018, p. 18.

[37] Munn, 2017, p. 10.

[38] Warmelink *et al.*, 2020, p. 331.

[39] De Stefano, 2016, pp. 4–5.

"can" count on when performing his work is also the reason why he waived any labour law protection, as well as social insurance rights.

Irregularities that have been noticed in Serbia when it comes to persons who are employed by limited liability companies and who perform work for the food delivery platforms, on the other hand, are entirely different and mostly concern the employment contracts that such workers conclude. It has been observed, for example, that such contracts are often concluded for a minimal number of working hours, which is a scenario in which employees work much longer and receive part of the money (for working hours based on the contract) to their bank account, and part of the money in cash (for the additional period of time they spent working).[40] But even if the irregularities did not exist, this type of engagement does not represent a realistic picture of this situation because, regardless of the fact that these workers are formally employed by such companies, their actual employer, realistically speaking, is the platform. The platform is the one assigning tasks, supervising the work of these workers, and is also the one that can prevent them from accessing work at any given moment. This situation, on the other hand, is partly a product of the fact that the work itself is carried out with tools/equipment owned by the worker, which is often an argument for renouncing the labour law relationship between the worker and the platform.[41]

An additional problem is that, although the condition for performing this type of work through a limited liability company is the existence of an employment contract, concluded in accordance with the regulations, the validity of such contracts is also an issue that is often not verified by the platform itself, nor by the labour inspectorate.[42] However, truth be told, this is probably too much of a challenge for the labour inspection, since the deficit of labour inspectors is a big problem in Serbia. This is also indicated by the fact that, according to the report of the European Commission, it is estimated that the current number of labour inspectors (214) needs to be increased to 360.[43] This need is also evident from the fact that, according to available data, 134,958 business entities are currently registered in Serbia.[44] Nevertheless, in 2022, certain improvements were also noticed, which is indicated by the fact that the Wolt company ensured that the employment contracts of persons employed in this way contain appropriate provisions regarding the rights under the mandatory social insurance, as well as that it started

40 Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 20.

41 Urdarević and Antić, 2021, p. 164.

42 Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 31.

43 Commission Staff Working Document, Serbia 2022 Report, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2022 Communication on EU Enlargement policy, Brussels, 12 October 2022.

44 Agencija za privredne registre, <https://www.apr.gov.rs/%d0%bf%d0%be%d1%87%d0%b5%d1%82%d0%bd%d0%b0.3.html> (accessed 29 May 2023).

monitoring their implementation.[45] Additionally, some improvements have been noted in the area of occupational safety and health, as both Glovo and Wolt have provided evidence of training workers for safe and healthy work, as well as the provision of personal protective equipment (although, according to the workers) this kind of equipment has its flaws.[46] What are the flaws of such equipment and whether such equipment can really provide adequate protection is a question that the author cannot currently answer. However, what is indisputable is that, in accordance with the current Law on Safety and Health at Work, the employer is obliged to ensure that the personal protective equipment is appropriate and does not endanger the safety and health at work of the employee.[47] It is, however, unclear why, e.g., the Wolt company took it upon itself to provide such equipment, since this platform supposedly does not have the role of an employer.

Self-employed persons who work through food delivery platforms do not have the right to collective bargaining since, according to the current Labour Law, only employees can organise into unions.[48] Collective action of such workers towards the platform, on the other hand, is also not possible, which is not surprising considering that the valid Serbian Law on Strike[49] was passed in 1996, when the bilateral nature of the employment relationship (employer-employee) could not even be questioned. Currently, however, the situation regarding the right to strike is not much different in comparative law, despite the fact that the fundamental standards of the International Labour Organization regarding the freedom of association and the right to collective bargaining and to collective action do not decisively exclude from the scope of their application self-employed persons (who can often be found in dependent position).[50] However, there are exceptions, as proven by the French El Khomri law, which gives self-employed platform workers both the right to organise and the right to strike. Nevertheless, the legislator, interestingly, avoids the use of the term strike, using the language construction "concerted refusal to provide the service" and that solely for the purpose of describing the legal consequences of such actions of those workers.[51] Additionally, the Law failed to provide clarification of the matter of the legal status of platform workers in general, but rather just defined its personal scope by limiting its application to the self-employed workers that are using

45 Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 22.

46 *Ibid.*, p. 22.

47 The Law on Safety and Health at Work (*Zakon o bezbednosti i zdravlju na radu*), Official Gazette of the RS, No. 35/2023, Article 10(1)(3).

48 The Labour Law, Article 6. The fact that the Labour Law offers the full scope of labour law protection exclusively to employed persons has been the subject of criticism from both the professional and scientific public for a long time.

49 The Law on Strike (*Zakon o štrajku*), Official Gazette of the RS, Nos. 29/96 to 103/2012.

50 Roşioru, 2022, pp. 139–142.

51 Chatzilaou, 2020, pp. 95–96.

these platforms for the exercise of their professional activities, without qualifying all platform workers as such.[52]

The collective action of persons employed in limited liability companies, on the other hand, seems somewhat pointless since, although formally and legally they are their employers and, therefore, they can only take this kind of action against them, their real employer is the platform. Again, it is pointless to discuss the right to a collective action of workers that find themselves in informal employment, because they certainly (even if they wanted to) cannot have any rights deriving from the employment relationship, and, therefore, also the right to organise into a union, or to a collective action. However, they do not strive for this and so far, at least as far as the author is aware, no such worker has initiated court proceedings to determine his status of an employee of the platform, since they prefer short-term financial gain over labour and social protection.[53] The question that such behaviour raises, on the other hand, is whether that means that such workers have absolutely lost faith in the protection that the employment contract as a legal instrument can offer them? Anyhow, the lack of interest of these workers to seek a judicial protection also makes it impossible for the court to determine whether the relationship that these workers have found themselves in has the nature of an employment relationship and, thus, whether the platform should be qualified as an employer.

4. Current Lack of Regulative and Possible Solutions Regarding Food Delivery Platform Work in Serbia

Despite some initial efforts, Serbia has currently paused efforts to regulate the status of platform workers. In the case of those engaged in crowdwork, the approach has been somewhat reversed. The focus has shifted to addressing the tax treatment of these workers, despite the lack of a precise legal definition for them in existing regulations.[54]

On the other hand, since Serbia has the status of a candidate for membership in the European Union and the obligation to harmonise its law with the legal *acquis* of the European Union, the conceptual shift could be the Directive on transparent and predictable working conditions in the European Union[55] which stipulates the recognition of a minimum catalogue of rights for all workers, including those who work under the aus-

[52] *Ibid.*, pp. 97–98

[53] The situation in comparative law is completely different, where this issue has repeatedly appeared before the courts. Adams-Prassl, Laulom and Maneiro Vazquez, 2022, pp. 76–91.

[54] Urdarević, 2022, p. 16.

[55] Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Official Journal of the EU L 186, 11 July 2019, pp. 105–121).

pices of new forms of work, as well as those who work through platforms.[56] Namely, the Directive introduces, for the first time, the right to "minimum predictability of work", in the sense that platform workers, as well as others who work in new forms of work, have the right to be informed in advance of a work assignment within a reasonable notice period, and the right to refuse a work assignment without adverse consequences if such an information was not given.[57] In addition, the Directive prescribes the obligation of the employer to inform workers (in written form) about the important aspects of the work that they should perform,[58] where this written statement should be perceived as a practical means which allows the information provided by the employer to be made more relevant to the employees.[59] In this way, the worker is informed about the nature of the work, the amount of the remuneration he can expect, the reference hours and days within which he may be required to work if the work pattern is entirely or mostly unpredictable, the place of work, etc. This turned out to be a big problem for food delivery platform workers in Serbia, since such workers often cannot count on clear and transparent contractual terms and conditions.[60] Acting in accordance with the Directive would imply a redefinition of the concept of an employee in terms of the Labour Law, and even, perhaps, the introduction of a certain *sui generis* category that would be somewhere between a self-employed and an employed person. This last approach, however, carries with it the risk of the workers who should essentially be qualified as employees being subsumed under that category, since it would certainly entail a smaller scope of rights, and thus lower costs for employers as well.

The legal presumption of an employment relationship of persons performing platform work, such as the one presented within the Proposal for the Directive on improving working conditions in platform work,[61] on the other hand, does not seem like a realistic solution. This, namely, in author's opinion, due to the fact that such a solution has the potential of driving away the business of such platforms out of the Serbian market, mainly because it does not "bring anything to the table" to such platforms, other than

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56 Although it has been observed that this new "hybrid" concept of a worker may create certain problems when it comes to the implementation of this Directive. Georgiou, 2022, pp. 201–202.

57 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Official Journal of the EU L 186, 11 July 2019, pp. 105–121), Article 10.

58 Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Official Journal of the EU L 186, 11 July 2019, pp. 105–121), Article 4.

59 Kenner, 2003, p. 194.

60 Labour standards in the platform economy, Fairwork Serbia ratings 2022, p. 23.

61 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, Article 4.

the additional costs.[62] In other words, the positive aspects of the Directive should be felt most by the competitors of digital platforms, as well as by the Member States that will collect revenues from taxes and contributions. The platforms themselves, on the other hand, should be satisfied with the fact that the Proposal for the Directive will "ensure legal certainty and transparency for all parties involved" and, therefore, reduce the number of cases brought before the courts. It seems that the European Commission did not consider the fact that digital platforms, in their work, rely on a large number of currently available workers, who are ready to provide fast services at a relatively low price. A business model in which platforms primarily rely on self-employed persons, or persons employed by subcontractors, enables them to generate income and provide services while transferring the risk of business to the self-employed and to the subcontractors. Such workforce is significantly cheaper for the platforms compared to the one that would have to be employed, which contributes to their efficiency and competitiveness on the market. Therefore, it is really an open question how will the requalification of a large part of platform workers, i.e. their translation into classic employment, affect the survival of the business model of digital platforms.

In that regard, one of the possible directions in which a normative solution in Serbia can be sought could be the regulation of on-demand platform work in general following the example of temporary agency work. In that scenario, on-demand platform workers would establish an employment relationship with a temporary work agency (in this case, a platform), with the sharing of obligations, i.e. duties and responsibilities deriving from the employment relationship, between the agency and the user with whom the agency has concluded the contract on assignment of workers. In other words, on-demand platform workers would establish an employment relationship with the platform, and then the platform would assign them to the user, with the obligation that the user previously provides them with certain minimum working conditions, and that the platform pays compensation for their work. No contractual relationship would exist between the user and the worker, as is the case with the current regulation on agency employment in Serbia.[63] However, for obvious reasons (the fact that food delivery platform workers do not perform their work within a longer period at the user's premisses), obligations of users of food delivery platforms would be pretty much non-existent. That is also the reason why there would be no consequences when it comes to the demand for food delivery platform work. In contrast to that, users of other types of on demand work (such

[62] The estimated financial impact of such a policy would, at the EU level, increase the annual costs of these platforms up to EUR 4.5 billion if the platforms were to be forced to hire their self-employed workers. Commission staff working document impact assessment report (accompanying the document Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work), p. 34.

[63] The Law on Agency Employment (*Zakon o agencijskom zapošljavanju*), Official Gazette of the RS, No. 86/2019, Article 11.

as cleaning services, care for the elderly, etc.) would have to face some obligations they should have when it comes to safety and health of these workers, the hours of work, etc. In case of food delivery platform work, such a solution could be an adequate one, especially because such platforms really do act as employers and not as employment intermediaries. In this sense, the platform worker would conclude an employment contract with the platform[64] and have a status similar to that of a temporary agency worker, while the platform would have the status of a temporary work agency and would have to meet certain conditions to be registered for the performance of this activity. This solution, again, would certainly not be well received by the platforms that are the subject of this article, regardless of the fact that they realistically do behave like employers, due to the same reasoning given in the part of the article in which the presumption of an employment relationship of a platform worker was mentioned.

However, another possible solution for the Serbian legislator, according to the concept of temporary agency work, would be to make appropriate changes to the existing Law on Agency Employment[65] whose scope would then expand to such workers (food delivery platforms workers) as well. The guiding idea of such a solution would be a greater level of protection of food delivery platform workers, but it would also have certain advantages for all other actors interested. The state would finally succeed in putting this type of work into some kind of a legal framework. On the other hand, such workers would get the employee status and would, therefore, have all the rights deriving from the employment relationship (even the right to organise collectively) while, perhaps, if such changes were to be adopted, people who are already employed could be enabled to work on the basis of a contract on additional work.[66] Food delivery platforms would have to conclude the contract on the assignment of the employee with the temporary work agency and, therefore, would have to provide the assigned employees with certain rights (e.g. occupational safety and health), but they would also have access to a workforce that has already been selected and that meets certain criteria in terms of knowledge, ability and reliability. Furthermore, even though it may seem that the rights that food delivery platforms would have to secure to the employees of temporary work agencies would also imply higher operational costs, which certainly is the case, that is not the only aspect of this solution, at least cost-wise. One should also consider the costs that those platforms

64 Temporary agency work necessarily implies the existence of an employment contract. Risak, 2018, p. 10.

65 The Law on Agency Employment.

66 Namely it is possible, according to the norm of the Labour Law, to conclude a contract on additional work, according to which an employee who already has a full-time job with another employer, but needs additional income, can perform supplementary work. Hence, according to the Law, other employers are allowed to hire these employees to the maximum of one-third of full-time working hours, thus protecting workers from exhaustion, but giving them the possibility of earning an additional income as well. The Labour Law, Article 202.

would have if they were to be defined as employers, considering the fact that such a qualification of these platforms would also imply a more complex structure in terms of the personnel they would have to hire. For example, the qualification of a food delivery platform as an employer would also imply the need of hiring people who would work in accounting for the purpose of calculation and payment of wages, as well as of hiring people who would provide HR services and the ones that would work in legal services, etc. Therefore, a solution in which they would be qualified as user undertakings would probably be more acceptable for these platforms rather than the one previously presented (in which they would have the status of temporary work agencies).

It is indisputable that whatever direction the state decides to take, it must be well thought out. With all of the disadvantages that work through food delivery platforms entails, it is absolutely undeniable that such platforms represent an opportunity for work for people who face difficulties in finding work, but also for those who need additional income. It is, therefore, necessary to find a solution that will not significantly affect the business of such platforms, but which, on the other hand, will also provide an adequate level of protection to these workers.

5. Conclusion

The sudden expansion of work via food delivery platforms, as a result of the COVID-19 pandemic, found Serbian legislature completely unprepared, which is not surprising since the issue of work performed via platforms is still a hot topic even in comparative law, which encountered this phenomenon much earlier. Food delivery platform work in Serbia does not only lead to the problem of the lesser extent of protection that self-employed persons who perform work for the platform are provided with. It also leads to the violation of rights of employees of limited liability companies that have concluded a "partnership agreement" with the platform, as well as to the problem of informal employment, which some of these workers find themselves in.

Despite several attempts, Serbia has still not managed to find a solution that would define what a platform worker actually is and what rights he could and should count on. There are more possibilities in this sense. One possibility is to redefine the concept of an employee or to form a certain *sui generis* category that would be somewhere between an employee and a self-employed person. The latter solution carries with it a great risk of workers who should essentially be qualified as employees being subsumed under that category. The third possible solution is the application of the concept of agency employment (in which the platform would assume the role of a temporary work agency). Such solution, however, implies the existence of an employment contract and, therefore, the definitive definition of such platforms as employers, even though, given their powers, they essentially are employers, regardless of their formal and legal status. The fourth

possible solution—although somewhat similar to the third one due to the fact that the inspiration behind it is, again, temporary agency work—would be the one in which food delivery platforms would assume the role of the user undertaking. On one hand, this would increase the scope of the obligations of these platforms as well, but would also, on the other hand, provide them with the access to an already carefully selected group of workers. Additionally, these particular workers would also have greater legislative protection, without the need to define food delivery platforms as employers (a solution that would create even higher operational costs for these platforms).

And although it is indisputable that food delivery platform workers must be entitled to a certain range of rights from the employment relationship, any further step in defining such rights would have to be taken very carefully, because every single recognised right based on work also implies costs and, therefore, represents a disincentive for food delivery platforms to remain in the Serbian market. With all of the disadvantages that work through food delivery platforms entails, it is undeniable that such platforms are an opportunity for work for people who face difficulties in finding work, but also for those who need additional income.

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Ljubljana Law Review
2023, Vol. LXXXIII

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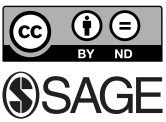

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Scientific article
UDC: 331.106.24:331.102.12
331.102.12:347.7:346.54
DOI: 10.51940/2023.1.99-118

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An Inquiry into the Guidelines on the Application of EU Competition Law to Collective Agreements concerning the Working Conditions of the Solo Self-Employed

Abstract

The purpose of this article is to examine the compatibility of collective agreements for self-employed persons with the principles of European competition law. According to European law, self-employed persons are considered to be on equal footing with companies, thus making them susceptible to violating competition rules by entering into agreements on working conditions. The judgments of the European Court of Justice in the *Albany* and *FNV Kunsten* cases have established that collective agreements for self-employed persons are not generally exempted from the rules prohibiting restrictions on competition. However, considering the protection needs of numerous self-employed persons, a change in approach seems necessary. In 2022, the European Commission adopted Guidelines aiming to clarify the scope of EU competition law regarding collective agreements for self-employed persons. The objective is to exclude self-employed individuals who are most in need of trade union protection. However, there are some critical points in the Guidelines that warrant attention, such as the assessment of the compatibility of collective agreements for self-employed persons with competition law being conducted on an individual basis. A collective approach to the issue appears necessary instead of an individual one. Therefore, it seems appropriate to reflect on the dialectic between market freedom and social rights in European law concerning this specific issue, particularly in light of the recent proposal.

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Key words

Self-employment, European labour law, collective agreements, European competition law, labour protection.

1. Collective Action and Competition Law – The Principles at Stake

The issue of the legitimacy, under European law, of collective agreements applicable to self-employed persons involves some of the fundamental principles of the European Union legal system and individual national legal systems. In particular, the principle of free competition in the internal market comes into conflict with those relating to the sphere of trade union freedom, which national legal systems, and to some extent, the European legal system, also recognise for self-employed persons. The tension between these two spheres is not new and is influenced by a historical process that has seen the affirmation and expansion of social rights in the last century at the expense of the rigidity of much older competition law regulation[1].

The conflict is long lasting and stems from the fact that the European Union is an organisation that was founded to create a common market but that soon became a very complex political body with a wide range of competences.

The tension between the need to ensure a fair competition in the internal market and the necessity to meet social needs also emerges in the case law on collective agreements applicable to self-employed persons.

The issue of collective bargaining has not been the only battleground between the social principles of the Union and the rules of competition[2]: one can think of disputes regarding Sunday rest[3], job placement[4], and strikes[5].

As regards European Union law, one has to consider Article 101 of the Treaty on the Functioning of the European Union (TFEU), which states that

> "all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States and which

[1] For a historical reconstruction, cf. Minda, 1989, pp. 466 ff; see also Ichino, 2001, pp. 185–188.

[2] On this issue, Corti, 2016, pp. 505–509.

[3] CJEU C-145/88 *Torfaen Borough Council v B & Q plc* of 23 November 1989; ECLI:EU:C:1989:593 (*Torfaen*).

[4] CJEU C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* of 23 April 1991; ECLI:EU:C:1991:161 (*Macroton*); CJEU C-55/96 *Job Centre coop. arl.* of 11 December 1997; ECLI:EU:C:1997:603 (*Job Centre)*.

[5] CJEU C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* of 11 December 2007; ECLI:EU:C:2007:772 (*Viking*); CJEU C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* of 18 December 2007; ECLI:EU:C:2007:809 (*Laval*).

> have as their object or effect the prevention, restriction or distortion of competition within the internal market"

are prohibited because they are incompatible with the internal market[6].

While collective agreements concerning individual rights of employees are generally not considered incompatible with free competition[7], as it is protected by EU law in relation to the market for goods, services, and capital rather than the labour market, issues can arise when provisions in collective agreements result in restrictions on competition in the service market.

However, it is important to clarify that in European law there are rules, including primary legislation, that establish trade union freedom without explicit constraints regarding the subjective qualification of those exercising it. Article 152 of the TFEU states that

> "the Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy".

It has been argued that the new wording of Article 152 introduced in the Treaty of Lisbon has severed the functionalisation constraint of social dialogue to the interests of the Union, recognising it as an autonomous function[8].

The substance of Article 152 is then specified by the subsequent Article 155, with particular reference to social dialogue "at Union level". Article 155 provides that this "may lead to contractual relations, including agreements". The issue of the conclusion and effectiveness of collective agreements at the EU level involves regulatory specificities that partly transcend the subject matter and, therefore, cannot be fully addressed[9].

Moreover, Article 28 of the Charter of the Fundamental Rights of the European Union, which now holds equal status with the Treaties on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), states that

> "workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels"[10].

It can be affirmed that Article 28 constitutes a fundamental vehicle for the principle of solidarity in the EU[11].

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6 Article 102 could also be relevant if a union achieves a dominant position. See Lianos, Countouris and De Stefano, 2019, p. 303; and Lianos, 2021, p. 302, also about Article 106(2) (pp. 302–304).

7 In this sense, Ichino, 2001, p. 189. According to Biasi, 2018a, p. 361, "European competition law is specifically directed at undertakings (and their dealings) and it does not – apparently – cover individuals".

8 Caruso and Alaimo, 2011, p. 282.

9 See, on Article 155 TFEU, Comandè, 2010, pp. 210 ff.

10 See Lazzari, 2001, pp. 641 ff.

11 On the issue of solidarity in European labour law, see Zimmer, 2022, p. 47 in particular.

It is important to note that Article 28 mentions collective agreements for the first time in the context of primary European sources. In other provisions, including the aforementioned Article 152 of the TFEU, more generic expressions such as "social dialogue" are preferred[12]. It is believed that the recognition of social dialogue itself translates into the recognition of collective bargaining since the latter is the natural outcome of the former. In fact, the reference to the negotiation phase extends the scope of Article 28 to all the necessary steps leading to the conclusion of an agreement[13], even if it is not ultimately reached[14].

No definition of "collective agreement" is provided. The use of the expression "in accordance with Community law and national laws and practice" appears to defer the definition to the legislation of the Member States. Additionally, the reference to "appropriate levels" seems to encompass the various forms and articulations of bargaining in individual national experiences, ranging from company-level agreements to those concluded within the framework of European social dialogue.

Another peculiarity of Article 28 is that it codifies the right to collective bargaining alongside the right to trade union action, in what has been called a "cumulative view"[15]. The right to bargaining, in fact, lacks effectiveness when trade union action is not adequately supported by norms that legitimise and facilitate it within a framework characterised by democratic principles. Therefore, it is significant that the connection between these two rights has been recognised and codified at the European level in Article 28, based on the constitutional traditions of the Member States[16].

2. Collective Agreements and Competition Law in the ECJ Case Law

2.1. Collective Agreements Applicable to Workers as Defined by ECJ Case Law

European law, as mentioned, has long been a battleground for the principles discussed so far.

Before analysing the case law of the ECJ on collective agreements applicable to self-employed persons, it is worth briefly reviewing the steps that led the Court of Justice to consider agreements applicable only to employees compatible with European law.

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12 Schnorr, 1993, p. 328; Caruso and Alaimo, 2011, p. 274. Sciarra, 2020, p. 86, affirms that it might be required, "in the long run", a reform of Article 152.

13 Veneziani, 2002, p. 54.

14 Ales, 2019, p. 43.

15 Ales, 2019, pp. 42–43.

16 According to the ILO 'General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008', "specific provisions in relation to collective bargaining are present in 66 constitutions" (p. 4).

As early as 1999, in the judgement of *Becu*,[17] the Court established that, for the purposes of competition law, workers are not considered undertakings[18].

Just a few days later, in the well-known *Albany* case[19], the Court ruled on the compatibility with EU law of an obligation for an undertaking to affiliate with a pension fund set up by a collective agreement. According to the Court, despite "certain restrictions of competition being inherent in collective agreements between organisations representing employers and workers", "the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty" (now Article 101) "when seeking jointly to adopt measures to improve conditions of work and employment". In the Court's reasoning, objectives of social relevance have a recognised space in the Treaties[20] and must, therefore, be taken into account in a proper balance with competition rules. Thus, an agreement that pursues social objectives falls outside the scope of EU competition rules.

The exemption from competition law established by the Court is, therefore, subject to a "double filter"[21]. The first filter concerns the nature of the agreement, that has to be that of a "collective agreement". The second filter concerns the object of the collective agreement[22]. For this reason, Article 101 remains applicable in cases where workers' associations act as economic actors comparable to undertakings. Collective agreements, therefore, fall outside of Article 101, and the so-called *Albany* exemption applies to them only when they pursue certain objectives of social relevance[23]. The notion of social objectives has been further specified in subsequent judgments of the Court[24], which have more clearly stated that collective agreements, in order not to be unlawful under Article

17 CJEU C-22/98 of 16 September 1999; ECLI:EU:C:1999:419.

18 Para. 26: workers (in the specific case, dockers) "do not therefore in themselves constitute 'undertakings' within the meaning of Community competition law". According to CJEU C-179/90 *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* of 10 December 1991; ECLI:EU:C:1991:464 (*Merci*) a person's status as a worker is not affected by the fact that "the worker, whilst being linked to the undertaking by a relationship of employment, is linked to other workers by a relationship of association".

19 CJEU C-67/97 of 21 September 1999; ECLI:EU:C:1999:430.

20 According to De Vries, 2016, p. 221, the Court raises collective bargaining "to a legitimate European social value".

21 Di Via, 2000, p. 283.

22 According to Pallini, 2000, p. 242, the control over the object makes the freedom of bargaining "supervised".

23 Schiek, 2020, p. 402.

24 CJEU C-222/98 *Hendrik van der Woude v Stichting Beatrixoord* of 21 September 2000; ECLI:EU:C:2000:475 (*van der Woude*), para. 21; CJEU C-437/09 *AG2R Prévoyance v Beaudout* Père et *Fils SARL* of 3 March 2011; ECLI:EU:C:2010:676 (*AGR2*), para. 29. Cfr. Evju, 2001, pp. 165 ff.

101, must be "intended to improve employment and working conditions". Other judgments have subsequently confirmed what was established in *Albany*[25].

For the aforementioned reasons, the exemption space guaranteed by *Albany* has been defined as "arguably narrow"[26] and the ruling has been considered partially consistent with the Court's previous orientations[27]. The prohibition on restrictions to competition remains the general rule, but a space of exemption, albeit limited and based on "at least too generic" argumentations[28], is carved out in favour of collective agreements aimed at improving working conditions.

2.2. Collective Agreements Applicable to (False) Self-employed Persons

It should be noted that the decisions analysed so far pertain to cases where the agreements were applicable only to employees, and not to self-employed persons as well. It is worth noting that the Court of Justice, while referring to the workers in the *Albany* judgement, "does not go on to specify who does and who does not qualify as a worker for the purpose of this exception"[29].

It is now necessary to understand what the Court has established when it has had to judge the compatibility with competition law of agreements between self-employed persons and their clients. In many EU Member States, it is very common for unions and workers' associations to conclude collective agreements that regulate the working con-

[25] Among those not yet mentioned, CJEU C-219/1997 *Schenker AG przeciwko Koninklijke Luchtvaart Maatschappij NV i Komisja Europejska* of 21 September 1999; ECLI:EU:C:2012:334 (*Maatschappij*); CJEU C-115/97, C-116/97 and C-117/97 *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* of 21 September 1999; ECLI:EU:C:1999:434 ('*Brentjens*').

[26] Freedland and Countouris, 2017, p. 59; cf. Biasi, 2018b, p. 450. It's worth noting that AG Wahl, in the opinion given in *FNV Kunsten* (CJEU C-143/13 *FNV Kunsten Informatie en Media v Staat der Nederlanden* of 4 December 2014; ECLI:EU:C:2014:2411) affirmed that "the notion of direct improvement of the employment and working conditions of employees must not be too narrowly construed".

[27] Allamprese, 2020, p. 35. The previous orientation of the judges emerges from the opinion of the Advocate General Lenz (20 September 1995) in the *Bosman* case (CJEU C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* of 15 December 1995 ECLI:EU:C:1995:463): "[T]here is in my opinion no rule to the effect that agreements which concern employment relationships are in general and completely outside the scope of the provisions on competition in the EC Treaty", paras. 273 and 274); see also CJEU C-241/94 *French Republic v. Commission of the European Communities* of 26 September 1996; ECLI:EU:C:1996:353.

[28] Ichino, 2001, p. 193.

[29] Risak and Dullinger, 2018, p. 21.

ditions of self-employed individuals[30]. Although collective bargaining for self-employed persons is not as widespread and effective as it is for employees, the interests at stake and the established protections are still of great relevance[31]. Furthermore, in some countries, this phenomenon has also developed with the collective regulation of the work relationship of platform workers, whose legal classification is still subject to extensive debates[32].

The first judgement that addressed the issue was the *Pavlov* case[33]. According to the Court, the *Albany* exclusion

> "cannot be applied to an agreement which, whilst being intended, like the agreement at issue in the main proceedings, to guarantee a certain level of pension to all the members of a profession and thus to improve one aspect of their working conditions, namely their remuneration, is not concluded in the context of collective bargaining between employers and employees".

Therefore, the Court determined that the pension fund created under the collective agreement in question did not have social objectives that would exempt it from competition rules, as the Treaties

> "did not contain any provisions 'encouraging the members of the liberal professions to conclude collective agreements with a view to improving their terms of employment and working conditions".

An only partially different assessment was made subsequently in the well-known *FNV Kunsten* case[34]. According to some scholars, a factor that influenced the Court of Justice's different approach was the entry into force of the Lisbon Treaty, which has equated the provisions of the Charter of Fundamental Rights of the European Union, including the aforementioned Article 28, with those of the Treaties themselves[35].

It is necessary to analyse the judgement in detail. In the case of *FNV Kunsten*, a Dutch union signed a collective agreement that applied to both employees and self-employed musicians, specifically those substituting for members of an orchestra. The Dutch Competition Authority deemed this agreement to be in violation of both internal and European competition rules.

After reaffirming that a union acting on behalf of self-employed persons is not considered a social partner but an association of undertakings, the Court examined the interpretation of the term "undertaking" in the context of Article 101 to determine whether the agreement should still be exempted from the application of that article. According to

30 See Hießl, 2021, pp. 279 ff.

31 In particular, this is true for those who perform personal work and are subject to a power imbalance with their counterpart. Cf. Countouris and De Stefano, 2021, p. 10.

32 An effective summary of the debate is provided by Bellomo, 2022, pp. 155 ff.

33 CJEU C-180/98 to C-184/98 of 12 September 2000; ECLI:EU:C:2000:428.

34 CJEU C-143/13 of 4 December 2014; ECLI:EU:C:2014:2411.

35 Lianos, Countouris and De Stefano, 2019, p. 308.

the judges, the concept of an undertaking includes those who "perform their activities as independent economic operators in relation to their principal"[36]. Consequently,

> "a service provider can lose his status of an independent trader, and hence of an undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking".

If the self-employed persons to whom the agreement is applied can be said "entirely dependent", they "are in fact 'false self-employed', that is to say, service providers in a situation comparable to that of employees". The Court affirmed also that

> "the classification of a 'self-employed person' under national law does not prevent that person being classified as an employee within the meaning of EU law if his independence is merely notional"[37].

As a result of the Court's ruling, only service providers in a situation comparable to that of workers are exempted from competition law. This exemption applies to those who perform the same activities as the employees in the same company and are considered "false self-employed". The Court stated that "is for the national court to ascertain whether that is so". In summary, only collective agreements that apply to "false" self-employed individuals are exempted from the competition rules.

The characteristics that the Court outlines to describe false self-employment seem to refer, partially, to the notion of economic dependence[38], which has been occasionally used in some national legal systems as a basis for providing protections to workers[39]. It is possible to say that the Court has identified criteria that can be used to interpret the European notion of worker (in an extensive manner) for the purpose of applying the *Albany* exemptions, using an approach that has been defined "functional"[40].

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[36] Cf. CJEU C-217/05 *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) and Asociación de Gestores de Estaciones de Servicio v European Commission* of 14 December 2006; ECLI:EU:T:2014:60 (*CEEES*), para. 38.

[37] As stated before in CJEU C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* of 13 January 2003; ECLI:EU:C:2004:18 (*Allonby)*, para. 71.

[38] Grosheide and ter Haar, 2017, p. 37; Menegatti, 2019, pp. 80–81, according to whom the EU notion of worker is "much broader to that of 'employee' commonly endorsed by national judiciaries, to the point of including intermediate categories workers – variously referred by some legislations to as dependent contractors, economically dependent, 'parasubordinate' workers, employee-like persons".

[39] Consider, for example, the figure of the TRADE (Trabajador Autónomo Económicamente Dependiente) in the Spanish legal system. Cf. also Delfino, 2017, p. 46, where he affirms that almost all of the requirements described by *FNV Kunsten* are formally present in "hetero-organised" employment relationships as regulated in Italy by Article 2, d.lgs. 81/2015.

[40] Lianos, Countouris and De Stefano, 2019, p. 313.

While this solution is reasonable in ensuring that even those who are only formally self-employed receive the protections guaranteed by collective agreements, on the other hand, it appears to be somewhat excessively cautious as it continues to strongly link the applicability of collective agreements to the qualification of a worker, albeit in the form of false self-employment[41].

Nevertheless, there are several categories of self-employed persons who, although not falling within the Court's definition of false self-employment, are deserving of the protections provided by collective agreements (as well as, primarily, the right to engage in collective bargaining)[42].

3. The European Commission Guidelines – The Contents

3.1. Purposes of the Guidelines and General Scope of Application

From 2013 to the present, the debate on the inadequate protection of self-employment and the growing inadequacy of labour law categories (both at the European and national level) has progressively intensified. As mentioned, the emergence of platform work, which has long been a matter of interest to labour law scholars, has highlighted the need for concrete interventions to ensure greater protections for self-employed persons.

On 9 December 2021, the European Commission presented Guidelines on the application of the Union competition law to collective agreements regarding the working conditions of solo self-employed persons[43], not by chance alongside the proposal for a directive on working conditions in digital platforms. These Guidelines, presented as an annex to communications, aimed to establish criteria for extending the scope of the antitrust exemption to certain collective labour agreements. The Guidelines were finally adopted as a Communication of the Commission on 30 September 2022[44].

Aware of the developments in the Court of Justice case law and the challenges arising from it, the Commission has attempted to strengthen and clarify the criteria established by the case law.

A comprehensive introduction provides an overview of the current state of the conflict between labour law and competition law and outlines the objectives of the Guidelines.

41 Probably "false self-employed" cannot constitute a third intermediate category between workers and entrepreneurs. Cf. Risak and Dullinger, 2018, p. 21; and Loi, 2018, pp. 864–865.

42 Lianos, Countouris and De Stefano, 2019, p. 314, mention, for example, creative workers, who can easily be excluded by the Court definition of false self-employed because they "have autonomy regarding the 'time, place, and content' of the task".

43 C(2021) 8838 final of 9 December 2021.

44 Communication from the commission Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons 2022/C 374/02, OJ C 374 of 30 September 2022.

Points 3 and 4 highlight the different values involved, namely antitrust law (specifically Article 3 TEU and Article 101 TFEU) on one hand, and Article 28 CFREU and Article 152 TFEU on the other. The Court of Justice case law is then mentioned in detail (points 5, 6 and 7). Lastly, attention is given to the changes in work organisation that have occurred in the last decades (point 8).

As to the general scope of application, point 13 affirms that the Guidelines apply to collective agreements as previously defined by them. Point 2(c) defines collective agreements, for the purpose of the Guidelines, as agreements

> "negotiated and concluded between solo self-employed persons or their representatives and their counterparty/-ies to the extent that it, by its nature and purpose, concerns the working conditions of such solo self-employed persons".

This definition is certainly derived from the Court of Justice case law generally stating that a collective agreement, to be considered exempt from competition law, must have the specific objective of improving the working conditions of workers[45]. However, for the sake of completeness, point 15 provides an exemplary—and perhaps redundant—list of the subjects that fall within the scope of working conditions regulated by collective agreements. The list includes, in particular,

> "conditions under which the solo self-employed person is entitled to cease providing his/her services or under which the counterparty is entitled to cease using their services".

Similarly, for illustrative purposes, cases are also mentioned where collective agreements cannot be exempted from competition rules, as they do not concern working conditions. In particular, the Guidelines explicitly do not apply to agreements that determine "the conditions (in particular, the prices) under which services are offered by solo self-employed persons or the counterparty/-ies to consumers" or which limit "the freedom of undertakings to hire the labour providers that they need".

As for the subjective scope of application, the Guidelines apply to solo self-employed persons, defined as individuals who do not

> "have an employment contract or who is not in an employment relationship, and who relies primarily on his or her own personal labour for the provision of the services concerned".

Solo self-employed persons are thus distinguished, on one hand, from employees, and on the other hand, from entrepreneurs, as it is expected that the solo self-employed person must perform predominantly personal work (therefore, the contribution of other means in addition to personal work, such as the use of machinery or the help of substitutes or assistants, cannot prevail on personal work but should be ancillary)[46].

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[45] See para. 2.1.

[46] It is worth noting that CJEU C-692/19 *B v Yodel Delivery Network Ltd* of 22 April 2020; ECLI: EU:C:2020:288 (*Yodel*), para. 45, considered the fact that a person uses "subcontractors or substi-

After outlining the definitions, general principles, and scope of application, the Guidelines describe specific cases that fall outside the scope of Article 101 (and are therefore exempt) in Section 3, as well as cases in which the Commission chooses not to intervene in Section 4. The distinction between these two scenarios could generate ambiguity since, concerning the cases provided for in Section 4, the legitimacy of collective agreements is not explicitly established, thus allowing the intervention of other entities besides the Commission (such as judgments from the Court of Justice that may intervene following a preliminary reference in a dispute between private parties).

3.2. Collectives Agreements Falling Outside Scope of Article 101 TFEU

After mentioning the content of the *FNV Kunsten* judgement regarding the definition of self-employed persons in a situation comparable to that of workers and the loss of undertaking status[47], the Guidelines define three different categories of self-employed persons who are presumed to be exempt from the application of Article 101 with reference to collective agreements applicable to them.

These categories represent a further development of the criteria already identified by the Court of Justice. The criteria are specified through the identification of factual indicators. This approach is commonly used in recent European legislation and is similar to the one used for determining the employment relationship in the proposed directive on work in digital platforms[48].

The first indicator considered in the Guidelines is economic dependency towards the counterparty. According to the European Commission, economic dependency is likely to be a common characteristic of workers who provide services in a predominantly personal way (point 23). The Guidelines refer to certain national legislations, such as those in Germany and Spain[49], which recognise the right of self-employed persons to engage in collective bargaining, subject to certain conditions.

In point 24, the Guidelines define the factual indicators for presuming economic dependency of solo self-employed individuals. According to the Guidelines, economic dependency is presumed if the work-related earnings of the solo self-employed person from a single counterparty exceed 50 percent over a period of either one or two years.

The inclusion of two different and individually assessable timeframes, which was not present in the 2021 draft, aims to maximise the effectiveness of protection and prevent abusive behaviour by the client. In particular, this prevents the client from potentially

tutes to perform the service" as capable of excluding the qualification of "worker".

47 See para. 2.

48 The reference is to the proposal for a directive "on improving working conditions in platform work" of 9 December 2021 (COM(2021) 762 final). See on the issue, *ex multis,* De Stefano, 2022, pp. 107 ff.

49 For Germany: Section 12a of the Collective Agreements Act; for Spain: Article 11 of Law 20/2007, of 11 July 2007.

splitting the payment of fees to minimise their impact within a single year and thus avoid the application of the collective agreement to the solo self-employed person.

The established threshold is objective and easily measurable[50]. Once the threshold is exceeded, the self-employed person is presumed to be economically dependent, without the need for further investigations into specific circumstances.

The second indicator is defined as the "similarity of tasks". If a solo self-employed person works side-by-side with an employee for the same counterparty, is placed under the direction of him, does not bear the commercial risk of the counterparty activities or does not enjoy sufficient independence as regards the performance of the economic activity concerned, then that person can benefit from collective bargaining.

The Guidelines clearly specify that these indicators should not be considered for determining the reclassification of the worker under national laws but only with regard to the applicability of collective agreements under EU law. The EU definition of "false self-employed persons" can in fact also include workers who, under individual national legislation, are considered genuinely self-employed. Furthermore, it is clarified, albeit redundantly, that collective agreements that apply to both employees and self-employed persons can also be exempted from competition law. There is no reason to assume the exclusion of such collective agreements, as they are very common in the practice of collective bargaining in certain Member States[51].

However, it is a fact that, according to the legislation of many Member States, the conditions mentioned in the Guidelines, which clearly reference those of the *FNV Kunsten* judgement, can easily lead to the recognition of employee status. Consequently, it is believed that the concrete application of this indicator would be very limited and reserved for rare cases where such strong indicators of subordination do not result in the reclassification of the self-employed person as an employee[52].

The indicator of task similarity is indeed more indeterminate than the indicator of economic dependency and, as a result, more challenging to apply in concrete terms. It can be envisioned that applying a collective agreement to a self-employed person based on this indicator would not be "automatic" and likely require, instead, a judicial decision explicitly confirming its presence.

The third indicator pertains to the specific case of workers operating through digital platforms. The sector-specific nature of this category is closely tied to the platform work debate in recent years, which has revealed the poor working conditions faced by individuals working through digital platforms, often classified as self-employed.

The Guidelines underline that platform workers often have to accept the conditions imposed by platforms without the opportunity for individual negotiation ("take it or

[50] The threshold has been considered too high in relation to its function of determining a presumption of economic dependency. Cf. Georgiou, 2022.

[51] Fulton, 2018.

[52] Cf. Rainone, 2022, p. 189.

leave it"). The Commission then points out that many national authorities or courts increasingly recognise the dependence of service providers on certain types of platforms, or even recognise the existence of an employment relationship, which supports the comparability of solo self-employed individuals working through platforms with workers.

While what noted above holds true for the recognition of "dependency", which, as we have seen, is a prerequisite for the comparability to workers according to the *FNV Kunsten* judgement, the argument is not equally valid when it comes to the fact of platform workers being recognised as employees. If they were considered employees, they would undoubtedly be regarded as workers under European law, and therefore, the *Albany* exemption would apply in any case. In other words, the fact that some platform workers are recognised as employees does not impact the assessment of comparability with workers because the classification depends on how the actual service is performed and not on the use of a particular tool (the digital platform). It is possible to have both employee platform workers and self-employed platform workers (although, given the current practices of major platforms, the latter scenario is less common).

What really matters in the evaluation of comparability with workers is the state of dependence, even for platform workers considered self-employed under national laws. Determining this state, in the case of platform workers, does not require a specific inquiry from an economic perspective (as outlined in the first indicator) or in terms of working conditions (as examined in the second indicator). According to the Guidelines, the mere fact that a worker operates through a digital platform is enough to consider them as "false self-employed" under European law and, therefore, exempt from the application of Article 101 regarding the collective agreements applicable to them[53].

It is also highlighted that some Member States have implemented specific legislation to protect platform workers. The regulations of Spain[54] and Greece[55] are explicitly mentioned, but it is important to note that France[56] and then Italy[57] have also enacted laws specifically aimed at platform workers or certain subcategories of them. The Italian law, which provides certain protections for self-employed riders, explicitly defers the regulation of some matters, such as compensation, to collective bargaining[58].

To fully understand the scope of this latest index identified by the Guidelines, it is important to carefully examine the definition of "digital platform" provided by them.

[53] The application of collective agreements probably serves as residual protection for those platform workers who cannot be presumed to be employees under the proposed directive. Cf. Giovannone, 2022, p. 222.

[54] Royal Decree-Law 9/2021 of 11 May 2021.

[55] Law 4808/2021.

[56] Law 2016-1088 of 9 August 2016.

[57] D.l. 101/2019 of 3 September that has modified d.lgs. 81/2015 introducing a specific regulation for self-employed riders. See Santoro-Passarelli, 2020, pp. 214 ff.

[58] See Article 47-quater, d.lgs. 81/2015.

A restrictive definition of a digital platform is given. According to point 2(d), a digital platform is

> "any natural or legal person providing a commercial service which meets all of the following requirements: (i) it is provided, at least in part, at a distance through electronic means, such as a website or a mobile application; (ii) it is provided at the request of a recipient of the service; and (iii) it involves, as a necessary and essential component, the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location".

This definition is identical to the one given in the proposal for a directive "on improving working conditions in platform work" mentioned above. Furthermore, it is envisaged that if the definition were to change during the approval of the directive, the Commission could consider revising the one contained in the Guidelines as well.

Requirement (iii), regarding the necessary organisation of work by the platform, is better defined in point 30, where it is stated that the organisation of work should imply, at a minimum, a significant role in matching the demand for the service with the supply of labour by an individual who has a contractual relationship with the digital labour platform and who is available to perform a specific task, and can include other activities such as processing payments.

The organisation, as defined by the Guidelines, therefore, may not concern the performance of work itself but only the initial phase of the relationship. However, it is necessary for the platform to have a "significant role", not just in providing a mere service of matching demand and supply, but in the context of the matching phase. It is in this phase that the platform's organisational intervention must be concretely evident.

Finally, with an overly general provision, it is stated that digital platforms, according to the Guidelines, are those for which

> "the organisation of work performed by the individual [...] constitutes a necessary and essential, and not merely a minor and purely ancillary, component".

3.3. Cases in which the Commission Will not Intervene

Section four of the Guidelines addresses cases where solo self-employed persons, although not in comparable conditions to that of workers, still find themselves in a position of contractual weakness compared to the counterparty. In these cases, the Commission intends not to intervene regarding the legitimacy of collective agreements applicable to them, if these aim to improve working conditions.

The Guidelines specifically identify two different conditions under which the Commission foresees non-intervention. In the first case, collective agreements concluded by solo self-employed persons with counterparties of a certain economic strength are involved. This is because solo self-employed persons may have insufficient bargaining pow-

er in these situations to influence the determination of their working conditions[59]. From the Commission's perspective, collective agreements would serve to address this disparity.

The disparity is envisaged under two alternative conditions: 1) if the agreement is negotiated with one or more counterparties which represent the whole sector or industry; 2) if the counterparty/ies have an annual turnover and/or annual balance sheet of more than 2 million euros or the counterparty/ies has a staff headcount equal to or more than 10 persons. If several counterparties negotiate the agreement, they are considered jointly for the calculation of the threshold.

The indices in this case are associated with factual data. It is challenging to imagine the occurrence of the first index, as it refers to an entire sector or industry. The second index can more easily occur, as it sets a low threshold for the number of employees and a high turnover or balance sheet limit. This index appears to be designed to include digital companies that in many cases have few or no employees but generate significant income. One possible side effect of this index could be that it could make the counterparties reluctant to negotiate working conditions jointly, as this could become a condition for the legitimacy of the agreements themselves[60].

The second category of collective agreements in which the Commission establishes non-intervention is those "concluded by self-employed persons pursuant to national or Union legislation". Such legislation must pursue social objectives. This provision suggests a scrutiny of the reasons for intervention, which is difficult to pursue. An example of such a provision is provided in the Guidelines itself, referring to Directive (EU) 2019/790, regarding the right of authors and performers to appropriate and proportionate remuneration.

The Commission thus leaves it to the Member States to identify in abstract the cases in which the social objectives, already referred to in the *Albany* case, are effectively pursued. In other words, the existence of the "social" object of the agreement, as required by EU case law, is presumed through an internal provision that legitimises collective bargaining to pursue it.

4. Effectiveness of the Guidelines – Problems and Possible *de jure condendo* Solutions

The Commission Guidelines identify certain criteria based on which collective agreements applied to self-employed persons are considered exempt from competition law or against which the Commission decides not to intervene in any case.

[59] According to Rainone, 2022, p. 189, the use of bargaining power as an index represents a "paradigm shift" in EU law.

[60] In general, regarding the potential abusive behaviour of companies related to numerical thresholds, see Daskalova, 2021, p. 49.

In the first case, the Guidelines serve to specify the orientations of the *FNV Kunsten* judgement by providing indicators that presume certain self-employed persons to be comparable to employees for the purpose of the applicability of competition law.

In the second case, the Guidelines introduce a partially innovative provision by acknowledging for the first time that some self-employed persons, even if not comparable to workers, may fall within the scope of the *Albany* exemption, based on specific indicators demonstrating the market vulnerability of them.

However, in this latter case, the Commission can only take action in relation to its own proceedings and cannot, through its own autonomous act, overturn the orientation of the Court of Justice.

It is precisely due to the type of act adopted (a Commission communication) that the main issues of effectiveness of the Guidelines arise. On the one hand, these Guidelines merely clarify who is considered a "false self-employed" within the specific subject matter, essentially reaffirming the exclusion of "true" self-employed persons under European law from the application of collective agreements. On the other hand, they establish non-intervention by the Commission even with regard to economically weak "true" self-employed persons (normally comparable to undertakings), but they cannot guarantee total exemption in all circumstances where the legitimacy of the agreement may be called into question.

Moreover, as highlighted in the previous paragraph, some of the criteria identified by the Guidelines have clear limitations, sometimes due to their excessive indeterminacy, and other times due to possible difficulties in verification.

However, the most evident problem of the Commission's approach is that it leaves the evaluation of the legitimacy of collective agreements applied to solo self-employed persons to individual judgement. In some cases, the distinction is even based on indicators closely related to the personal situation of the person (a paradigmatic example being economic dependency)[61]. In other cases, decisive factors concern the counterpart, such as belonging to a particular sector (such as the digital platform sector as defined by the Guidelines) or meeting economic or employee number thresholds.

The potentially contradictory consequence of this approach is that a collective agreement may be legitimately applied only to certain self-employed persons in a specific sector or company, while excluding others based on subjective elements that are not easily verifiable *ab initio*.

Therefore, although the Guidelines are a significant interpretative advancement in relation to the established Court of Justice case law, they may not be the best tool for resolving the issue of the legitimacy of collective agreements applicable to economically

[61] Giovannone, 2022, p. 221, argues the difficulty for social partners to ensure the application only to persons with certain requirements. See also Villa, 2022, p. 306. On the inadequacy of a system based on numerical thresholds, cf. Treu, 2010, p. 615.

vulnerable self-employed persons. Nor is it believed that the economic weakness of an individual self-employed person, based on objective and precise data, can be a suitable criterion for evaluating the legitimacy of collective agreements.

A collective approach to the issue is necessary. A legislative solution, through a specific Regulation, which could be based on the full implementation of Article 28 of the Charter of Fundamental Rights[62], may be needed[63]. This solution could involve redefining the concept of a worker in the European law[64], at least for the purpose of evaluating the legitimacy of collective agreements, to include not only employees and false self-employed persons but also, in general, self-employed persons who provide their services in a personal way[65]. Only such an action can overcome the restrictive orientation of the *FNV Kunsten* ruling and allow the *Albany* exemption to be applied to a broader category of individuals without the need for complex case-by-case assessments.

This type of action, by eliminating uncertainty, would also have the merit of promoting collective bargaining in negotiation and pre-negotiation phases, enabling the full implementation of Article 28 with regard to the freedom of trade union action in general.

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62 Cf. Lianos 2021, p. 318; Piglialarmi, 2021, p. 23.

63 According to some scholars, this article alone could make it possible to consider the interests of the self-employed in bargaining superior to the rules of competition law. Cf. Lianos, Countouris, and De Stefano, 2019, p. 323.

64 Lianos, 2021, pp. 314–316. According to Ferraro, 2019, p. 77, "the absolute equivalence self-employed = undertaking [...] configure an obstacle to the realization of objectives of inclusion and social protection".

65 As suggested by Lianos, Countouris and De Stefano, 2019, p. 323; cf. Biasi, 2018a, pp. 371–372. Partially *contra* Daskalova, 2021, p. 48, who argues that "limiting the collective bargaining exemption to vulnerable self-employed seems necessary to avoid undesirable consequences", but she acknowledges that "a uniform vulnerability criterion may be difficult to spell out".

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Ljubljana Law Review
2023, Vol. LXXXIII

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Scientific article
UDC: 349.2:339.13.012.42:061.1EU
331.55:061.1EU
DOI: 10.51940/2023.1.119-144

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Free Movement of Workers within the EU: Western Solidarity or Dystopian Challenges for Central-East European Workers?

Abstract[1]

The article analyses the application of the principle of free movement of workers within the European Union, focusing on the challenges arising from implementing transitional arrangements that restricted this freedom for the Central and Eastern European (CEE) countries' nationals because of the concerns about mass migration and its potential impact on the labour market. The article aims to provide an overview of these reasons, scrutinising their proportionality and justification. Additionally, it examines the impacts of those transitional provisions, which have resulted in unequal EU citizenship rights and have stimulated the CEE workers' predominant occupation in low-wage sectors of the labour market. Furthermore, the emergence of prejudice based on cultural differences towards the CEE workers has influenced Western EU employers' preference for 'good workers' from the CEE countries, often attributed to the strong work ethic and willingness of the CEE workers to fill workforce gaps in less desirable jobs. To interrogate this matter and to determine whether the preference of the CEE workers arises from solidarity or some other interest, empirical research was conducted on a sample of Croatian

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1 This article is a product of work that has been fully supported by the Faculty of Law Osijek Josip Juraj Strossmayer University of Osijek under the project nr. IP-PRAVOS-3: *Labour law and the challenges of the 21st century; transformation, humanization, discrimination and equality*.

nationals working in Germany. By its qualitative and quantitative approach, the article contributes to understanding the implications and dynamics surrounding the freedom of movement for workers within the EU, with a specific focus on the position of the CEE countries' nationals. It explores the motives behind the implementation of transitional arrangements, examines their consequences for the EU labour market, and investigates the factors influencing Western employers' preferences toward the CEE mobile workers.

Key words

Free movement of workers, transitional arrangements, CEE workers, EU labour market.

1. Introduction

The free movement of workers is one of the fundamental freedoms of EU citizens based on Article 45 of the Treaty on the Functioning of the European Union (TFEU)[2], applicable to the Member States' nationals outside their State's domestic sphere[3].[4] It prohibits the nationality discrimination of the other Member States' workers in employment, remuneration or other employment conditions. Also, it includes the right to accept employment offers in another EU Member State, to move within that State, to stay in it because of the employment and to remain there after the termination of the employment relationship, all followed by the possible limitations based on the public policy, security, or health and with the exclusion of the employment in public service.[5]

Nevertheless, the TFEU is not the first EU legislation regulating that freedom. The Treaty establishing the European Coal and Steel Community in 1951[6] first introduced a free movement of workers, while the 1957 Treaty of Rome[7] generally guaranteed the free movement of workers and services. However, during the first discussions on the Treaty of Rome, only two of the six original Member States—Belgium and Italy—supported the freedom of movement for workers as one of the pillars for creating a common market. Simultaneously, Germany, France, Luxembourg, and the Netherlands admitted only the freedom of movement of goods, capital, and services. Nonetheless, considering the large

2 Consolidated version of the Treaty on the Functioning of the European Union (TFEU), Official Journal of the EU, C 326, 26 October 2012.

3 Judgment of the Court (Second Chamber) of 28 January 1992, Case C-332/90 *Volker Steen v Deutsche Bundespost*, ECLI:EU:C:1992:40, p. 341.

4 Blanpain, 2010, p. 276.

5 Barnard, 2000, p. 133; TFEU, Article 45.

6 Treaty Establishing the European Coal and Steel Community, ECSC Treaty, signed on 18 April 1951.

7 Treaty Establishing the European Economic Community (The Treaty of Rome, or EEC Treaty), signed on 25 March 1957.

number of unemployed workers in the territory of Italy and the then probable victory of the Communist Party, the acceptance of the free movement of workers prevailed, and it was included in the 1957 Treaty of Rome.[8]

In the years that followed, the original Member States feared a massive migration of workers after the accession of the new Member States. This fear existed during the accession of the United Kingdom, Ireland, and Denmark in 1973, Greece in 1981, and Spain and Portugal in 1986 but increased during the accessions of the Central and Eastern (CEE) EU Members[9].[10] However, according to the pre-2001 data, the EU had been characterised by a low internal working migration rate between 1991 and 2001, which manifested in only 15 per cent of EU citizens being involved in EU cross-border employment.[11] Thus, despite initial concerns proving to be exaggerated due to the subsequent reverse migration of workers following the accession of nations, such as Greece, Portugal, and Spain[12], the accession of the Central and Eastern European countries into the EU spark a significant debate among some Member States on the challenges of controlling their borders.[13] Consequently, even though the prior intention of the 2004 eastward expansion of the EU was to provide all EU citizenship rights and freedoms to the new countries, it did not happen since labour market rights were subject to limitations in terms of transitional arrangements.[14] Therefore, before the accessions on 1 May 2004, the Accession Treaty, signed on 16 April 2003, introduced transitional arrangements that restricted the free movement of workers from and to the new Member States.[15] Finally, due to previous EU policy and numerous studies provided by the European Commission and other independent bodies demonstrating that the accession of new Member States would not cause an instant and significant influx or outflux of workers, the question arises if establishing the transitional arrangements was justified and restriction for the CEE workers necessary.

Henceforth, the freedom of labour mobility is a significant achievement of the EU, frequently utilised by citizens across all Member States. Nonetheless, critics assert that this freedom serves as a conduit for residents from economically disadvantaged Member States to exploit social benefits in host nations, similar to contentions surrounding the notion that the freedom of labour mobility allows foreign individuals to displace domestic workers, thereby exacerbating unemployment among the native populace, or that

8 Toader, and Florea, 2012, pp. 68–69.

9 This article adopts the term "CEE" countries to encompass the Member States of EU-8, EU-2, and the Republic of Croatia.

10 Tudor, 2017, p. 41.

11 Kapural, 2005, p. 85.

12 *Ibid.*

13 Tudor, 2017, p. 41.

14 Drnovšek and Debnár, 2021, p. 3.

15 Blanpain, 2010, pp. 277–278.

immigrants from countries with lower wages depress remuneration for low-skilled labour in the recipient country. Nevertheless, none of these theories has been substantiated by compelling evidence.[16]

The following gives a more detailed overview of the transitional arrangements, emphasising the transitional process of CEE countries and questioning the differentiation of "two-tier citizens of the EU". Therefore, the CEE transitional arrangements are impugned to potentially elaborate its necessity for the candidate countries (Albania, Bosnia and Herzegovina, Moldova, Montenegro, North Macedonia, Serbia, Türkiye, and Ukraine)[17] and potential candidates (Georgia and Kosovo),[18] which also mainly belong to the post-socialist and economically less wealthy countries.

2. Transitional Arrangements

The Treaty of Accession of new Member States defines the scope of the EU measures toward the citizens of that State. Those restrictions concern only the freedom of movement of workers and, since they are not equalised, can depend on the accessing country.[19] Transitional arrangements are discretionary, allowing each Member State to decide on implementation and derogate from Articles 1 to 6 of Regulation 1612/68.[20] EU legislation enabling these provisions are: TFEU as primary legislation and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States[21], Directive 96/71/EC of the European Parliament and the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services[22], Regulation (EU) No 492/2011 of the European Parliament

16 Mulligan, 2017, pp. 254–255.

17 Joining the EU, <https://european-union.europa.eu/principles-countries-history/joining-eu_en> (accessed 10 May 2023).

18 *Ibid.* Note: The indication of Kosovo is without prejudice to its status, and it is based on UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.

19 Vinković and Dudaš, 2015, p. 141.

20 Consolidated text: Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal of the EU, L 141, 27 May 2011.

21 Consolidated text: Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, Official Journal of the EU, L 158, 30 April 2004.

22 Consolidated text: Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services,

and of the Council of 5 April 2011 on freedom of movement for workers within the EU[23], as secondary legislation.[24] The accession acts signed on 16 April 2003 in Athens set conditions for the accession of the following countries: the Czech Republic, the Republic of Cyprus, the Republic of Estonia, the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania, the Republic of Malta, the Republic of Poland, the Slovak Republic, and the Republic of Slovenia.[25] In some of those cases, measures were considered as needed due to the apprehension of the potential labour migrations from the new Member States, based on, for example, territorial accessibility, earning divergences, low employment rates, and "a culture of migration".[26] However, the citizens of Cyprus and Malta were not restricted by the transitional arrangements, so the 2004 accessions could be summarised under the "EU-8" notion. Furthermore, the 2005 Treaty of Accession of the Republic of Bulgaria and Romania, summarised under the notion of the "EU-2", also included restrictions to the free movement of workers since becoming the Member States from 1 January 2007 until 31 December 2013.[27] Therefore, the EU-15[28] Member States introduced transitional arrangements primarily before the accessions of 2004 to control the influx of workers primarily from the EU-8, then the EU-2 countries in 2007, Croatia in 2013, and all other upcoming Member States. However, those restrictions were not entirely innovative since rules existed when Greece, Spain, and Portugal joined the EU. Still, their population and economic status were almost immeasurably different, and the duration of those restrictions was much shorter than for the CEE countries.[29]

Consequently, transnational arrangements since 2004, 2007 and 2013 restricted workers' freedom of movement and *de facto* enabled the opportunity to employ Central-Eastern EU citizens for up to seven years. Restrictions included complex application pro-

Official Journal of the EU, L 18, 21 January 1997.

23 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal of the EU, L 141, 27 May 2011.

24 Mulligan, 2017.

25 Blanpain, 2010, p. 278. See more in: Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, Official Journal of the EU, L 236, 23 September 2003.

26 Consolidated text: Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal of the EU, L 141, 27 May 2011.

27 See more in: Treaty of Accession of the Republic of Bulgaria and Romania, Official Journal of the EU, L 157, 21 June 2005.

28 "EU-15" Member States included: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. However, even though the UK is no longer a Member State, the notion "EU-15" will be used as the representation of the EU system at the time of 2004, 2007 and 2013 accessions.

29 Ulceluse and Kahanec, 2022, p. 721.

cedures in terms of working permit requirements, quotas, proven suitability, and other national measures.[30] Therefore, to provide the gradual adjustment of the labour market between old and new Member States, transnational arrangements were constructed by the three-step process in the form of a 2+3+2 formula, which meant that the old Member States could impose the transnational measures for two years and extend them for three years if needed. The additional two years could be applied only exceptionally under the condition of evidencing the serious disruptions in their labour markets caused by the accession of the new Members States.[31]

Thus, for the first two years, the Member States were applying the national rules or the bilateral agreements rules meaning that workers from the new Member States still needed a work permit for the "old States" labour market.[32] Before its expiry, every Member State using the transitional provisions should provide a report to the Commission and declare if they want to continue to apply national conditions and bilateral agreements or fully implement the EU legislation on the free movement of workers. According to it, the Council decides if continuing previous measures for an additional three years is necessary and justified.[33] After three additional years, the Member State must submit the report to the Commission again. If the Member State wants to prolong the transitional period for an additional two years, it has to prove the justification in terms of "serious disturbances" or a "threat of serious disturbances" to that Member States' labour market.[34] Once that transitional period expires, the host State can no longer restrict the free movement of workers from or to the new Member State, and all workers must be entitled to equal treatment as the nationals of the receiving State.[35] Additionally, there is a possibility for the Member States that chose not to implement the transitional measures but still experience a certain threat to their labour market, or their labour market has serious difficulties, to use the "safeguard clause", which allows that Member State to ask for the Commission's permission to introduce new measures. Also, a "standstill clause" forbade the EU-15 Member States to apply stricter rules during the transitional period than they applied before accessions, and they had to give a preference to the workers from the new Member States over the third countries' nationals.[36]

However, despite all the previously mentioned transitional rules, 2004, 2007, and 2013 CEE accessions were followed by contradictory responses from the "old Member States". Only a few of them, including Ireland, the United Kingdom and Sweden, pro-

30 Ulceluse and Bender, 2022, p. 452.

31 See more in: Holland *et al.*, 2011.

32 Blanpain, 2010, pp. 278–279.

33 Vinković and Dudaš, 2015, p. 142.

34 *Ibid.*

35 Currie, 2016a, p. 17.

36 Blanpain, 2010, p. 279.

vided access to their respective labour markets to the EU-8 nationals straight away. Still, both Ireland and the United Kingdom limited access to social benefits by restricting social assistance and introducing Habitual Residence Conditions.[37] Also, the United Kingdom introduced a special registration procedure to monitor the migration's influence on its labour market. On the other hand, 15 out of 25 Member States applied transitional restrictions to Romania and Bulgaria after their accession. However, although Cyprus, Finland, and Slovenia were within the list of the countries that did not restrict free movement for the EU-2 nationals, they applied similar measures of the special registration procedure as the United Kingdom for the new Member States during the previous accessions.[38] After the accession of Croatia in 2013, 13 out of 27 Member States applied transitional arrangements for the Croatian nationals, including, for example, previously mentioned Slovenia and Cyprus, as ones that did not use that possibility during the previous EU-2 accessions.[39]

In the following section, the reasons for most of the "old Member States" pre-accession concerns will be analysed to determine their justification.

2.1. The Role of EU-15 Concerns as Foundational Elements in the Implementation of Transnational Arrangements in CEE Countries

One of the prior intentions of the enlargement to the CEE countries was a conclusion of the "East/West division of the continent" and the same mobility rights for their citizens. However, that ideal was left away soon, and the reality has proven to have a different outcome by introducing the transnational arrangements that represented the restrictions to the CEE workers for a defined period after their accession.[40] Consequently, the free movement of workers was one of the most controversial discussions before signing the first Treaty of Accession in 2003 due to the unpopular general public's opinion on the potential influx of workers from the new Member States to the "old ones".[41] Some "privileged" Member States were concerned about the impact of the "less-privileged" citizens' migration to their respective labour markets.[42] Accordingly, the question arose if the transitional arrangements which provided restricted rights to the new Member States' workers were contrary to the EU's primary intentions of encouraging inter-state fluctuation.[43] Regarding the European Commission's Social Rights Action Plan from

37 Szelewa and Polakowski, 2022, pp. 242–243.

38 Vinković and Dudaš, 2015, p. 143.

39 *Ibid.*, p. 144.

40 Favell, 2008, p. 264.

41 Farkas and Rymkevitch, 2004, p. 369.

42 See more in: Dougan, 2004.

43 Currie, 2016a, pp. 11–12.

March 2021, "Europeans value this unique social and economic model and expect it to bring opportunities for all,"[44] but it is disputable if transitional arrangements represent the opposite approach.

To clarify that doubt, the reasons for the EU-15's concerns will be presented below, emphasising the short quantitative empirical research on the justification of one of the reasons. The presumption is that the *ratio* behind the EU-15's enlargement hierarchy was nationality as the factor crucial for detecting the economic background of each acceding country's citizen. Therefore, the alleged reason for introducing those restrictions by the EU-15 countries was that CEE countries were less wealthy, primarily due to unemployment, low income and limited job opportunities.[45] To verify one of the mentioned reasons, the following hypothesis has been set: low income in the CEE countries was a justified concern of the EU-15 countries to introduce the transitional arrangements before their accessions. To prove or reject the proposed hypotheses, we provide an overview of the minimum wages of the CEE countries (the EU-8, the EU-2 and Croatia) just before their full membership in the EU. Depending on the available data, several EU-15 countries' minimum wages are selected as the basis for the comparison.

Table 1: The monthly minimum wages in selected EU-15 countries in euros in 2004, 2007 and 2013, depending on the date of the CEE's full membership in the EU (the EU-8 on 1 May 2004, the EU-2 on 1 January 2007, and Croatia on 1 July 2013)

Selected EU-15 countries	The monthly minimum wages in the first semester of 2004	The monthly minimum wages in the second semester of 2006	The monthly minimum wage in the first semester of 2013
Belgium	EUR 1,186.31	EUR 1,234.00	EUR 1,501.82
Ireland	EUR 1,073.15	EUR 1,292.85	EUR 1,461.85
France	EUR 1,215.11	EUR 1,254.28	EUR 1,430.22
Luxembourg	EUR 1,402.96	EUR 1,503.42	EUR 1,874.19
The Netherlands	EUR 1,264.80	EUR 1,284.60	EUR 1,469.40
The United Kingdom	EUR 1,054.20	EUR 1,200.69	EUR 1,249.85

Source: Author's comparison based on the data available at: <https://ec.europa.eu/eurostat/databrowser/view/EARN_MW_CUR__custom_6295261/default/table?lang=en> (accessed on 20 May 2023).

[44] European Commission, 2021, p. 5.

[45] Kvist, 2004, p. 305.

Table 2: The monthly minimum wages in the CEE countries in euros in 2004, 2007 and 2013, depending on the date of their full membership in the EU (the EU-8 on 1 May 2004, the EU-2 on 1 January 2007, and Croatia on 1 July 2013[46])

CEE countries	The monthly minimum wages in the first semester of 2004	The monthly minimum wages in the second semester of 2006	The minimum monthly wages in the first semester of 2013
EU-8			
Czechia	EUR 206.73	EUR 279.19	EUR 318.08
Estonia	EUR 158.50	EUR 191.73	EUR 320.00
Hungary	EUR 201.90	EUR 220.58	EUR 335.27
Latvia	EUR 118.96	EUR 129.29	EUR 286.66
Lithuania	EUR 130.34	EUR 173.77	EUR 289.62
Poland	EUR 175.25	EUR 221.72	EUR 392.73
Slovakia	EUR 147.68	EUR 179.92	EUR 337.70
Slovenia	EUR 470.99	EUR 511.62	EUR 783.66
EU-2			
Bulgaria	EUR 61.36	EUR 81.81	EUR 158.50
Romania	EUR 68.03	EUR 92.43	EUR 157.50
EU-1			
Croatia	-	-	EUR 372.35

Source: Author's comparison based on the data available at: <https://ec.europa.eu/eurostat/databrowser/view/EARN_MW_CUR__custom_6295261/default/table?lang=en> (accessed on: 20 May 2023).

According to the data above, the average minimum wage in the EU-8 countries before their full membership in 2004 was EUR 201.29, while in the same period, the average minimum wage in the selected EU-15 countries was EUR 1,199.42. Therefore, the EU-8 countries had six times lower average minimum wages in the first semester of 2004 than the selected Western countries. Furthermore, before the accession of the EU-2

[46] For this purpose, Croatia's accession is declared as "EU-1".

countries in the second semester of 2006, their average minimum wage was EUR 87.12, while the selected EU-15's average minimum wage was EUR 1,294.97, almost 15 times higher than Bulgaria's and Romania's. Finally, the average minimum wage in the selected EU-15 countries in the first semester of 2013 was EUR 1,497.88, four times higher than the Croatian minimum wage at its accession. Therefore, the previously mentioned hypothesis on low income as the reason for the EU-15's concern for the potential CEE worker's massive migration after their accessions could be justified due to the statistical data analysed above. Nevertheless, the transitional arrangements cannot be deemed as adequately safeguarding the labour market in proportion to the limitations imposed on the EU's fundamental freedoms based solely on the analysed concern.

Therefore, concerns arose in the EU-15 countries on the potential interruptions of the labour market, reduction of wages and uncertain impact on the unemployment rate.[47] Further possible issues were social dumping, unfair benefits for businesses establishing their offices in the CEE countries to lower their costs using cheaper labour force and premises and social tourism in the form of migrations for more generous social benefits and low contributions.[48] Significantly, the Court of Justice's broad interpretation of the term "worker" contributed to the last concern since the Court included, for example, individuals who worked part-time or received remuneration which was less than the minimum means of substance[49] or if the received remuneration was lower than the regulated minimum wage[50].[51] However, according to the proportionality principle, the question was whether all the reasons mentioned were enough to restrict the freedom of movement to post-communist countries' citizens.[52] For a measure to be deemed proportionate, it must undergo scrutiny through a legitimacy assessment, a suitability evaluation, and a necessity examination, and ultimately, it must adhere to the *stricto sensu* proportionality requirement, entailing a balancing stage. Hence, in the context of transitional arrangements, it is customary to inquire whether a harmonious equilibrium has been achieved between market freedoms and non-economic interests.[53]

That question specifically arose in 2007 when Malta and Cyprus were deemed sufficiently aligned with the established EU Member States to promptly attain full EU membership rights. Concurrently, the CEE countries were precluded from enjoying complete

47 Jileva, 2002, p. 694.

48 Kvist, 2004, pp. 305–306.

49 Judgment of the Court of 14 December 1995, C-317/93 *Inge Nolte v Landesversicherungsanstalt Hannover*, ECLI:EU:C:1995:438, p. 4656.

50 Judgment of the Court (First Chamber) of 26 March 2015, C-316/13 *Gérard Fenoll v Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handicapées mentales (APEI) d'Avignon*, ECLI:EU:C:2015:200, p. 7.

51 Currie, 2016a, p. 13.

52 Currie, 2016b, p. 159.

53 Marzal, 2017, p. 630.

mobility rights upon accession, thereby categorising them as "second-class members". As a result, excluding only these two chosen countries further intensified the perception of discrimination towards the CEE countries and exacerbated the differentiation between the EU-15 and the newly admitted Member States.[54] Additionally, analysing the previous accessions of Greece, Spain, and Portugal in 1981 and 1986, which also had lower incomes than the "old Member States", it is essential to note that they were subject to transitional restrictions, too. This approach indicates contrasting historical nation-building experiences, particularly when comparing the original six founders of the EU with these Southern states that emerged from post-dictatorship eras and the CEE states that transitioned from the post-communist regimes.[55]

These divergent experiences resulted in notable disparities in economic development, geo-strategic interests and normative power.[56] However, the income divergence of Greece, Spain, and Portugal was not as significant as the one previously analysed from the CEE countries.[57] Also, despite the initially envisaged duration of six years for Greece and seven years for Spain and Portugal, their transitional agreements were ultimately shortened, owing to the absence of significant worker migration during that period. In the years ahead, their accession and the rate of movement from those three countries even decreased, which proved the concerns of "old Member States" had been unfounded.[58]

According to the aforementioned transitional provisions, one might initially presume that the nationals of CEE countries were in similar position to those from Southern EU countries[59]. However, scholarly discourse varied considerably regarding the need to compare the transitional restrictions of the CEE countries with those of Greece, Spain, and Portugal. On one side, some scholars argued that the accession of Greece, Spain, and Portugal could be a template for projecting the migration flow of the CEE countries' nationals due to economic correlations and despite cultural and social deviations. Due to that, one would expect that the EU-15 concerns on after-accession migrations from the CEE nations were unfounded.[60] On the other hand, some scholars argued that the southern countries' situation could not be a model for the CEE countries for several reasons. Firstly, the economic situation of the CEE countries lagged way behind the southern countries at the time of their accession. Secondly, the EU-8 and the EU-2

54 Currie, 2016b, p. 159.

55 Dyson and Sepos, 2010, p. 23.

56 Ulceluse and Bender, 2022, p. 450.

57 Tamans and Münz, 2006.

58 Vaughan-Whitehead, 2003, p. 413.

59 Currie, 2016b, p. 160.

60 Kaczmarczyk, 2004, p. 71.

accessions included almost double the number of new EU citizens than Greece, Spain, and Portugal's accessions.[61]

Consequently, besides all the previously mentioned reasons and academic arguments, the EU-15's concerns regarding potential migrations were significantly influenced by the political and cultural discrepancies of the CEE countries, particularly their post-communist status. Therefore, it can be concluded that the crucial (latent) reason for the EU-15 countries to introduce the transitional arrangements was potentially prompting negative public opinion on the massive instant influx from the CEE countries rather than any previously mentioned economic, labour market or welfare reasons.[62] That approach was a pillar for implementing prejudicial practices and establishing the "second-class citizens". Unequal treatment has shaped the economic and social hierarchy in the EU while dividing citizens into "two tiers". To analyse the mentioned issue, the following section provides the process and shortcomings that caused labelling the CEE countries' nationals as unequal.

2.2. Challenges in Acquiring the EU) Citizenship: The Impact of Transitional Arrangements

Freedom of movement of workers has two key objectives: economic and social-political. The economic objective, as the dominant one, is realised through benefits, not only for workers but also for the Member States (especially the "host countries") and the EU in general.[63] It aims to give workers the possibility to enhance their lives and employment conditions, all while contributing to the satisfaction of the Member States' economic requirements.[64] Besides it, as the motive of the economic policy of the monetary union, the free movement of workers enables the balancing of asymmetrical shocks, including events that affect the economy of one Member State significantly more than another. However, even though that freedom has contributed to the West EU countries, the EU in general and mobility workers, it negatively affected the CEE countries regarding labour force outflow, especially qualified workers, consequently slowing down convergence with "the old Member States".[65] On the other hand, when it comes to the political objectives of the free movement of workers, it is the factor that contributes to European integration and community. But the reality has shown that due to cultural and linguistic differences, just like the strong national identity, the EU citizens have not practised that freedom on a large scale until citizens of the economically less wealthy Member States got the opportunity to use it for working in the Western Member States.

61 Henderson, 2000, p. 1.

62 Currie, 2016a, p. 15.

63 Goldner Lang, 2021, p. 78.

64 Tudor, 2017, p. 41.

65 Goldner Lang and Lang, 2019, p. 89.

Additionally, in practice, the freedom of movement has, instead of community feeling, stimulated negative public opinion of nationals of "host States". For example, the "Polish plumber" stereotype has been used in the Western EU to mark the cheap labour force from the CEE countries.[66] Some theorists have concluded that certain States are, from a legal standpoint, unhesitatingly selecting "desirable" categories of foreigners without even probing the moral dimension. Consequently, they find themselves teetering on the precipice of straddling the line between preferential treatment and discrimination.[67] That approach can be contrary to the EU legislation elaborating on the equal treatment of other Member State workers and contrary to the Court of Justice's case law that emphasised the importance of equal treatment of workers for the integration of workers and their family members into the host State and for the accomplishment of the main aims of the freedom of movement within the EU.[68] Therefore, every national legislation or practice limiting the employment of other Member States' citizens that does not apply to their nationals is null and void.[69] According to Regulation No. 492/2011, the principle of non-discrimination should be interpreted as an equal priority in employment for all EU nationals, just as domestic workers enjoy.[70] Furthermore, although Advocate General Jacobs expressed the view on 19 March 1998[71] that every EU citizen residing in another Member State, regardless of their economic activity, possessed the right to be free from discrimination under ex Article 12 TEC (today's Article 18 TFEU[72]), the notion of EU citizenship as a separate concept was initially introduced through the 1992 Maastricht Treaty[73] and subsequently expanded by the 1997 Treaty of Amsterdam. Before the Maastricht Treaty, the Treaties of the European Communities provided protections for the free movement of economically active individuals, such as workers, but not generally for other categories of individuals.[74] Therefore, EU citizenship aimed to integrate EU na-

66 Goldner Lang, 2021, p. 78.

67 Pécoud and Guchteneire, 2007, p. 9.

68 See more in: Judgment of the Court of 11 July 1985, C-137/84 *Ministère public v Mutsch*, ECLI:EU:C:1985:335.

69 Blanpain, 2010, p. 280.

70 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Official Journal of the EU, L 141, (7).

71 Opinion of Advocate General Jacobs from 19 March 1998 in Case C-274/96 *Bickel and Franz*, para. 19.

72 TFEU, Article 18: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination."

73 Consolidated Version of the Treaty on European Union, Official Journal of the EU, C-202/1, 7 June 2016.

74 Toader and Florea, 2012, p. 21.

tionals outside their domestic country and foster a closer relationship between "Europe" and its citizens.[75] Also, that notion, which still causes debates, pertains to belonging to and engaging with a community.[76] The constitutionalising of the EU citizenship strongly corresponds with the concept of free movement, as the majority of the rights associated with it, except Article 18 TFEU itself, can only be exercised when a cross-border movement is involved.[77] Hence, given the interrelation between cross-border mobility and EU citizenship, there was uncertainty regarding the impact of transitional arrangements on the citizenship status of individuals from the CEE countries, especially workers. Consequently, this matter will be critically examined below.

It is imperative to underscore that during the transitional period, citizens from the CEE countries were granted the privilege to travel and establish residency within the EU-15 nations, but they encountered prevailing constraints when attempting to access the labour markets in these respective countries.[78] Therefore, upon accession, individuals from the acceding country immediately obtain the EU citizenship within and are granted the right to move and reside freely in other Member States for any reason other than employment.[79] However, self-employed individuals were exempt from the transitional arrangements and enjoyed unrestricted entry into the labour markets of all Member States. As a result, self-employment became a tactic used by the CEE nationals and their employers to circumvent the imposed restrictions. These individuals operated as *de facto* employees while officially registered as self-employed.[80] Numerous studies have undertaken a targeted examination of the impact resulting from the implementation of transitional arrangements on the proportion of individuals engaged in self-employment. The findings of these studies have provided compelling evidence that the implementation of transitional restrictions led to an elevation in the prevalence of self-employment. In contrast, the subsequent removal of these restrictions resulted in a decline in the self-employment rate.[81] The deficiencies observed in the previous transitional systems[82] highlight the importance for policymakers to adopt a comprehensive perspective regarding the potential repercussions of such restrictions for future enlargements.

Finally, concerning the general effects of the enlargement, it is noteworthy that the Commission determined that the migration flows following the enlargement engendered favourable consequences for the economies of the pre-existing EU-15 Member States,

75 Ackers and Dwyer, 2002, pp. 16–18.

76 Faist, 2001, p. 40.

77 Currie, 2016b, p. 148.

78 Ulceluse and Bender, 2022, p. 452.

79 Guild, 2014, p 105.

80 Ulceluse and Kahanec, 2023, p. 720.

81 *Ibid*., pp. 722–723.

82 Palmer and Pytliková, 2015, p. 145.

much more than for the sending countries. These accessions have actively contributed to the general labour market performance, facilitated sustained economic growth, and improved public finances.[83] Moreover, according to the Centre of Migration's Research, removing transitional arrangements would have resulted in even more significant gains in terms of aggregate output. Existing empirical evidence highlights that those countries that delayed the liberalisation of their labour markets experienced a disproportionate loss of skilled and young migrants, who instead chose countries, such as Ireland and the UK.[84] Also, implementing transitional arrangements to safeguard domestic labour markets had unintended side consequences, such as social dumping, self-employment misuse, and worker posting. Consequently, these transitional periods, stemming from political rather than market mechanisms, were not optimal choices in terms of maximising the benefits of mobility for both host economies and migrants themselves. Instead, they entailed significant socio-economic costs.[85]

According to Zielonka, whether previous enlargements prompted the EU to adopt an imperialistic approach towards its new neighbouring countries remains a matter of inquiry. The inclusion of nations such as, for example, Turkey, Serbia, and Ukraine would undeniably pose even greater challenges, considering the significant interests involved. However, the last waves of enlargement have demonstrated the EU's adeptness and resolve in safeguarding its most vital interests.[86]

3. (In)equality of Workers from the Central and Eastern EU Countries: A Critical Examination

The term "return to Europe" was used to describe the CEE countries' accessions to the EU since the freedom of movement, undoubtedly, served as a remarkable contrast to the intrastate and interstate mobility restrictions experienced under the communist regime.[87] From the perspective of the established Member States, the CEE enlargements were predominantly viewed as a "missionary crusade" to impart superior Western practices of conducting business and engaging in politics to the comparatively less developed countries.[88] Given the symbolic significance of freedom of movement for the CEE countries, which were physically and ideologically separated from the Western part by the Iron Curtain[89], it becomes a valid inquiry to examine whether the seven-year transitional

83 Goldner Lang, 2007, p. 270.

84 Fihel *et al.*, 2015, p. 79.

85 *Ibid.*

86 Zielonka, 2006, p. 64.

87 Petev, 1998, p. 83.

88 Zielonka, 2006, p. 69.

89 Currie, 2016, p. 1.

arrangements were congruent with the concept of a post-communist formation of a larger Europe.[90] Those transitional restrictions have not only downgraded the status of the CEE countries' nationals and aggravated "a common political, geographical, social and civil identity" of the EU citizens,[91] but they also *de facto* permitted discrimination based on nationality in the scope of employment.[92] Consequently, the transitional arrangements, which allowed the "old Member States" to refuse and postpone labour market access to citizens from the CEE countries, had made the legal status and the EU concept of "worker" inapplicable to many new EU citizens.[93] We concur with the viewpoint by certain scholars[94] who contend that the (mis)treatment of the CEE mobile workers during (and after) the transitional period exposed the presence of a dual-tier EU citizenship. The imposition of temporary limitations on the rights of the CEE mobile workers served as a catalyst and validation for the effective adoption of discriminatory practices.

While certain parallels can be drawn between European integration and state-building endeavours, it is essential to note that the EU does not resemble a Westphalian superstate. Instead, Zielonka emphasises that the emerging polity takes on the characteristics of a neo-medieval empire, featuring a polycentric governance system, overlapping jurisdictions, remarkable cultural and economic diversity, ambiguous borders, and divided sovereignty.[95] The CEE countries generally exhibit limited participation in the "knowledge culture" prevailing in Brussels, and their political influence remains comparatively modest since Western states predominantly seek policy input from among themselves, rarely reaching out to the CEE countries. Paradoxically, despite professing a commitment to fostering solidarity with the CEE Member States, the Western EU countries occasionally entertain the notion of a "multi-speed Europe".[96] Therefore, the facilitation of unrestricted intra-EU mobility should have played a pivotal role in effectively resolving the longstanding division between the East and the West,[97] but the expansions did not promptly grant equal rights to the CEE's mobile workers compared to the Western EU citizens.[98] The presence of economic factors, the positions adopted by other Member States, and the unique socio-economic context and demand for migrant workforce collectively influenced the divergent approaches taken in implementing tran-

90 Reich, 2004, p. 21.

91 Stalford, 2003, p. 11.

92 Currie, 2016b, p. 162.

93 See more in: Judgment of the Court of 3 July 1986, C-66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg*, ECLI:EU:C:1986:284.

94 See more in: Ulceluse and Bender, 2022.

95 Zielonka, 2006, p. 43.

96 Anghel, 2020, p. 200.

97 Favell, 2008, p. 701.

98 Drnovšek and Debnár, 2021, p. 3.

sitional arrangements during each round of enlargement.[99] Ultimately, the contemporary mistreatment of workers from the CEE countries is not directly linked only to the divergent rights established by transitional arrangements. However, these arrangements have played a role in forming a "second-class citizenship" and have perpetuated the perception of the CEE nationals as workers of lesser value.

Therefore, the legitimisation of an unequal approach during the transitional period resulted in the transformation of second-class citizens into workers primarily occupying the lowest sectors of the labour market in the post-transition period. This transformation was accompanied by extensively documented practices, including underemployment, inadequate compensation, excessive working hours, substandard living conditions, and exploitative housing charges.[100] The CEE workers also encounter precarious working conditions, diminished bargaining power, and frequent hostility from the domestic population due to being perceived as a threat to their labour market.[101] The emerging manifestation of new "cultural" racism towards the CEE workers arises from their distinct way of life, language challenges, and the common underlying resentment harboured by the local population.[102] However, certain studies have indicated that Western employers prefer mobile workers from the CEE countries primarily due to their strong work ethic and readiness to undertake additional tasks for comparatively lower wages. Additionally, these workers are perceived as easily replaceable by other individuals from the same parts of the EU.[103] Undoubtedly, the recent crises that affected the EU have brought renewed attention to disparities within the European labour market, specifically with regard to the worker's country of origin.[104] These events indicated that when Western countries demand additional labour, foreign workers pose no concerns. However, during times of crisis, the migration rate suddenly becomes an unbearable challenge for them.[105] Despite the potential alignment of economic theory in favour of such an approach, wherein migrant workers are presumed to alleviate workforce shortages, the social capital accumulation model fails to corroborate this contention.[106] Notable instances that serve as evidence supporting this theory are the analysed transitional periods, the Brexit phenomenon, and the Covid-19 pandemic.

Brexit served as a wake-up call for numerous EU citizens who experienced first-hand that their previously taken-for-granted freedom of movement had been curtailed.[107] The

99 Ulceluse and Kahanec, 2023, p. 721.

100 Ulceluse and Bender, 2022, p. 452.

101 Szelewa and Polakowski, 2022, p. 240.

102 Garner, 2012, p. 445.

103 Friber and Midtbøen, 2018, p. 1472; Szelewa and Polakowski, 2022, p. 240.

104 Bruzelius, 2018, p. 72.

105 Mulligan, 2017, p. 255.

106 *Ibid.*

107 See more in: Sypris, 2022, pp. 808–814.

next period that changed the perspective on the freedom of movement of the CEE workers was the Covid-19 crisis. Due to the complete or substantial restriction on cross-border movement, Western EU nations, notably Germany, encountered a significant lack of labour force in the primarily agricultural and food production sectors. This shortage pertained specifically to roles demanding physical strength, endurance, and agility amidst prolonged working hours, diminished remuneration, and demanding working conditions. Considering the inability of these countries to procure labour from their domestic population, this circumstance served as an additional catalyst in highlighting the significance and preference of workers from the CEE countries, who typically occupied positions not deemed appealing or sought-after by the local population.[108] Finally, according to the abovementioned, the concept of the "good worker" designation often poses a potential pitfall as it gives rise to anticipations among employers that individuals from CEE exhibit heightened diligence, manifesting in a proclivity for extended working hours and a readiness to undertake more challenging assignments.[109]

To substantiate the claims above and examine the issue of the CEE workers' employment in Western EU countries, we conducted empirical research focusing on Croatian citizens employed in Germany. The findings of this research, which will be analysed in the subsequent sections, aim to provide evidence and insights into the topic at hand.[110]

4. Assessing Perceptions of German Employers Towards Croatian Workers: An Empirical Study

As previously mentioned, the employment of the CEE workers has become increasingly prevalent in many European countries, including Germany. This study aimed to investigate the underlying reasons for this phenomenon by examining the perspectives of Croatian workers..

Therefore, this section presents the findings of an empirical research study to explore why German employers hire Croatian workers. The study was conducted using an anonymous online poll distributed among Croatian workers residing and working in Germany. The sample comprised of 184 participants, primarily recruited through Croatian Catholic communities in Germany and social media groups for Croatian immigrants in Germany. Participants were presented with 13 answer choices and could select multiple options based on their perceptions. The objective was to gain insights into the perceived factors influencing the preference of German employers for Croatian

[108] Szelewa and Polakowski, 2022, pp. 245 and 252; See more in: Koinova *et al.*, 2023, pp. 242–257.

[109] Baxter-Reid, 2016, p. 337.

[110] The empirical research conducted for this article is an integral part of the author's doctoral research. Due to the comprehensive nature of the research, only a subset of the results is presented here.

workers as a form of a representative group of the CEE workers: Western solidarity or a dystopia for Croatian workers.

4.1. Hypothesis and Methods

The research hypothesis suggests that German employers favour employing Croatian workers, demonstrating Western EU employers' preference for mobile workers from the CEE countries. This preference is primarily attributed to the CEE workers' perceived strong work ethic and willingness to undertake jobs undesirable by the local populace that may involve additional tasks, all at comparatively lower wages.

The research included an empirical approach, utilising an anonymous online poll as the primary data collection method. The target population consisted of Croatian workers currently residing and working in Germany. The survey was distributed through two main channels between December 2022 and April 2023: Croatian Catholic communities in Germany and social media groups for Croatian immigrants in Germany. The sample consisted of 184 participants, of which 69,9 per cent were women and 30,4 per cent were men.

Among the 26 questions in the poll, this article focuses exclusively on presenting the results related to one question: "What are the reasons for the German solidarity toward the Croatian workers?". Participants were given 13 answer choices and could select multiple options based on their perceptions. The analysis of the responses provides valuable insights into the reasons behind German employers' employment preference towards Croatian workers.

4.2. Results

The results of this study offer insights into how Croatian workers perceive the motivation of German employers regarding their willingness to hire Croatian workers. The subsequent section presents an analysis of the results, organised according to the order in which they were received by the respondents.

1. 52.7 per cent of Croatian respondents believe that German employers gladly employ Croatian workers because they undertake jobs deemed undesirable and attractive by the domestic workers. Therefore, Croatian mobile workers are perceived as a compensational workforce for the secondary sectors.
2. 16.8 per cent of Croatian respondents indicated that Croatians are willing to engage in seasonal work, making them desirable and suitable for seasonal employment needs.
3. 49.5 per cent of respondents observe that the reason for the employment of Croatian workers is their openness to working outside their professional domain, potentially addressing labour shortages in various sectors of the German labour market.

4. 45.1 per cent of respondents noted that German employers gladly hire Croatians because they are undertaking a position where there is a workforce shortage.
5. 31 per cent of respondents think that the reason for employing Croatian workers is that they demonstrate readiness to work for lower wages than domestic workers. It suggests that Croatian workers are perceived as more cost-effective for German employers, contributing to their employment appeal.
6. 40.2 per cent of respondents think that the reason is that Croatian workers tend to work overtime, indicating their dedication and commitment to their work and potentially increasing their attractiveness to German employers.
7. 47.3 per cent of respondents indicated Croatian workers' readiness to take on more challenging tasks as the reason for their preferences by the employers.
8. 39.1 per cent of respondents noted that it is because Croatian workers refrain from lodging complaints regarding workload, marking them as adaptable, resilient, and willing to tackle their assigned tasks without grievance.
9. 17.4 per cent of respondents believe that German employers' preference lies behind the more susceptible manipulation of Croatian workers than local ones.
10. 19.6 per cent of respondents marked the Croatian workers' willingness to engage in informal employment ("black market") as the reason for their preference by employers.
11. 58.7 per cent of respondents perceive previous positive experiences with Croatian workers as the reason for preferences by German employers.
12. 46.7 per cent of respondents consider that the reason is better productiveness than the local workers, which makes them viewed as highly efficient and capable of delivering high-quality work.
13. 2.2 per cent of respondents indicated that none of the above reasons apply because they believe German employers do not gladly welcome and employ Croatian citizens.

The research results reflect various perceived factors contributing to German employers' willingness to employ Croatian workers. These mainly include their skills in undertaking less-desirable jobs and filling workforce shortages, cost-effectiveness, dedication, adaptability, and positive past experiences. However, the results indicated potential concerns about the vulnerability and exploitation of Croatian workers. Also, it can indicate discussions on labour mobility in general, employment patterns, and potential areas for improvement in cross-border employment.

Therefore, understanding of analysed perceptions of Croatian workers can contribute to a better understanding of the dynamics between the CEE workers and employers from the Western EU countries. Further research is encouraged to explore these perceptions in greater depth and to validate these findings in a broader sense.

In conclusion, the research findings confirm the hypothesis, as most respondents (97.8 per cent) claimed that German employers willingly employ Croatian workers. However, the reasons for it are mostly masked under the notion of being a "good worker", which encompasses undertaking undesirable jobs and addressing the labour shortage while exhibiting higher efficiency for lower remunerations compared to domestic workers. Therefore, while the Western EU countries demonstrate solidarity by offering employment opportunities to the CEE countries' workers, it is overshadowed by the underlying need for a more cost-efficient labour force which compensates for the workforce shortage in the less desirable job positions.

5. Conclusion

The freedom of movement of workers—a fundamental freedom granted to all EU citizens—primarily pertains to the mobility of individuals from the Central and Eastern EU regions who relocate to the Western EU countries to seek potentially improved employment prospects. Therefore, the transitional arrangements were a project for the EU-15 countries that should have fulfilled the aim of protecting their labour markets from "disruption" and "benefiting tourism". Despite that, the concerns surrounding liberalising labour markets for citizens from the CEE Member States were largely baseless and could not be equated with the substantial economic and social advantages derived from the principle of free movement of workers within the EU. Despite the "unity" policy, emphasised as the reason for the enlargement, the "old Member States" managed to tailor the process according to their economic interests, followed by the "cherry-picking" of certain professions that could have fulfilled their workforce's deficiencies.

The successive enlargements of the CEE countries in 2004, 2007, and 2013 further solidified the existing internal hierarchies, significantly impacting the perception of power dynamics, influence, and leverage between the long-standing Member States and the more recent additions. Therefore, the prior intention of "returning to Europe" of the post-communist countries, which were on the opposite side during the Cold War, was left behind the transitional restrictions that legitimised discrimination based on nationality by providing an unequal approach to new citizens but excluding the "welcomed" citizens from Malta and Cyprus. However, not even formal equalisation has not erased the West EU's perception of the CEE countries' workers as "second-class citizens" trapped in the secondary, low-skilled labour market. Therefore, legitimising an unequal approach during the transitional period led to converting individuals considered second-class citizens into workers predominantly concentrated in the lowest sectors of the labour market in the post-transition period. The provided empirical research indicates that Western employers demonstrate a preference for mobile workers from the CEE countries, primarily driven by factors, such as their readiness to undertake less-desirable jobs, flexibility

in working conditions, cost-effectiveness, dedication, and adaptability but expertly disguised behind the facade of solidarity.

Therefore, even though cultural prejudices still follow the CEE workers in Western countries after the expiration of transitional periods, it does not mean that transitional arrangements did not inflame existing economic divisions in the "unified" European society. However, it appears improbable that the long-standing tradition of transitional phases will not persist for the candidate states, which are also classified as less wealthy and, consequently, less warmly received members. Nevertheless, even in the case of maintaining the arguably justifiable transitional period, the EU must effectuate substantial modifications to mitigate the potential bewilderment among citizens of the newly acceded Member States. This necessitates the comprehensive dissemination of pertinent information on the relevant legal framework, thereby ensuring clarity and understanding among the affected individuals. Moreover, the EU should explore alternative measures for safeguarding labour markets, such as implementing immigration quotas. This approach could potentially mitigate criticism regarding the perceived differentiation of nationalities into distinct classes.

Furthermore, considering the significantly influential role of the Western European nations, it arises as a matter of inquiry whether the CEE countries will be afforded a chance to actively participate in shaping overall transformation or mitigate the impact of the future transitional phases. It is worth noting that the effectiveness and justification of transitional arrangements, which entail exclusion from the freedom of movement of workers—one of the fundamental principles of the EU—are contingent only upon successfully passing the proportionality test. Moreover, whether the CEE EU countries will align with the restrictive approach adopted by Western countries or demonstrate solidarity towards the future Member States is yet to be determined. Regarding Croatia, the most recent Member State to join the EU, and its current labour market situation, introducing a transitional period for new Members would potentially create more disadvantages than benefits, just as has happened to several "old Member States".

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Ljubljana Law Review
2023, Vol. LXXXIII

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Znanstveni članek
UDK: 351.95:342.7
DOI: 10.51940/2023.1.145-169

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Zloraba procesnih pravic v upravnem procesnem pravu

Povzetek

Prispevek obravnava zlorabo procesnih pravic v upravnem procesnem pravu. Namen prispevka je predstaviti dosedanji razvoj zlorabe procesnih pravic v upravnem procesnem pravu ter na podlagi stališč teorije in sodne prakse nakazati smer nadaljnjega razvoja tega instituta. Raziskovalni cilj prispevka je tudi oblikovanje in predstavitev kriterijev za prepoznavo zlorabe procesnih pravic. Avtorja ugotavljata, da se bodo zaradi vse večje kompleksnosti procesnih in materialnih vidikov (upravno)sodnega odločanja upravni organi in upravno sodstvo v prihodnje še pogosteje srečevali s primeri zlorabe procesnih pravic, posledično pa se bodo oblikovala tudi vse natančnejša merila za prepoznavo in presojo zlorabe procesnih pravic.

Ključne besede

zloraba procesnih pravic, upravni postopek, upravni spor, sodna praksa, prepoznava zlorabe procesnih pravic.

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1. Uvod

Prispevek obravnava zlorabo procesnih pravic v upravnem procesnem pravu. Najprej podaja splošna teoretična izhodišča o zlorabi pravic in se opredeljuje do koncepta zlorabe pravic v slovenski pravni doktrini. Nato se s teoretičnega in praktičnega vidika osredotoči na zlorabo procesnih pravic v upravnem postopku in v upravnem sporu.

V upravnem postopku se oblikuje procesno razmerje med posameznikom in upravnim organom, ki odloča o posameznikovi pravici, obveznosti ali pravni koristi. Zaradi enostranske in oblastvene narave odločanja je v upravnem postopku vzpostavljeno razmerje nadrejenosti upravnega organa nad stranko postopka. Drugače velja v upravnem sporu, kjer sta tožnik in toženec enakopravni stranki. Glede na navedeno je treba razumevanje instituta zlorabe procesnih pravic v upravnem postopku in upravnem sporu prilagoditi pravni naravi posameznega postopka. Na opredeljevanje zlorabe procesnih pravic v upravnem procesnem pravu deloma vpliva tudi približevanje pravil upravnega spora pravilom pravdnega postopka, kar se kaže tudi v številnih novih stališčih sodne prakse. S primerjalnega vidika prispevek analizira zlorabo procesnih pravic v upravnem procesnem pravu v Italiji. Tako kot pri nas tudi v Italiji prepoved zlorabe (procesnih) pravic nikjer v zakonodaji ni izrecno določena, kljub temu pa je ta institut izjemno razvit tako na ravni teorije kot tudi prakse.

Namen prispevka je predstaviti dosedanji razvoj zlorabe procesnih pravic v upravnem procesnem pravu ter na podlagi stališč teorije in sodne prakse nakazati smer nadaljnjega razvoja tega instituta. Raziskovalni cilj prispevka je tudi oblikovanje in predstavitev kriterijev za prepoznavo zlorabe (procesnih) pravic. Prispevek je zasnovan na delovni hipotezi, da je kljub odsotnosti splošnega pravnega pravila o prepovedi zlorabe procesnih pravic v upravnem procesnem pravu ta institut pri nas že uveljavljen in da lahko pričakujemo, da se bo tudi v prihodnje še intenzivneje razvijal tako na ravni doktrine kot tudi prakse. Metodološko so temeljna vsebinska izhodišča prispevka zasnovana na proučevanju normativne ureditve in znanstvene literature ter študiju sodne prakse. Z navezovanjem na ta izhodišča, s pomočjo primerjalne metode in na temelju induktivnega sklepanja podajamo stališča glede prihodnjega razvoja tega instituta.

2. Splošna teoretična izhodišča o zlorabi procesnih pravic

V rimskem pravu je veljalo splošno pravilo, da pravic ni mogoče zlorabiti.[1] Zgolj kot izjemo so dopuščali, da se v posameznih primerih pravica lahko zlorabi,[2] in poznali tudi institute za preprečevanje zavestnih zlorab procesnih pravic.[3] Zametki sodobnega

[1] Kranjc, 2018, str. 174.

[2] Prav tam

[3] Varanelli, 2009, str. 8–11.

pojmovanja zlorabe pravic segajo v 19. stoletje in sovpadajo z razvojem velikih evropskih kodifikacij civilnega prava. Pojem zlorabe pravice se je sprva štel kot zloraba materialnopravnih premoženjskih pravic.[4]

Utemeljitev koncepta zlorabe pravic pomeni socialni pogled na pravice, ki ni več strogo individualističen, temveč narekuje, da pri izvrševanju pravic upoštevamo tudi pravice drugih.[5] V razvoju instituta zlorabe pravic se je oblikovalo več teorij. Liberalistične teorije skladno z duhom časa niso dopuščale možnosti, da bi bilo pravice mogoče zlorabiti.[6] Njihovo stališče opisuje maksima *Qui suo iure utitur, neminem laedit*.[7] Izhajale so iz predpostavke, da kdor izvršuje pravico, ravna v skladu s pravom, njegova dejanja pa so dopustna.[8] Druge teorije so zlorabo pravice dopuščale, razlikovale so se glede meril abstraktnega dejanskega stana zlorabe pravice, v splošnem pa so se delile na objektivne in subjektivne teorije.

2.1. Subjektivne in objektivne teorije zlorabe pravic

Subjektivne teorije o zlorabi pravice so se na doktrinarni ravni začele razvijati v Avstro-Ogrski in v Franciji.[9] Zastopale so stališče, da pravico zlorabi tisti, ki ravna krivdno, in zato drugemu nastane škoda.[10] Subjektivne teorije omejevanje posameznikove pravice priznavajo z vplivom morale na pravo, ko je podan krivdni odnos pravnega subjekta do izvrševanja pravice.[11] Da bi ugotovili, ali gre v konkretnem primeru za zlorabo pravice, se moramo vprašati po namenu storilca škodovati drugemu.[12] Subjektivne teorije torej temeljijo na deliktni (civilni) odgovornosti pravnega subjekta, pri čemer se poudarja naklep škodovati.[13] Znotraj subjektivnih teorij sicer ni bilo konsenza, ali in kdaj za delikt zadoščata tudi *culpa lata* in *culpa levis*.[14] Pavčnik ugotavlja, da slednje kaže na neobstoj istovetnosti med dejanskim stanom delikta in dejanskim stanom zlorabe pravice, s čimer se je pokazala nuja po večjem namenjanju pozornosti teleološki razlagi pravic.[15] Največja slabost subjektivnih teorij je, da se čezmerno osredotočajo na dejanski stan delikta in da so zato preozke.

4 Dondi v Taruffo (ur.), 1999, str. 109–111; Berden, 2000, str. I–VI.

5 Dondi v Taruffo (ur.), 1999, str. 109–110; Pavčnik, 1986, str. 34–37. Josserand, 1939, str. 394–400.

6 Berden, 2000, str. I–VI.

7 Pavčnik, 1986, str. 26; Berden, 2000, str. I–VI.

8 Žuber, 2018, str. 41.

9 Pavčnik 1986, str. 42–47; Zobec v Ude in Galič (ur.), 2010, str. 101.

10 Žuber, 2018, str. 41.

11 Berden, 2000, str. I–VI; Pavčnik, 1986, str. 31–32.

12 Pavčnik, 1986, str. 30–34; Berden, 2000, str. I–VI.

13 Pavčnik, 1986, str. 30–34.

14 Prav tam.

15 Prav tam, str. 39.

Objektivne teorije zlorabe pravic so se začele razvijati zaradi slabosti subjektivnih teorij in kot posledica nesoglasij v francoski pravni doktrini.[16] Drugače kot pri subjektivnih teorijah je podstat objektivnih teorij utemeljena na družbeni solidarnosti.[17] Izvrševanja pravice ne določa zgolj posameznikov subjektivni odnos, temveč je za to bistven namen pravice.[18] Posameznik torej ne odgovarja samo tedaj, ko ravna protipravno, temveč tudi tedaj, ko izvršuje pravico »nepravilno«; kdor od njenega namena odstopa, jo zlorablja in je za svoje ravnanje odgovoren.[19]

Po objektivnih teorijah ima zloraba pravic tri elemente. Prvič, subjektovo ravnanje mora izhajati iz abstraktnega upravičenja, pri čemer mora meje upravičenja tudi preseči.[20] Tako za zlorabo pravice ne bo šlo samo v primeru, ko izpolni dejanski stan delikta.[21] Drugič, pri izvrševanju abstraktnega upravičenja mora priti do konflikta dveh pravic, pri čemer subjektu, ki pravico zlorablja, ob njenem izvrševanju nastanejo manjše koristi od škode, ki jo prizadene nosilcu druge pravice.[22] Tretji element pa je vrednostna ocena, kdaj in zakaj je bila posamezna pravica zlorabljena.[23] Vprašali se bomo, ali je pravica uporabljena v nasprotju z njenim namenom. Pri odgovoru na to vprašanje je treba upoštevati socialni namen konkretne pravice ter njeno tipično družbeno izvrševanje.[24]

2.2. Koncept zlorabe pravic v slovenski pravni doktrini

Slovenski pravni red ne pozna splošne prepovedi zlorabe pravic, razen kolikor ta izhaja iz ustavnega načela pravne države (2. člen Ustave). [25] V slovenski pravni doktrini tudi ni enotnega stališča o tem, na podlagi katere teorije presojati, ali je izpolnjen dejanski stan zlorabe pravice. Pavčnik se zavzema za objektivno teorijo, ki temelji na objektivnih merilih presoje konflikta dveh medsebojno neizključujočih se pravic.[26] Svoje stališče ute-

16 Prav tam, str. 34.

17 Prav tam.

18 Prav tam, str. 34–37. Prim. Josserand, 1939, str. 394–400.

19 Žuber, 2018, str. 41.

20 Pavčnik, 2019a, str. 177.

21 Pavčnik, 1986, str. 33–34; Pavčnik, 2019a, str. 179–180.

22 Pavčnik, 1986, str. 37.

23 Prav tam.

24 Pavčnik, 2019a, str. 178. Prim. Zobec v Ude in Galič (ur.), 2010, str. 98; in Ude, 2020, str. 134.

25 Pavčnik, 2019a, str. 176–178. Glej tudi odločbo Ustavnega sodišča RS U-I-85/16, Up-398/16 z dne 14. julija 2016, točka 14 obrazložitve. Prim. Žuber, 2017, str. 626–631.

26 Pavčnik, 2019a, str. 177–178. Tako tudi Berden, 2000, str. I–VI.

meljuje z omejitveno klavzulo iz tretjega odstavka 15. člena Ustave Republike Slovenije,[27] po katerem so človekove pravice omejene zgolj s pravicami drugih.[28]

Na drugi strani je glede zlorabe procesnih pravic mogoče zaznati tendenco po povezovanju subjektivnih in objektivnih teorij o zlorabi pravic. Zobec zagovarja stališče, da iz drugega odstavka 11. člena Zakona o pravdnem postopku[29] (ZPP) izhaja *splošna prepoved šikane*,[30] čeprav so v teoriji širše sprejete objektivne teorije.[31] Čeprav izhodiščno drži, da se subjektivne teorije objektivnim teorijam približujejo prek pravnih standardov (na primer vestnost in poštenje na področju civilnega prava[32] oziroma poštena uporaba pravic iz 11. člena Zakona o splošnem upravnem postopku (ZUP),[33] Zobec ne ponudi natančne utemeljitve, zakaj je treba v civilnem procesnem pravu upoštevati subjektivne teorije o zlorabi pravice. Dodatno se v zvezi s tem kot problematična kaže tudi dikcija *prepoved šikane*, saj pri šikani ne gre za zlorabo pravice, temveč za delikt (pravno kršitev).[34]

Varanelli za pravdni postopek predlaga srednjo pot, po kateri bi se poleg objektivnih meril, kot je standard procesne skrbnosti, uporabil še subjektivni kriterij namena stranke škodovati.[35] Tudi po njegovem stališču ni videti doslednega razlikovanja med dejanskim stanom zlorabe procesnih pravic skladno z objektivno teorijo in dejanskim stanom šikane, ki ustreza deliktu. Ključna značilnost zlorabe pravice (s tem pa tudi zlorabe procesnih pravic) je namreč prav preplet protipravnega in pravnega ravnanja.[36] Varanelli spregleda, da je v drugem odstavku 11. člena ZPP namen drugemu škodovati zapisan kot alternativa ravnanja, usmerjenega k cilju, ki je v nasprotju z dobrimi poslovnimi običaji. Alternativna formulacija pogojev je namreč nujna zaradi razlike med intenzivnostjo sankcij, ki so posledica ravnanja v nasprotju s prvim oziroma tretjim odstavkom 11. člena ZPP.[37] V prispevku izhajamo iz objektivnega koncepta zlorabe pravic, saj ocenjujemo, da ga poleg siceršnje doslednosti in izčiščenosti utemeljujejo tudi relevantni ustavnopravni argumenti.

Za dejanski stan zlorabe pravice je značilno:

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27 Uradni list RS-I, št. 33/91 do 92/21.

28 Pavčnik, 2019a, str. 177–178. Tako tudi Ustavno sodišče RS v zadevi U-I-85/16-15, Up-398/16-9 z dne 14. julija 2016, točka 14 obrazložitve. Prim. Pavčnik, 1986, str. 51–52; Grad, Kaučič in Zagorc, 2018, str. 747–750; in Kerševan v Avbelj (ur.), 2019, str. 126.

29 Uradni list RS, št. 73/07 do 3/22.

30 Ta dikcija odkazuje na uporabo subjektivnih teorij.

31 Zobec, 2009, str. 1369–1372.

32 Pavčnik, 1986, str. 38–40.

33 Uradni list RS, št. 24/06 do 3/22.

34 Pavčnik, 2019a, str. 180.

35 Varanelli, 2009, str. 8–11. Prim. Zobec, 2009, str. 1369–1383.

36 Pavčnik, 1986, str. 49.

37 Tako tudi Zobec, 2009, str. 1369–1383.

– da nosilec izhaja iz pravno dopustnega abstraktnega upravičenja, ki ga konkretizira in materializira tako, da njegovo ravnanje presega meje upravičenja,
– da med dvema neizključujočima pravicama nastane konflikt,
– končna opredelitev o tem, kdaj in zakaj je bila posamezna pravica zlorabljena.[38]

O zlorabi pravice na splošno govorimo:

– kadar subjekt izhaja iz abstraktnega upravičenja, vendar ga izvršuje tako, da posega v pravico, ki pripada drugemu,
– kadar se pravica uporablja v nasprotju z namenom, za katerega je bila ustanovljena,
– kadar je uporaba pravice popolnoma nerazumna in ne zasleduje legitimnega interesa oziroma
– kadar nekaj, kar imamo v rabi, preusmerimo v zlo(rabo).[39]

Navedena teoretična izhodišča so splošno uporabljiva za prepoznavo zlorabe materialnih in procesnih pravic. Namen pravice ugotavljamo z namensko razlago, pri tem pa upoštevamo običajno izvrševanje pravice in njeno socialno funkcijo. Pri tem je treba že izhodiščno poudariti pomen restriktivne razlage prepovedi zlorabe procesnih pravic. Ustavna procesna jamstva, kot so pravica do izjave (22. člen Ustave),[40] pravica do sodnega varstva (23. člen Ustave) in pravica do pravnega sredstva (25. člen Ustave), so človekove pravice procesne narave, ki jih konkretizirajo področni zakoni. Vprašanje zlorabe procesnih pravic tako ne bo prišlo v poštev znotraj opredeljevanja dometa posamezne človekove pravice procesne narave, temveč v okviru vprašanja dopustnosti njenega omejevanja.[41] Temelj za slednje pa je že omenjena omejitvena klavzula iz tretjega odstavka 15. člena Ustave, ki je skupaj z načelom sorazmernosti iz 2. člena Ustave objektivna podlaga za omejevanje človekovih pravic.[42] Načelo sorazmernosti je ključno tudi v kontekstu razumevanja, da iz ustavnih procesnih jamstev za posameznika ne izhajajo zgolj pravice, temveč tudi obveznosti.[43] Država namreč posamezniku ne more zagotoviti poštenega postopka v razumnem roku ob nerazumnem vlaganju zahtev za izločitev sodnika, večkratne zamenjave pooblaščenca zaradi zavlačevanja postopka in drugega zapletanja postopka.[44] Tudi Ustavno sodišče je v svoji praksi že poudarilo, da je pospešitev in koncentracijo postopka mogoče doseči le ob ustrezni aktivnosti in odgovornosti strank v postopku

38 Pavčnik, 2019a, str. 177–178.

39 Glede opredelitve zlorabe pravice v teoriji glej: Pavčnik, 2019a, str. 177–181; Avbelj, 2005, str. 90–91; Žuber, 2018, str. 41.

40 Glej tudi odločbo Ustavnega sodišča RS U-I-289/95 z dne 4. decembra 1997, kjer v točki 10 obrazložitve Ustavno sodišče prepoved zlorabe procesnih izvede iz *načela* enakega varstva pravic iz 22. člena Ustave RS.

41 Barak, 2012, str. 19 in 71. Prim. Štefanec, 2018, str. 157.

42 Kerševan v Avbelj (ur.), 2019, str. 127. Kerševan in Androjna, 2018, str. 72–73.

43 Galič, 2004, str. 264–265 in 301. Prim. Knez v Kovač in Kerševan (ur.), 2020, str. 567–570.

44 Galič, 2004, str. 349–352.

in da je zato nujno, da zakonska ureditev strankam nalaga obveznost, da s skrbnim in odgovornim ravnanjem v postopku prispevajo h koncentraciji in pospešitvi postopka.[45]

Zloraba procesnih pravic je lahko tudi civilni delikt, za katerega lahko oškodovanec (denimo stranski udeleženec v upravnem postopku ali stranka v kontradiktornem upravnem postopku) zahteva povračilo škode.[46] Možina ugotavlja, da je za deliktno odgovornost za zlorabo pravice treba izkazati naklepno zlorabo pravice z izključnim namenom škodovati drugemu.[47] Ker se dejanski stan delikta ne prekriva z dejanskim stanom zlorabe pravice, naklepna izvršitev zlorabe procesnih pravic pomeni šikano, kar ustreza civilnemu deliktu. Za samo zlorabo procesnih pravic pa po Pavčnikovem stališču zadošča tudi malomarnost.[48] Plauštajner ugotavlja, da v kontekstu odškodninske odgovornosti zaradi zlorabe procesnih pravic v upravnih postopkih slovenska pravdna sodišča ne upoštevajo objektiviziranih meril ravnanja, temveč se opirajo na subjektivne teorije o zlorabi pravice.[49] Takšno stališče sodne prakse je pravilno, saj je dejanski stan delikta izpolnjen le, če se izkaže krivda stranke, ki šikanozno izvršuje svoje procesne pravice.

3. Zloraba procesnih pravic in upravno(sodno) odločanje

3.1. Normativne podlage zlorabe procesnih pravic v upravnem postopku in upravnem sporu

Procesne pravice se lahko zlorabljajo na različne načine, na primer kot kršitve resnicoljubnosti (primeri lažnih izjav in navedb, zavestno navajanje neresničnih podatkov), kot izkoriščanje procesnih pravic zgolj zaradi zavlačevanja in oteževanja postopka (izogibanje vročitvam, vlaganje pravnih sredstev z namenom odložiti nastop dokončnosti oziroma pravnomočnosti, zaporedni in neutemeljeni predlogi za izločitev odločevalcev oziroma izvedencev, predlaganje številnih dokazov, ki jih ni mogoče izvesti v razumnem času), kot zloraba pravice do pravnega sredstva oziroma do sodnega varstva (vlaganje očitno neutemeljenih tožb, pritožb), v obliki nedovoljenih žalitev, kot namerno škodovanje drugemu, kot izogibanje kogentnim pravilom o pristojnosti (dejanja, usmerjena v obid kogentnih pravil o pristojnosti).[50] Zakonodajalca zavezuje pozitivna obveznost zagotavljati mehanizme, ki preprečujejo zlorabo procesnih pravic, pri čemer pa se ti mehanizmi pogosto dojemajo kot administrativne ovire, ki so sami sebi namen.[51]

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45 Odločba Ustavnega sodišča RS Up-2443/08 z dne 7. oktobra 2009.

46 Zobec v Ude in Galič (ur.), 2010, str. 107–109. Možina, 2022, str. 19; Pavčnik, 2019a, str. 178–180.

47 Možina, 2022, str. 19.

48 Pavčnik, 2019a, str. 178–180.

49 Plauštajner, 2017, str. 16.

50 Zobec v Ude in Galič (ur.), 2010 str. 103.

51 Kovač in Remic, 2014, str. 21.

V ZUP je prepoved zlorabe procesnih pravic uvrščena med temeljna načela postopka, kjer je v 11. členu določeno, da so stranke dolžne govoriti resnico in pošteno uporabljati procesne pravice. Ureditev prepovedi zlorabe pravic v obliki pravnega načela pomeni, da je pri razlagi procesnih pravil to načelo treba uporabiti kot vrednostno merilo.[52] Načelo prepovedi zlorabe pravic organu na splošni ravni omogoča, da določi izjemo od pravila in ne upošteva posameznega procesnega dejanja stranke, če je bilo to izvršeno v nasprotju z namenom procesnega upravičenja.[53] Sodna praksa in doktrina še nista ponudili izčrpnejše analize interpretacijske vrednosti načela prepovedi zlorabe procesnih pravic v upravnem postopku, kar v praksi povzroča nekaj negotovosti.[54] V vsakem primeru bi morala biti posledica zlorabe procesnih pravic neveljavnost procesnih dejanj, ki ustrezajo abstraktnemu dejanskemu stanu zlorabe procesnih pravic oziroma bi bilo treba takim vlogam odreči pravno varstvo. Pri tem ne smemo zanemariti dejstva, da je zloraba procesnih pravic izjema od pravila, kar zahteva restriktivno razlago abstraktnega dejanskega stana.[55]

ZUP ureja posamezne institute oziroma procesne rešitve, ki jih je mogoče razumeti kot izrecno predviden odziv za nepošteno uporabo posameznih procesnih pravic. Za vlaganje žaljivih vlog v postopku ZUP v 111. členu izrecno pooblašča organ, da lahko kaznuje udeležence postopka. Podobno je v tretjem odstavku 113. člena ZUP določena prevalitev stroškov na udeleženca upravnega postopka, ki je stroške povzročil po svoji krivdi ali iz nagajivosti.[56] Taka normativna ureditev sankcije za zlorabo pravice sicer na jezikovni ravni odstopa od objektivnih teorij zlorabe procesnih pravic, saj se za procesno sankcijo zahteva krivda oziroma »nagajivost«. Ne glede na to bi po teleološki razlagi določbe prišli do razlage pojma »nagajivost« v smislu ravnanja v nasprotju z namenom posameznih procesnih upravičenj, s katerimi je udeleženec povzročil nepotrebne stroške. Pri tem je sicer krivdna odgovornost odveč, saj so objektivne teorije o zlorabi pravice širše, ima pa taka določba za upravne organe lahko vrednost z didaktičnega vidika razumevanja zlorabe pravice. Kot odziv na nepošteno uporabo pravic lahko razumemo tudi zakonske omejitve navajanja novih dejstev in dokazov v pritožbenem postopku in pri izrednem pravnem sredstvu obnove postopka.[57] Dikcija tretjega odstavka 238. člena

[52] Pavčnik, 2019b, str. 127–142; Novak, 2010, str. 217–225.

[53] Prim. Novak, 2010, str. 229–230.

[54] Žuber v Kerševan in Podlipnik (ur.), 2023, str. 200–203; Kerševan v Kovač in Kerševan (ur.), 2020, str. 154.

[55] Pavčnik, 2019a, str. 180–181; Žuber v Kerševan in Podlipnik (ur.), 2023, str. 201–203. Pirc Musar in Kraigher Mišič (ur.), 2017, str. 102–108. Prim. sodbo Upravnega sodišča RS I U 293/2020 z dne 18. maja 2022, točka 28 obrazložitve.

[56] Kerševan v Kovač in Kerševan (ur.), 2020, str. 154.

[57] Glej tretji odstavek 238. člena in drugi odstavek 261. člena ZUP. Tako tudi Kerševan v Kovač in Kerševan (ur.), 2020, str. 154.

ZUP[58] je z vidika uporabe objektivne teorije o zlorabi pravice ustrezna, saj se ne omejuje zgolj na subjektivni odnos stranke postopka do izvrševanja pravice do navajanja dejstev in dokazov. Namen pravice do izjave je namreč dati stranki možnost, da v postopku na prvi stopnji navede vsa pravnorelevantna dejstva in dokaze. Na drugi strani pa iz pravice do izjave izhaja tudi dolžnost, ki jo strankam postopka nalaga 238. člen ZUP. To je namreč varovalka, ki stranke sili k aktivnemu ravnanju že v postopku na prvi stopnji,[59] s tem pa stremi k zagotavljanju poštene uporabe procesnih upravičenj. Že prvostopenjski organ mora namreč ugotoviti popolno in resnično dejansko stanje,[60] kar mu narekuje tudi načelo materialne resnice (8. in 138. člen ZUP). Drugače pa je z drugim odstavkom 261. člena ZUP, ki izrecno omenja krivdo oziroma skrbnost stranke pri navajanju novih dejstev za obnovo postopka.[61] Dejstva, ki upravičujejo obnovo postopka, morajo biti subjektivno nova dejstva, torej taka dejstva, za katera stranka ne bi mogla niti morala vedeti v postopku, ki se je končal z dokončno odločbo.[62] To pa samo po sebi ne vpliva na (ne)možnost uporabe objektivnih teorij o zlorabi pravice tudi v tem kontekstu. Obnova postopka je namenjena varstvu pravic oziroma pravnih koristi iz že urejenih upravnih razmerij, ki jih ni mogoče uveljavljati v novem postopku.[63] Tako je v nasprotju z namenom izrednega pravnega sredstva obnove postopka, če stranka to pravno sredstvo uporabi za procesno taktiziranje oziroma zavlačevanje postopka, če bi dejstva lahko navedla že v prvotnem upravnem postopku.

Nekatere sankcije za nepošteno uporabo pravic so v ZUP določene zgolj posredno. Tako se lahko zaradi strankine podaje neresničnih navedb v postopku uporabita izredni pravni sredstvi obnove postopka (260. člen ZUP) in ničnosti odločbe (279. člen ZUP).[64]

Za preostale primere nepoštene uporabe pravic oziroma njihove zlorabe ZUP sankcij izrecno ne določa, se pa te na temelju razlage zakonskih določb razvijajo v sodni praksi. Sodna praksa je v tem smislu že obravnavala nesorazmerno obremenjevanje upravnega organa zaradi zahteve vložnika po izdaji 697 izpiskov iz matičnega registra. Upravno sodišče je ugotovilo, da je bil v tej zadevi izpolnjen dejanski stan zlorabe pravice, posledično pa je potrdilo pravilnost ravnanja upravnega organa, ki je zavrnil izdajo izpiskov v delu, v

[58] »Nova dejstva in novi dokazi se lahko upoštevajo kot pritožbeni razlogi le, če so obstajali v času odločanja na prvi stopnji in če jih stranka upravičeno ni mogla predložiti oziroma navesti na obravnavi.«

[59] Takšno obveznost strankam glede navajanja dejstev v postopku nalaga tudi prvi odstavek 140. člena ZUP in drugi odstavek 146. člena ZUP. Prim. Kovač v Kovač in Kerševan (ur.), 2020, str. 95–98 in 129; Kerševan in Androjna, 2018, str. 245.

[60] Knez v Kovač in Kerševan (ur.), 2020, str. 569.

[61] Žuber v Kovač in Kerševan (ur.), 2020, str. 669–670.

[62] Prav tam, str. 643–644.

[63] Prav tam, str. 637.

[64] Prav tam, str. 653; Kerševan in Androjna, 2018, str. 97. Glej tudi sklep Vrhovnega sodišča RS X Ips 73/2014 z dne 25. novembra 2015.

katerem je presodil, da gre za zlorabo.[65] Podobno velja tudi v primeru, če stranka organu ne sporoči pomembnih okoliščin glede razmerja med pooblastiteljem in pooblaščencem (na primer procesna sposobnost pooblaščenca, preklic pooblastila in vsebina novega pooblastila), saj v tem primeru zanjo nastopijo neugodne procesne posledice.[66]

Na podzakonski ravni je prepoved zlorabe procesnih pravic izpeljana v prvem odstavku 17. člena Uredbe o upravnem poslovanju (UUP),[67] ki določa, da organ (med drugim) ne odgovarja na dopise, ki so šikanozni. Tako je v UUP prepoved zlorabe procesnih pravic, kolikor se ta nanaša na dopise, urejena kot pravna zapoved in ne kot pravno načelo. Določba prvega odstavka 17. člena govori zgolj o šikani v smislu delikta. Kot smo že pojasnili, je pojem šikane ožji od zlorabe procesnih pravic. Posledično se postavlja vprašanje, ali je tu uredbodajalec namerno uporabil ožji pojem, ali pa lahko tako normiranje pripišemo površnosti. Ne glede na to pa so po načelu *lex superior derogat legi inferiori* upravni organi dolžni upoštevati tudi določbo 11. člena ZUP, ki je širša od določbe iz 17. člena UUP.

ZUP se v številnih upravnih postopkih v slovenskem pravnem redu uporablja subsidiarno.[68] Posledično lahko posebni zakoni, ki imajo specialnejše postopkovne določbe, kot je denimo Zakon o dostopu do informacij javnega značaja (ZDIJZ),[69] vprašanje prepovedi zlorabe pravice urejajo tudi podrobneje kot ZUP. Tako na primer ZDIJZ v petem odstavku 5. člena določa, da lahko organ prosilcu izjemoma *zavrne* dostop do zahtevane informacije javnega značaja, če prosilec zlorabi pravico dostopa do informacij javnega značaja oziroma je očitno, da je zahteva šikanozna.[70] Tako kot prvi odstavek 17. člena UPP je tudi peti odstavek 5. člena ZDIJZ zanimiv, saj odpira vprašanje, ali je del določbe glede šikanoznosti zahteve sploh potreben, saj je pojem zlorabe pravice širši od šikane.[71] Po stališču doktrine in sodne prakse je odveč besedilo, ki govori o šikanoznosti, saj vsaka šikanozna zahteva pomeni tudi zlorabo pravice.[72] Šikana je namreč čisti delikt,

[65] Sodba Upravnega sodišča RS II U 373/2016-17 z dne 11. oktobra 2017, točka 13 obrazložitve.

[66] Sklep Vrhovnega sodišča RS I Up 230/2015 z dne 11. februarja 2016.

[67] Uradni list RS, št. 9/18 do 135/22.

[68] Glej 3. člen ZUP. Več o tem Kerševan in Androjna, 2018, str. 30–31; in Kerševan v Kovač in Kerševan (ur.), 2020, str. 76–78.

[69] Uradni list RS, št. 51/06 do 141/22.

[70] Informacijski pooblaščenec je še pred spremembo ZDIJZ zahteve zaradi zlorabe pravice zavračal že na podlagi splošnih pravnih načel. O tem več v Pirc Musar in Kraigher Mišič (ur.), 2017, str. 102.

[71] Pavčnik, 2019a, str. 181. Prim. sodbo Upravnega sodišča RS II U 214/2016 z dne 7. februarja 2017, točka 21 obrazložitve, v kateri je sodišče zapisalo, da je vsaka zahteva, ki je očitno šikanozna, tudi v osnovi huda zloraba pravice.

[72] Pirc Musar in Kraigher Mišič (ur.), 2017, str. 107. Prim. sodbo Upravnega sodišča RS II U 214/2016 z dne 7. februarja 2017, točka 21 obrazložitve.

saj subjekt sploh ne izhaja iz abstraktnega upravičenja na določen način ravnati, ampak gre za protipravno ravnanje.[73]

Procesne pravice v upravnem postopku lahko zlorabi tudi organ. Kolikor bi organ *iure imperii* zavestno odločal v nasprotju z namenom procesnih pravic oziroma pri tem ne bi spoštoval javnega interesa, bi taka zloraba procesnih pravic pomenila tudi zlorabo oblasti. Tako zlorabo procesnih pravic organa bi seveda stranke lahko uveljavljale s pravnimi sredstvi znotraj upravnega postopka in pozneje v upravnem sporu. Povsem ločeno od tega pa je treba upoštevati, da bi tako ravnanje organa strankam lahko povzročilo tudi premoženjsko in nepremoženjsko škodo. V tem delu bi bila upoštevna pravila o odškodninski odgovornosti države na podlagi 26. člena Ustave ob smiselni uporabi določb Obligacijskega zakonika (OZ).[74, 75] V zvezi s tem Kerševan ugotavlja, da sodna praksa Vrhovnega sodišča v zvezi z odškodninsko odgovornostjo države za sodniške in tožilske napake temelji na 148. členu OZ, ki po razlagi Vrhovnega sodišča izrecno izključuje osebno odškodninsko odgovornost oseb, ki odločajo v imenu državnih organov.[76] Slednje pomeni, da subjektivna odškodninska odgovornost uradnika ne bo prišla v poštev; upravni organ je namreč vselej povezan z javno oblastjo in deluje *iure imperii*, pri čemer uživa določeno stopnjo neodvisnosti.[77]

Drugače kot ZUP bomo zapoved poštene uporabe procesnih pravic zaman iskali v Zakonu o upravnem sporu (ZUS-1),[78] je pa načelo prepovedi zlorabe procesnih pravic v obliki načelne generalne klavzule določeno v 11. členu ZPP.[79] Na podlagi prvega odstavka 11. člena ZPP je sodišče dolžno onemogočiti vsako zlorabo pravic, ki jih imajo stranke in drugi udeleženci v postopku. Čeprav ZPP niti primeroma ne našteva ukrepov, ki jih sodišče lahko uporabi na tej podlagi, je v teoriji zastopano stališče, da lahko sodišče uporabi različne ukrepe, ki so primerni za preprečitev zlorabe (denimo neupoštevanje posamezne vloge ali procesnega dejanja).[80] V drugem in tretjem odstavku 11. člena je

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73 Pavčnik, 2019a, str. 179–180.

74 Uradni list RS, št. 97/07 do 20/18.

75 Možina (v Možina (ur.), 2015, str. 21–32) poudarja, da morajo stranke kvalificirano protipravnost zatrjevati že med upravnim postopkom in morebitnim upravnim sporom in ne šele v odškodninski pravdi zoper državo.

76 Kerševan, 2013, str. 824–826.

77 Prav tam. Za drugačno stališče glej Čebulj, 2018, str. 199–212.

78 Uradni list RS, št. 105/06 do 10/17 – ZPP-E.

79 Določbe od drugega do sedmega odstavka 11. člena ZPP so bile v preteklosti zaradi vprašanja dopustnosti posegov v pravico do enakega varstva pravic iz 22. člena Ustave predmet ustavnosodne presoje. Ustavno sodišče je ureditev z odločbo U-I-145/03-9 z dne 23. junija 2005 delno razveljavilo, saj je bilo za ravnanje v nasprotju z drugim odstavkom 11. člena ZPP mogoče izreči celo zaporno kazen, ne da bi bila posamezniku zagotovljena kazenskopravna procesna jamstva iz 29. člena Ustave.

80 Prim. Zobec v Ude in Galič (ur.), 2010, str. 104–105.

prepoved zlorabe procesnih pravic opredeljena kot pravno pravilo in ne zgolj pravno načelo v smislu interpretacijskega vodila.[81] V teh primerih ima sodišče pravico izreči tudi denarno kazen, kar sta v preteklosti že storila tudi Upravno sodišče in upravni oddelek Vrhovnega sodišča.[82] Določbe prvega, drugega in tretjega odstavka 11. člena ZPP se razlikujejo glede krivdnega elementa. Zobec ugotavlja, da je treba za delovanje po prvem odstavku 11. člena ZPP upoštevati širši dejanski stan, ki omogoča uporabo načela sorazmernosti pri tehtanju procesnih pravic, ki se znajdeta v koliziji, ni pa treba ugotavljati krivde posameznika. Kaznovanje po drugem in tretjem odstavku 11. člena ZPP pa je možno samo ob ugotavljanju subjektivne odgovornosti subjekta.[83]

Pooblastila iz 11. člena ZPP nedvomno kažejo na namen zakonodajalca po zagotavljanju učinkovite pravice do dostopa do sodišča[84] ter pravice do sojenja v razumnem roku.[85] Kot izhaja iz sodne prakse Evropskega sodišča za človekove pravice (ESČP), je to tudi pozitivna obveznost države iz prvega odstavka 6. člena Evropske konvencije o varstvu človekovih pravic (EKČP).[86] Ločeno od ukrepov iz 11. člena ZPP so sredstvo za omejevanje zlorabe pravice do sodnega varstva tudi sodne takse.[87] Skladno s tretjim odstavkom 105.a člena ZPP se v primeru neplačila sodne takse v predpisanem roku sodno varstvo odreče tako, da se vlogo šteje za umaknjeno, kolikor niso izpolnjeni pogoji za oprostitev, odlog ali obročno plačilo sodnih taks.

3.2. Zloraba procesnih pravic v sodni praksi

3.2.1. Zloraba procesnih pravic v naši upravnosodni praksi

Koncept zlorabe procesnih pravic v naši upravnosodni praksi še ni dokončno izoblikovan. Sodišča so se sicer v več zadevah opredeljevala do obstoja zlorabe procesnih pravic oziroma do posameznih elementov, ki tvorijo dejanski stan zlorabe procesne pravice.

81 Zobec, 2009, str. 1369–1383.

82 Glej na primer sklep Vrhovnega sodišča RS I Up 357/2014 z dne 27. novembra 2014, v katerem je Vrhovno sodišče pritožnico kaznovalo zaradi zaporednega vlaganja pravnega sredstva brez postulacijske sposobnosti. Prim. sodbo in sklep Upravnega sodišča RS I U 1568/2015 z dne 7. februarja 2017, točka 25 obrazložitve, kjer je sodišče tožnika kaznovalo zaradi očitnega namena diskreditirati in zmanjševati ugled.

83 Zobec, 2009, str. 1369–1383.

84 Galič, 2004, str. 60–65. Tako tudi sodbe ESČP v zadevah *Airey proti Irski*, št. 6289/73, z dne 9. oktobra 1979, točke 24–27 obrazložitve; *Golder proti Združenemu kraljestvu*, št. 4451/70, dne 21. februarja 1975, točka 35 obrazložitve in sodba ESČP v zadevi Ashingdane proti Združenemu kraljestvu, št. 8225/78, z dne 28. maja 1985.

85 Zobec v Ude in Galič (ur.), 2010, str. 108–109. Galič v Avbelj (ur.), 2019, str. 220–222.

86 Zobec v Ude in Galič (ur.), 2010, str. 108. Glej tudi na primer Sodbo ESČP v zadevi *Scordino proti Italiji (št. 1)*, št. 36813/97, z dne 29. marca 2006, točka 183 obrazložitve.

87 Glej 105.a člen ZPP.

Do danes je upravno sodstvo odločilo o približno 200 zadevah, ki so povezane z zlorabo procesnih in materialnih pravic. V nadaljevanju bo strnjeno predstavljena analiza sodne prakse, ki obravnava zlorabo procesnih pravic.

Upravnosodna praksa je kršitve resnicoljubnosti že obravnavala v okviru vprašanja razmerja med kršitvijo prepovedi zlorabo procesnih pravic iz 11. člena ZUP in ničnosti odločbe zaradi drugega nedovoljenega dejanja iz 5. točke prvega odstavka 279. člena ZUP. Sankcija v primeru obeh procesnih situacijah pomeni poseg v pravico do izjave iz 22. člena Ustave. Razlika med navedenima dejanskima stanovoma je po stališču Vrhovnega sodišča *namerno* podajanje neresničnih podatkov in je prav na podlagi teh podatkov organ odločil drugače, kot bi ob upoštevanju resničnega dejanskega stanja.[88] Tako je jasno vzpostavljeno razlikovanje med dejanskima stanovoma, ko neresničen podatek stranka posreduje namerno in ko stranka neresnične podatke navaja iz malomarnosti.

Stranke svojih procesnih pravic tudi ne smejo uporabljati za zavlačevanje in oteževanje postopka. Pavšalno navajanje novot ne bo dovoljeno, če stranka vlaga številne zaporedne vloge, s katerimi želi doseči ponovno odločanje o mednarodni zaščiti, da ne bo vrnjena v državo, kjer zoper njo teče kazenski postopek.[89] Relevantna dejstva morajo stranke navesti takoj, ko za njih izvedo, saj bodo le tako procesne pravice uporabljene skladno z njihovim namenom.[90] Sklicevanje na prekluzijo je mogoče, ko se stranka ni mogla opredeliti do ugotovljenega dejanskega stanja ali pa je za navajanje novot podala enega od opravičljivih razlogov, pri čemer iz okoliščin ne izhaja, da je pravice zlorabila z namenom zavlačevanja.[91] Tako posledice zlorabe procesnih pravic kot tudi posledice prekluzije pomenijo poseg v pravico po 22. členu Ustave.[92]

Zlorabiti je možno tudi pravico do pravnega sredstva oziroma do sodnega varstva, če revizija ni pripravljena z dolžno skrbnostjo in pomeni kompilacijo vlog iz predhodnega postopka.[93] Enako velja tudi za zaporedno vlaganje pravnih sredstev na Vrhovno sodišče brez postulacijske sposobnosti, kjer je sodišče poseglo tudi po pooblastilu za denarno kaznovanje iz tretjega odstavka 11. člena ZPP.[94] To pooblastilo je uporabilo tudi Upravno sodišče v primeru vloge brez ločil, ki je v 80 odstotkih predstavljala žalitve na račun

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88 Sodba Vrhovnega sodišča RS I Up 179/2003 z dne 19. januarja 2006. Prim. sodbo Upravnega sodišča RS III U 224/2015 z dne 23. januarja 2015.

89 Sodba Vrhovnega sodišča RS I Up 208/2022 z dne 22. februarja 2023.

90 Stranke morajo na primer odklonitveni razlog za izločitev uradnika iz 37. člena ZUP uveljavljati takoj, ko zanj izvejo. Tako Sodba Vrhovnega sodišča RS X Ips 40/2019 z dne 21. aprila 2019.

91 Sodba Vrhovnega sodišča RS X Ips 51/2021 z dne 12. aprila 2023.

92 Prav tam.

93 Sodba Vrhovnega sodišča RS X Ips 141/2017 z dne 25. aprila 2018, točka 11 obrazložitve.

94 Sklep Vrhovnega sodišča RS I Up 161/2014 z dne 5. junija 2014, točke 9–14 obrazložitve. Glej tudi sklep Vrhovnega sodišča RS I Up 357/2014 z dne 27. novembra 2014, točke 10–13 obrazložitve.

Republike Slovenije, njenih organov, poimensko navedenih oseb, njeni zahtevki pa tudi očitno niso spadali v pristojnost Upravnega sodišča.[95]

V upravnosodni praksi je razmeroma obširno obravnavana tudi prepoved zlorabe pravice do informacij javnega značaja. Čeprav je pravica do informacij javnega značaja po svoji naravi materialna, lahko njeno uveljavljanje v upravnem postopku pomeni tudi kršitev procesnih pravic. Ta je denimo podana, ko stranka vlaga več funkcionalno povezanih vlog, v katerih zahteva izjemno obširno korespondenco zavezanca s številnimi organi, saj stranka izvršuje svojo pravico v nasprotju z njenim namenom demokratičnega nadzora oblasti.[96] Skozi razvoj upravnosodne prakse na to temo sta Upravno sodišče in Informacijski pooblaščenec (IP) sledila ustavnosodni praksi glede zlorabe pravic. Tako se za zlorabo pravice šteje tudi poseganje v dostojanstvo organa z velikim številom vlog,[97] vlaganje očitno nedovoljenih ali neutemeljenih zahtev,[98] izražanje številnih negativnih vrednostnih sodb in žalitev[99] ter čezmerno vplivanje na delo organa in s tem na pravice tretjih.[100]

3.2.2. Zloraba procesnih pravic pred ESČP

O dovoljenih ukrepih za preprečevanje zlorab procesnih pravic se je v svoji praksi večkrat izreklo tudi ESČP. Ukrepe v primeru zlorabe procesnih pravic je presojalo v okviru procesnih jamstev iz prvega odstavka 6. člena EKČP, v zvezi z omejitvami pravice do dostopa do sodišča[101] in kot mehanizem zagotavljanja sojenja v razumnem roku.

Pri obravnavanju dometa prvega odstavka 6. člena EKČP se vprašanje zlorabe procesnih pravic pojavlja v zvezi z resnostjo in pristnostjo spora (angl. *dispute*, fr. *contestation*) o civilnih pravicah in obveznostih, kar sodišče načeloma obravnava v kontekstu

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95 Sodba in sklep Upravnega sodišča RS I U 1568/2015 z dne 7. februarja 2017, točka 25 obrazložitve.

96 Sodba Upravnega sodišča RS III U 240/2012 z dne 7. novembra 2013. Sodišče je obravnavalo zadevo, v kateri je od 86 prejetih vlog v letu 2012 zavezanec samo od tožnika prejel 66 vlog.

97 Odločba Informacijskega pooblaščenca 090-99/2023 z dne 20. aprila 2023. Tako tudi sodba Upravnega sodišča RS IV U 108/2021-19 z dne 15. februarja 2022, točka 30 obrazložitve.

98 Odločba Informacijskega pooblaščenca 090-29/2023 z dne 2. februarja 2023. Glej tudi sklep Ustavnega sodišča RS Up-448/12-11 z dne 21. junija 2012, točka 6 obrazložitve. Prim. sklep Vrhovnega sodišča RS I Up 357/2014 z dne 27. novembra 2014, točke 10–13.

99 Glej na primer odločbo Informacijskega pooblaščenca 090-249/2016 z dne 2. januarja 2017 in sklep Ustavnega sodišča RS Up-3093/08-5 in U-I-315/08-4 z dne 12. februarja 2009, točki 5–6 obrazložitve.

100 Odločba Informacijskega pooblaščenca 090-99/2023 z dne 20. aprila 2023. Tako tudi sodba Upravnega sodišča RS I U 1816/2016-34 z dne 4. oktobra 2017, točki 15–16 obrazložitve, in sodba Upravnega sodišča RS IV U 108/2021-19 z dne 15. februarja 2022, točka 30 obrazložitve.

101 Sodba ESČP v zadevi *Golder proti Združenemu kraljestvu*, št. 4451/70, z dne 21. februarja 1975, točka 35 obrazložitve. Glej tudi sodbo ESČP v zadevi *Zubac proti Hrvaški*, št. 40160/12, z dne 5. aprila 2018, točka 76 obrazložitve.

dopustnosti pritožbe.[102] Resnost in pristnost spora se po sodni praksi sodišča domnevata, dokler ni dokazano drugače.[103] Če spor ni bil sprožen z namenom, da bi stranka dejansko želela odločitev o civilni pravici ali obveznosti, jamstva iz 6. člena EKČP v postopku niso uporabljiva.[104] Tako spor ni resen oziroma pristen, na primer kadar iz tožnikovih vlog ni mogoče razbrati konkretiziranih pravnih ali dejanskih navedb, s katerimi bi tožnik utemeljeval svoj odškodninski zahtevek.[105] Prav tako spor ne bo resen, ko tožnik svojega zahtevka sploh ne bo podprl z dokazi,[106] oziroma če je pritožnikov zahtevek očitno pretiran ali nerealističen.[107]

Poleg splošne omejitve s testom legitimnosti in sorazmernosti je pravica do dostopa do sodišča omejena tudi s 17. členom EKČP,[108] ki prepoveduje zlorabo konvencijskih pravic.[109] ESČP 17. člen EKČP uporablja zlasti glede zlorabe materialnih konvencijskih pravic, medtem ko zlorabo pravice do pritožbe na ESČP ureja tretji odstavek 35. člena EKČP. Zloraba pravice do pritožbe na ESČP bo podana, kadar je namen pritožbe očitno v nasprotju s ciljem varovanja konvencijskih pravic in povzroči motnjo v delovanju sodišča.[110]

ESČP se z zlorabo procesnih pravic ukvarja tudi v okviru meritorne presoje dopustnosti posegov v pravico do dostopa do sodišča iz prvega odstavka 6. člena EKČP, s katerimi so države želele onemogočiti zlorabo procesnih pravic v pravnih postopkih. Države pogodbenice pri izbiri ukrepov, s katerimi omejujejo dostop do sodišča, načeloma uživa-

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102 O obveznosti zagotavljanja jamstev iz prvega odstavka 6. člena EKČP v upravnem sporu glej Lovšin v Žuber (ur.), 2020, str. 62–68.

103 Sodba ESČP v zadevi *Kupiec proti Poljski*, št. 16828/02, z dne 3. februarja 2009, točka 47 obrazložitve. Glej tudi sodbo ESČP v zadevi *Rolf Gustafson proti Švedski*, št. 23196/94, z dne 1. julija 1997, točka 39 obrazložitve.

104 Glej na primer sodbe ESČP v zadevah *Benthem proti Nizozemski*, št. 8848/80, z dne 23. oktobra 1985, točka 32 obrazložitve, *Grzęda proti Poljski*, št. 43572/18, z dne 15. marca 2022, točka 257 obrazložitve, in *Sporrong in Lönnroth proti Švedski*, št. 7151/75 in 7152/75, z dne 23. septembra 1982, točka 81 obrazložitve.

105 Sklep ESČP v zadevi *Skorobogathyk proti Rusiji*, št. 37966/02, z dne 8. junija 2006.

106 Odločba Komisije za človekove pravice v zadevi *Kaukonen proti Finski*, št. 24738/94, z dne 8. decembra 1997.

107 Sodba ESČP v zadevi *Kupiec proti Poljski*, št. 16828/02, z dne 3. februarja 2009, točka 47 obrazložitve.

108 Sodba ESČP v zadevi *Golder proti Združenemu kraljestvu*, št. 4451/70, z dne 21. februarja 1975.

109 Zloraba konvencijskih pravic je podana, kadar se pravice uporabljajo v nasprotju s temeljnimi vrednotami EKČP oziroma za varovanje dejanj, ki so usmerjena h kršenju pravic iz EKČP. Glej na primer sodbo ESČP v zadevi *Perinçek proti Švici*, št. 27510/08, z dne 15. oktobra 2015, točka 114 obrazložitve.

110 Sklep ESČP v zadevi *Zambrano proti Franciji*, št. 41994/21, z dne 7. oktobra 2021, točke 18–21 in 34–38 obrazložitve. Pritožnik je na sodišče vložil skoraj 18.000 funkcionalno povezanih pritožb.

jo široko polje proste presoje.[111] Pri tem mora ukrep zasledovati legitimen cilj in prestati test sorazmernosti.[112] Ta je prilagojen, kadar ESČP presoja omejitve pravice do dostopa do (naj)višjih sodišč.[113]

V zadevi *Ashingdane*[114] je ESČP presojalo nacionalno ureditev, ki je pomenila omejitev pravice do sodnega varstva osebam na psihiatričnem zdravljenju v zdravstvenih zavodih, da bi obvarovala zdravstvene delavce pred zlorabo sodnih postopkov. V zadevi so nacionalna sodišča odrekla sodno varstvo osebi s shizofrenijo, ki ji je bil izrečen varnostni ukrep obveznega psihiatričnega zdravljenja v zdravstvenem zavodu. To jim je omogočila ureditev, ki je omejevala odgovornost zaposlenih v ustanovah, kolikor stranka sploh ne bi očitala in dokazovala slabovernega ali malomarnega ravnanja. Sodišče je presodilo, da je tak ukrep zasledoval legitimen cilj, da je bil sorazmeren in tako ni izvotlil pravice do dostopa do sodišča.[115]

ESČP se je v svoji praksi opredelilo tudi do dopustnosti denarnega kaznovanja strank zaradi zlorabe pravice do izjave[116] ter naravo takega kaznovanja.[117] Presodilo je, da je taka ureditev odsev pravice in dolžnosti sodišča, da skrbi za procesno disciplino v postopku in ne spada v domet avtonomnega konvencijskega pojma kazenske obtožbe, če višina denarne kazni ni preveliko breme za stranko.[118] Bi pa v domet pojma kazenske obtožbe spadali primeri, ko lahko sodišče za zlorabo procesnih pravic izreče zaporno kazen ali ko se lahko na mesto denarne kazni izreče zaporna kazen, ne da bi se stranka imela možnost izjaviti o tem v ločenem postopku.[119]

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111 Sodbi ESČP v zadevah *Grzęda proti Poljski*, št. 43572/18, z dne 15. marca 2022, točka 343 obrazložitve, in *Ashingdane proti Združenemu kraljestvu*, št. 8225/78, z dne 28. maja 1985, točka 57 obrazložitve.

112 Sodbi ESČP v zadevah *Ashingdane proti Združenemu kraljestvu*, št. 8225/78, z dne 28. maja 1985, točka 57 obrazložitve, in *Golder proti Združenemu kraljestvu*, št. 4451/70, z dne 21. februarja 1975, točke 37–40 obrazložitve.

113 Sodišče v tem primeru upošteva 1. predvidljivost omejitev, 2. kdo nosi škodljive posledice procesnih napak v postopku in 3. kriterij prekomernega formalizma. Glej sodbo ESČP v zadevi *Zubac proti Hrvaški*, št. 40160/12, z dne 5. aprila 2018, točke 87–99 obrazložitve.

114 Sodba ESČP v zadevi *Ashingdane proti Združenemu kraljestvu*, št. 8225/78, z dne 28. maja 1985.

115 Prav tam, točki 59–60 obrazložitve.

116 Sodbi ESČP v zadevah *Putz proti Avstriji*, št. 18892/91, z dne 22. februarja 1996, in *T proti Avstriji*, št. 27783/95, z dne 14. novembra 2000.

117 Ugotavljalo je torej, ali gre v zadevi za »kazensko obtožbo« v smislu prvega odstavka 6. člena EKČP. Glej sodbo ESČP v zadevi *Engel in drugi proti Nizozemski*, št. 5100/71 idr., z dne 8. junija 1976, točka 82 obrazložitve.

118 Sodba ESČP v zadevi *Putz proti Avstriji*, št. 18892/91, z dne 22. februarja 1996, točka 33 obrazložitve. Prim. sodbi ESČP v zadevah *Ravnsborg proti Švedski*, št. 14220/88, z dne 23. marca 1994, točka 35 obrazložitve, in *Sace Elektrik Ticaret ve Sanayi A.Ş. proti Turčiji*, št. 20577/05, z dne 22. oktobra 2013, točke 27–34 obrazložitve.

119 Sodba ESČP v zadevi *Putz proti Avstriji*, št. 18892/91, z dne 22. februarja 1996, točka 37 obrazložitve. Prim. sodbo ESČP v zadevi *Ravnsborg proti Švedski*, št. 14220/88, z dne 23. marca 1994,

ESČP se je v svoji praksi opredelilo tudi do sistema sodnih taks, s katerimi želijo države preprečiti zlorabo pravice do sodnega varstva.[120] Sistem sodnih taks bo preveč tog, če *a priori* ne dopušča oprostitve večmilijonske sodne takse v primerih, ko so posamezniki in pravne osebe v hudih finančnih težavah.[121] Prav tako je v neskladju s prvim odstavkom 6. člena EKČP sodna taksa v višini povprečne letne plače, če nacionalna sodišča ne uporabijo pooblastila za oprostitev sodne takse, tega pa ne sanira niti instančno višje sodišče.[122]

3.3. Prepoznava zlorabe procesnih pravic in materialna izčrpanost pravnega sredstva v upravnem sporu

Pri prepoznavi zlorabe pravic je poleg uporabe splošnih kriterijev prepoznave, ki so bili v prispevku že predstavljeni, ključno zavedanje, da je presoja nastopa zlorabe pravic vedno vezana na konkretno življenjsko situacijo. Trditveno in dokazno breme glede zlorabe procesnih pravic je na sodišču. Pri identifikaciji zlorabe procesne pravice je ključna ugotovitev, ali je stranka iz taktičnih razlogov posamezno procesno pravico uporabila (ali opustila njeno uporabo) za dosego nekega namena, ki je drugačen od osnovnega namena pravice. Zaradi pravnih posledic, ki sledijo ugotovitvi, da je stranka zlorabila svoje pravice, in po vsebini pomenijo omejitev do pravnega varstva, mora sodišče zlorabo praviloma ugotoviti s standardom prepričanja v kontradiktornem postopku, v katerem se stranka glede očitkov zlorabe lahko izreče.[123] Ta pristop pri presoji zlorabe (procesne) pravice je smiselno uporabljiv tudi v upravnem postopku. Glede na to, da posledice zlorabe procesnih pravic pomenijo poseg v ustavna procesna jamstva, je treba k tej presoji pristopati restriktivno, odločitev o tem, zakaj je bila v posameznem strankinem procesnem ravnanju prepoznana zloraba procesne pravice, pa je treba skrbno obrazložiti.

Iz sodne prakse izhaja, da je v preteklosti precej težav pri prepoznavanju zlorabe procesnih pravic povzročalo razmerje med institutom materialne izčrpanosti pravnega sredstva in zlorabo procesnih pravic. V 6. členu ZUS-1 je za dopustnost upravnega spora predpisan pogoj pravočasno vloženega rednega pravnega sredstva. Iz navedene določbe jasno izhaja pogoj formalne izčrpanosti pravnega sredstva, v teoriji pa so se pojavila posamezna stališča o tem, da iz te določbe izhaja tudi zahteva po materialni izčrpanosti vloženega pravnega sredstva.[124] Na to stališče se je sodna praksa Upravnega sodišča v nekem obdobju začela precej opirati in ni upoštevala tožbenih ugovorov, ki niso bili

točka 35 obrazložitve.

120 Da je analogen sistem obstajal že v rimskem pravu, opozarja Varanelli, 2009, str. 8–11.

121 Sodba ESČP v zadevi *Nalbant in Drugi proti Turčiji*, št. 59914/16, z dne 3. maja 2022, točke 41–47 obrazložitve.

122 Sodba ESČP v zadevi *Kreuz proti Poljski*, št. 28249/95, z dne 19. junija 2001, točke 61–67 obrazložitve.

123 Žuber v Kerševan in Podlipnik (ur.), 2023, str. 202–203.

124 Smrekar v Kerševan (ur.), 2019, str. 56.

materialno izčrpani.[125] Hkrati je Upravno sodišče pogosto poseglo v pravico do sodnega varstva s sklicevanjem na zlorabo pravic (češ da je namen omejevanja ugovorov v upravnem sporu preprečevati zlorabe procesnih pravic), pri tem pa ni vzpostavilo ločnice med zlorabo procesnih pravic in materialno izčrpanostjo pravnega sredstva, čeprav so pravne posledice omenjenih institutov različne.[126]

Pravne posledice nastopa zlorabe procesnih pravic in materialne neizčrpanosti pravnega sredstva učinkujejo kot odklonitev pravnega varstva, zato je bilo pričakovati, da bodo stranke sprejeta stališča Upravnega sodišča izpodbijale in da se bo o teh pomembnih pravnih vprašanjih moralo izreči Vrhovno sodišče.[127] Slednje je v svoji najnovejši praksi zavzelo stališče, da iz prvega odstavka 6. člena ZUS-1 izhaja le zahteva po formalnem izčrpanju pravnega sredstva in da te določbe ni mogoče razumeti kot zahteve po izčrpanju posameznih vsebinskih ugovorov. Po presoji Vrhovnega sodišča zahteve po materialni izčrpanosti tožbenih ugovorov ni mogoče utemeljiti niti s sistemsko razlago ZUS-1.[128] Upoštevajoč to stališče bo moralo Upravno sodišče v prihodnje presojati vse tožbene ugovore, ne glede na to, ali je stranka posamezne očitke uveljavljala že v postopku s pravnimi sredstvi ali ne. Z vidika osrednje teme tega prispevka to novo stališče pomeni, da izjemno zahtevno vprašanje kriterijev razmejevanja med materialno izčrpanostjo pravnega sredstva in zlorabo procesnih pravic ter njunih procesnih sankcij v prihodnje ne bo več relevantno. Gotovo pa je, da se bo sodišče tudi v prihodnje še srečevalo z zlorabami procesnih pravic v postopku, moralo jih bo prepoznavati in se do njih opredeljevati.

5. Zloraba procesnih pravic v upravnih razmerjih v Italiji

5.1. O izvoru koncepta zlorabe (procesnih) pravic v Italiji

V Italiji se je koncept zlorabe (procesnih) pravic začel razvijati na področju civilnega prava in ima dolgo pravno tradicijo, uveljavljen pa je tako v teoriji kot tudi praksi. V Italiji poznajo institut zlorabe pravice (it. *abuso del diritto*) in institut zlorabe postopka (it. *abuso del processo*). V širšem smislu institut zlorabe pravice ustreza našemu razumevanju zlorabe materialnih pravic, institut zlorabe postopka pa zlorabi procesnih pravic. Italijanska zakonodaja zlorabo pravice in zlorabo postopka opredeljuje le parcialno, oba instituta sta se razvila v sodni praksi in doktrini.

Italijanska doktrina institut zlorabe pravic opredeljuje kot izkrivljeno uporabo pravice s strani njenega imetnika, ki brez uresničevanja lastnega interesa povzroča škodo

[125] Če bi bile vse tožbene navedbe materialno neizčrpane, bi to vodilo v zavrženje tožbe.

[126] O tem Žuber v Kerševan in Podlipnik (ur.), 2023, str. 201–202.

[127] Glej na primer sklepa Vrhovnega sodišča RS X DoR 219/2022-5 z dne 6. julija 2022 in X DoR 33/2022 z dne 9. marca 2022.

[128] Sklep Vrhovnega sodišča RS X Ips 17/2022 z dne 7. junija 2023.

drugim.[129] Predlog italijanskega civilnega zakonika iz leta 1942 je predvideval določbo, da »nihče ne sme uveljavljati svoje pravice v nasprotju z namenom, za katerega mu je bila pravica podeljena«, vendar ta določba v končno besedilo zakona ni bila sprejeta. Italijanski zakonodajalec je namesto splošne opredelitve zlorabe pravice raje predvidel posebna pravila za sankcioniranje zlorabe posameznih kategorij pravic. Nekateri najbolj tipični primeri zlorabe pravice, ki se navajajo v teoriji, so: zloraba starševske pravice,[130] zloraba pravice do uporabe,[131] zloraba premoženja s strani zastavnega upnika.[132] Posebej je treba omeniti določbo 833. člena italijanskega civilnega zakonika, ki določa, da »lastnik ne sme opravljati dejanj, katerih namen je škodovati drugim ali jih vznemirjati«, in jo poleg izraza splošnega načela prepovedi zlorabe lastninske pravice mogoče razumeti tudi širše, tj. kot prepoved zlorabe katerekoli pravice. Tudi sodna praksa se je že večkrat izrekla o zlorabi pravic, opredeljevala njene različne oblike in elemente. Italijansko kasacijsko sodišče je opredelilo naslednje konstitutivne elemente zlorabe pravic:

1. imetništvo pravice,
2. možnost večkratnih, nepredvidenih načinov izvrševanja pravice,
3. sporno izvrševanje pravice v konkretnem primeru,
4. nesorazmerje med ugodnostjo, ki jo na podlagi spornega izvrševanja pravice pridobi ena stranka, in poslabšanjem položaja druge stranke.

Namen škodovati ni opredeljen kot konstitutiven pogoj zlorabe pravice.[133]

Iz koncepta zlorabe pravice se je razvil koncept zlorabe postopka, ki pomeni zlorabo pravice do pravnega sredstva in do obrambe pred sodiščem.[134] Podobno kot zloraba pravice tudi zloraba postopka v zakonodaji ni izrecno predvidena. Zloraba postopka ima podlago v ustavnih načelih poštenega postopka[135] in v pravilih, s katerimi italijanski zakonik o civilnem postopku sankcionira procesne zlorabe.[136] S tega vidika je posebej zanimiva določba prvega odstavka 96. člena zakonika o civilnem postopku, ki določa:

> »Če se izkaže, da je stranka, ki je izgubila postopek, ravnala ali se je pred sodiščem upirala v slabi veri ali hudi malomarnosti, sodnik na zahtevo druge stranke tej stranki ne naloži le plačila stroškov, temveč tudi plačilo odškodnine, ki jo v sodbi določi tudi po uradni dolžnosti.«[137]

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[129] Kot primer starejših razprav o opredelitvi zlorabe pravice glej na primer: Rescigno, 1965, str. 205; Salvi, 1988; Sacco, 2012. Kot primere novejših razprav glej: Astone, 2017; in Carpentieri, 2019.

[130] Italijanski civilni zakonik, 330. člen.

[131] Italijanski civilni zakonik, 1015. člen.

[132] Italijanski civilni zakonik, 2793. člen.

[133] Odločba italijanskega kasacijskega sodišča, št. 20106, z dne 18. septembra 2009.

[134] Glede (civilne) zlorabe postopka glej: Ansanelli, 2007; Dondi, 2010; Cordopatri, 2000.

[135] Italijanska ustava, 111. člen.

[136] Glej 88., 92. in 96. člen italijanskega zakonika o civilnem postopku.

[137] Ta določba je, upoštevajoč specifike 26. člen italijanskega zakonika o upravnem sporu, uporabljiva tudi v upravnem sporu.

Iz italijanske doktrine in prakse izhajajo naslednje štiri temeljne kategorije zlorabe postopka:

1. delitev zahtevka, ko bi stranka lahko dosegla določen sodni rezultat z enim sodnim postopkom, namesto tega pa aktivira dva ali več postopkov,[138]
2. uporaba pravnega sredstva za dosego drugačnega učinka od njegovega siceršnjega in običajnega učinka,[139]
3. neprimerno ravnanje stranke ali njenega odvetnika v postopku,[140]
4. drugi primeri, v katerih sodnik oceni, da gre za zlorabo.[141]

5.2. O zlorabi procesnih pravic v upravnih razmerjih

V zadnjih letih postajata pojma zlorabe pravic in zlorabe postopka vse pomembnejša tudi v upravnem pravu.

V italijanskem upravnem materialnem pravu je pojem zlorabe pravic omejen le na razmerja med strankami in upravo, ko ta ne ravna oblastno. Kadar uprava oblastno odloča, ima v italijanski pravni ureditvi stranka v razmerju do odločevalca šibkejše upravičenje od dejanske (javne) pravice, tj. legitimni interes (it. *interesse legittimo*).[142] To je tudi poglavitni razlog za neuporabljivost koncepta zlorabe pravic v oblastnih upravnopravnih razmerjih.

Podobno kot naš ZUP tudi italijanski zakon o upravnem postopku določa, da »za odnose med državljanom in javno upravo veljata načeli sodelovanja in dobre vere«.[143] To sicer ni pravilo, ki bi neposredno prepovedovalo zlorabo pravic v upravnem postopku, vendar pa dolžnost dobre vere po sami naravi stvari prepoveduje zlorabo. Načelo dobre vere je bilo v italijanski zakon o upravnem postopku dodano šele leta 2020, zato lahko pričakujemo, da se bo praksa glede zlorabe v upravnem postopku šele razvila.

Drugače kot zloraba v upravnem postopku je bila zloraba v upravnem sporu v zadnjih desetletjih bistveno obširneje obravnavana.[144] K temu je najbolj pripomogla uveljavitev zakonika o upravnem sporu leta 2010, ki je izrecno določil načelo učinkovitosti varstva,[145] načelo poštenega postopka[146] in predpisal posebne sankcije za hujše procesne

[138] Ta zloraba je povezana zlasti s povečevanjem stroškov postopka. Glej na primer odločbo italijanskega kasacijskega sodišča, št. 23726, z dne 15. novembra 2007.

[139] Glej na primer odločbo italijanskega kasacijskega sodišča, št. 6420, z dne 3. novembra 1986.

[140] Glej na primer odločbo italijanskega kasacijskega sodišča, št. 2723, z dne 8. februarja 2010.

[141] Glej na primer odločbo italijanskega kasacijskega sodišča, št. 8513, z dne 9. aprila 2010.

[142] O pomenu pojma zakonitega (legitimnega) interesa v italijanskem pravnem sistemu glej Scoca, 2017.

[143] Odstavek 2-bis 1. člena Zakona št. 241/1990, odstavek dodan s prvim odstavkom 12. člena, črka 0a), Zakon št. 120/2020.

[144] Glej na primer Paolantonio, 2008; Tropea, 2015; Sandulli, 2013, str. 155; Gallo, 2008, str. 1007.

[145] Zakonik o upravnem sporu, 1. člen.

[146] Zakonik o upravnem sporu, 2. člen.

kršitve.[147] V doktrini in sodni praksi se kot pravne podlage za preprečevanje procesnih zlorab v upravnem sporu navajajo načela evropskega prava, 24., 111. in 113. člen italijanske ustave, 88., 91., 94. in 96. člen zakonika o civilnem postopku ter 1., 2. in 26. člen zakonika o upravnem sporu.[148]

Zlorabe upravnega spora je v svoji praksi obravnavalo tudi pritožbeno upravno sodišče v Italiji (it. *Consiglio di Stato*), ki v upravnem sporu odloča na drugi stopnji. Takoj po začetku veljavnosti zakonika o upravnem sporu iz leta 2010 je presodilo, da zlorabo pomeni ravnanje pritožnika, ki je izpodbijal določitev pristojnosti, potem ko se je na prvi stopnji sam zavzemal za prav tako določitev pristojnosti.[149] Kmalu zatem je sodišče ob sklicevanju na načelo lojalnosti in načelo pravičnosti kot zlorabo označilo ravnanje, ko je javna uprava, ki ji je bila izdana začasna odredba o ponovitvi tehnične presoje, namesto izvedbe izrečenega ukrepa vložila pritožbo zoper poznejšo sodbo v glavni stvari.[150] Sodna praksa je opredelila tudi številne druge primere, v katerih je mogoče ravnanje strank opredeliti kot zlorabo v upravnem sporu.[151] Doktrina na podlagi primerov iz sodne prakse zaključuje, da je sicer ustrezno uvesti prepoved zlorabe tudi v upravni spor, da pa je treba zaradi občutljivosti in pomembnosti interesov v upravnih sporih v izogib sporom pred najvišjimi sodišči ta institut uporabljati z največjo stopnjo previdnosti.[152]

6. Zaključek

Sklepno lahko ugotovimo, da je institut zlorabe procesnih pravic uveljavljen tako v upravnem postopku kot tudi v upravnem sporu. Na normativni ravni je zloraba pravic v ZUP predvidena v obliki pravnega načela, posamezni primeri zlorabe pravic pa so tudi izrecno sankcionirani v obliki pravnega pravila. Za preostale primere zlorab se sankcije na temelju pravnih razlag oblikujejo v upravni in sodni praksi, kar lahko povzroča pravno negotovost. V upravnem sporu je splošna podlaga za ravnanje v primeru zlorab procesnih pravic 11. člen ZPP. Ta podlaga za varstvo pred zlorabo procesnih pravic je strožja od (zgolj) načelne prepovedi zlorabe procesnih pravic iz 11. člena ZUP.

Izziv za nadaljnji razvoj teorije in sodne prakse glede zlorabe procesnih pravic v upravnem postopku so zlasti tisti primeri zlorab, za katere zakonodaja ne predvideva sankcij

147 Zakonik o upravnem sporu, 26. člen.

148 Taruffo, 1998, str. 435 in nasl.

149 Odločba italijanskega pritožbenega upravnega sodišča, št. 656 z dne 7. februarja 2012.

150 Odločba italijanskega pritožbenega upravnega sodišča, št. 1209 z dne 12. marca 2012.

151 Med novejšimi glej na primer naslednje odločbe italijanskega pritožbenega upravnega sodišča, št. 10439 z dne 28. novembra 2022; št. 3543 z dne 6. maja 2021; in odločbe italijanskih regionalnih upravnih sodišč, št. 7670 z dne 10. junija 2022, št. 1459 z dne 3. decembra 2021 in št. 2992 z dne 5. maja 2021.

152 Tako Sandulli, 2013, str. 155.

in jih je zato treba oblikovati primeroma. Zakonodajnih sprememb z vidika zlorabe procesnih pravic v splošnem upravnem postopku ni pričakovati. vVrjetnejše je, da se bo morala na nove oblike zlorab ustrezno odzvati upravna in sodna praksa. Dopuščati je treba tudi možnost, da sankcije za posamezne procesne zlorabe določi procesna zakonodaja. V upravnem sporu je zaradi vse intenzivnejšega približevanja pravil upravnega spora pravilom pravdnega postopka in posledično čedalje aktivnejšega načina sojenja v upravnem sporu mogoče pričakovati, da se bo upravno sodstvo v prihodnje še pogosteje srečevalo s primeri zlorabe procesnih pravic, posledično pa bo po vzoru italijanske sodne prakse primorano oblikovati splošna merila za prepoznavo in presojo zlorabe procesnih pravic.

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Ljubljana Law Review
2023, Vol. LXXXIII

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Scientific article
UDC: 341.9:347.628
DOI: 10.51940/2023.1.171-194

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De Facto Unions in Private International Law

Abstract

Over the past few decades, there has been a discernible trend among the European Union (EU) member states to regulate various aspects of *de facto* unions. Nonetheless, comparative analyses still reveal significant divergences in domestic laws. Within this spectrum, one may observe legal systems in which no explicit rules are envisaged for *de facto* unions, juxtaposed with those wherein the legal effects of such unions converge towards those of marriage. These differences in domestic substantive regulations of *de facto* unions inevitably pose formidable challenges for private international law. The article attempts to scrutinise the legal position of *de facto* unions under EU private international law and assess the extent to which such unions may benefit from the existing legal instruments. Overall, great fragmentation may be observed in the approaches found across various EU Regulations. In the second part, the article focuses on the regulatory landscape of *de facto* unions in Slovenia, encompassing both substantive and private international law aspects. Although Slovenia was once at the forefront of regulating *de facto* unions, it is now evident that the existing regulation in private international law is outdated and necessitates reform. This is particularly important, given that Slovenian substantive law attaches significant legal consequences to *de facto* unions, and such unions have become increasingly prevalent within Slovenian society.

Key words

De facto union, private international law, European cross-border family law, cross-border couples.

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1. Introduction

When reviewing the draft of the French *Code civil* in 1804, Napoleon famously stated "*Les concubins se passent de la loi, la loi se désintéresse d'eux*", which translates to "Cohabiting couples do without the law, and the law is indifferent to them." The historical lack of legal attention directed towards *de facto* unions may be attributed to various factors. In the past, unions between unmarried individuals were frequently considered immoral or even contrary to public policy.[1] If legal regulation did exist, it often aimed to sanction such unions, either through civil or even criminal law sanctions.[2] Furthermore, it was often considered inappropriate and overly paternalistic to impose legal consequences on couples, who may have intentionally chosen not to marry to avoid such consequences.

Nevertheless, it is evident that over the past few decades, an increasing number of legal systems have introduced substantive rules to govern various legal aspects of *de facto* unions. In doing so, the legislators have responded to the evolving social landscape, where an increasing number of couples choose to cohabit without formal marriage bonds.[3] A quick comparative analysis of such provisions across the Member States of the European Union (hereinafter: the EU) reveals that these states can generally be categorised into three distinct groups. On one end of the spectrum, we find legal systems, such as those in Slovenia and Croatia, where the legal consequences of *de facto* unions resemble those of marriage.[4] In these states, provisions regarding property relations, maintenance obligations, and succession rights of spouses are often applied *mutatis mutandis* for *de facto* unions.[5] Conversely, on the opposite end of the spectrum, certain Member States, such as Poland[6] and Lithuania[7], lack statutory regulations specifically addressing *de facto* unions. To remedy the legal *lacuna*, general rules of civil law are sometimes applied, particularly to decide in property disputes of *de facto* partners.[8] In between, a growing number of Member States can be identified where only specific aspects of *de facto* unions are subject

1 Permanent Bureau of the Hague Conference on Private International Law, 1992, p. 113.

2 Permanent Bureau of the Hague Conference on Private International Law, 1987, p. 159.

3 For an overview of statistical data, see: Boele-Woelki et al., 2019, pp. 15–35; and Permanent Bureau of the Hague Conference on Private International Law, 2015, pp. 3–7.

4 Winkler, 2022, pp. 248–254.

5 For more on substantive regulation of *de facto* unions in Slovenia, see part 3.1 of this Article.

6 Wąsik, 2019, pp. 510–511.

7 Limante and Chochrin, 2019, pp. 413–414.

8 *Ibid.*, pp. 417–418.

to regulation. These aspects may include tenancy protection, social security law, succession rights, etc., as seen in Austria[9] and Germany[10], for instance.

The divergences in substantive laws also reveal different understandings of what constitutes a *de facto* union.[11] This is further exemplified by the various terms used to describe such unions. In addition to the term *de facto* union, one encounters alternative designations, such as 'free union', 'non-marital union', 'unmarried couple', 'cohabitation', 'legal cohabitation', 'unmarried cohabitation', 'informal marriage', 'common law marriage', etc. For the purpose of this article, term *de facto* union will be used to refer to a union between two persons who live together in an intimate relationship on a permanent basis, are not married, and whose union was not officially formalised. Therefore, a distinction needs to be drawn between *de facto* unions and various types of registered partnerships, which have also become increasingly legally regulated.

The abovementioned differences in domestic substantive laws inevitably pose significant challenges to private international law. On one hand, courts are confronted with unfamiliar legal institutions and concepts, which can give rise to complex questions of characterisation. Should conflict rules regarding marriage be applied by analogy? Or should the relationships between *de facto* partners be subject to general rules of civil law? On the other hand, *de facto* partners face uncertainty, whether their union and its legal consequences will be recognised. The Hague Conference on Private International Law first acknowledged these issues as far back as 1987 when it added 'the law applicable to unmarried couples'[12] to its agenda, albeit without affording it any particular priority.[13] In the subsequent years, several comparative studies were prepared, yet thus far, no proposal for an international instrument in this field has been introduced.

The regulation of *de facto* unions in private international law thus remains in the domain of national legislators and, in the case of EU Member States, also within the domain of the EU. Consequently, this has led to the development of a complex patchwork of diverging solutions, with a consistent private international law approach to the treatment of *de facto* unions remaining elusive. To highlight some of the pertinent issues,

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9 See: Pertot, Austria, 2019, pp. 6 and 15. In Austria, surviving *de facto* partners can be intestate heirs if there are no other eligible heirs. Furthermore, they have the right to stay in the family home if the union lasted at least three years. They are also entitled to enter into the tenancy after the partner's death.

10 See Pertot, Germany, 2019, p. 264. In Germany, *de facto* partners (who maintained a joint household) have the right to enter into tenancy upon the death of their partner.

11 Regarding various concepts of *de facto* unions in substantive law, see: Boele-Woelki et al., 2019, pp. 55–63; and Permanent Bureau of the Hague Conference on Private International Law, 1992, pp. 113, 115 and 117.

12 In 1995, the scope was also extended to jurisdiction and recognition and enforcement of judgements relating to 'unmarried couples'.

13 Permanent Bureau of the Hague Conference on Private International Law, 1987, p. 161.

the article will initially explore the extent to which EU private international law addresses the relations between *de facto* partners. Subsequently, it will present the Slovenian approach to such unions, encompassing both substantive law and national private international law considerations.

2. *De Facto* Unions in EU Private International Law

Considering the aforementioned plethora of various approaches among EU Member States, it is unsurprising that relations between *de facto* partners have not received special attention of EU private international law. As will be explained bellow, where references to such unions were made, their purpose was to exclude their legal consequences from the scopes of application of different regulations. Nonetheless, it would be inaccurate to claim that the growing number of *de facto* unions has gone entirely unnoticed by the EU legislator. Indeed, the European Commission included them in the consultations,[14] which led to the adoption of the Regulation 2016/1103[15] (hereinafter: Matrimonial Property Regulation) and the Regulation 2016/1104[16] (hereinafter: Regulation on the Property Consequences of Registered Partnerships). The following analysis will seek to determine whether some EU regulations in the field of private international law may be applicable to the most common types of disputes between *de facto* partners.

2.1. Property Relations Between De Facto *Partners*

Disputes between *de facto* partners typically revolve around the property ties developed during the course of their union. Since the majority of EU jurisdictions do not attribute property consequences to *de facto* unions, the resolution of such disputes can be unpredictable, especially when they involve an international element.

As of 29 January 2019, the field of property regimes for cross-border couples is governed by unified rules of private international law, which are binding in the 18 Member States participating in the enhanced cooperation.[17] These rules are contained in the

[14] See: Commission of the European Communities, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, 17 July 2006, COM(2006) 400 final, pp. 11–12.

[15] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, Official Journal of the EU, L 183/1, 8 July 2016.

[16] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, Official Journal of the EU, L 183/30, 8 July 2016.

[17] Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden.

Matrimonial Property Regulation and the Regulation on the Property Consequences of Registered Partnerships.

One of the intentions of the European legislator in adopting the two regulations—often jointly referred to as the 'Twin Regulations'—was to provide cross-border couples with a higher level of legal certainty and predictability.[18] However, in relation to *de facto* partners, the question arises whether the rules contained in 'Twin Regulations', were also intended to facilitate their legal certainty and predictability. Answering this question requires a careful examination of their personal as well as their material scope of application.

Taking into account Article 1 of both regulations, it becomes evident that their scopes encompass 'matrimonial property regimes' and 'the property consequences of registered partnerships', respectively. Both notions are autonomously defined in Article 3 of each regulation.[19] The former is to be understood as 'a set of rules concerning the property relationships between the spouses and in their relations with third parties, as a result of marriage or its dissolution', while the latter represents 'the set of rules concerning the property relationships of the partners, between themselves and in their relations with third parties, as a result of the legal relationship created by the registration of the partnership or its dissolution'.

Both definitions are essentially the same in substance, with their primary distinction lying in the type of partnership from which the property consequences arise. To gain a comprehensive understanding of both concepts, it is therefore necessary to also understand the concepts of marriage and registered partnership as the preconditions for the 'matrimonial property regimes' and for the 'property consequences of a registered partnership', respectively.

The Twin Regulations only contain an autonomous definition of a registered partnership. According to Article 3, a registered partnership is described as 'the regime governing the shared life of two people which is provided for in law, the registration of which is mandatory under that law and which fulfils the legal formalities required by that law for its creation'. Consequently, the Regulation on Property Consequences of Registered Partners exclusively applies to the property regimes of partnerships that have been registered.[20] This is further underlined in Recital 16, which highlights the importance of distinguishing between registered partnerships and *de facto* unions. Thus, the property relations of *de facto* partners do not fall within the scope of the Regulation on the Property Consequences of Registered Partnerships.[21]

Additional ambiguity arises around the concept of marriage, which, unfortunately, is not autonomously defined within the regulations.[22] The reasons for this approach can

[18] See, for example, Recital 15 of the Twin Regulations.

[19] Bonomi, 'Article 3', 2021, p. 213.

[20] See also: Dutta, 2018, p. 148.

[21] Rudolf, 2019, p. 134.

[22] Rodríguez Benot, 'Article 3, Definitions', 2020, p. 35.

be attributed to the divergences among Member States regarding the regulation of same-sex marriages and the ensuing disagreements on the content of the concept marriage.[23] This was also one of the key reasons why the Twin Regulations were only adopted in the context of enhanced cooperation.[24]

The absence of an autonomous definition is partially remedied in Recital 17. It stipulates that marriage is defined by the national laws of the Member States. Considering the prevailing view in academic literature, this reference should be interpreted as pointing to the substantive as well as private international law of the forum state.[25] In other words, the competent court will have to decide in each particular case whether it can characterise the union before it as marriage. In making this determination, the court will have to rely on its national concepts, including those stemming from its national private international law.

Given the reluctance of many Member States to regulate *de facto* unions, it appears improbable that their courts would characterise such unions as marriages and consequently apply the Matrimonial Property Regulation. According to academic literature, the property consequences of *de facto* unions are thus excluded from the Matrimonial Property Regulation's scope.[26] This view is also supported by the fact that the European legislator initially considered to (expressly) include the property relations of *de facto* partners in the Twin Regulations,[27] but ultimately abandoned this idea.

Nonetheless, Dutta argues that the Matrimonial Property regulation may exceptionally be applicable in cases where a *de facto* union is subject to the same (default) property regime as marriage.[28] Such substantive regulation can be found in Croatia and Slovenia among EU Member States. This position has been previously rejected concerning the Croatian opposite-sex 'extramarital union' (*izvanbračna zajednica)* and same-sex 'informal life partnership' (*neformalno životno partnerstvo*) as regulated by Article 11(1) of the Croatian Family Act[29] and Article 3(1) of the Croatian Life Partnership Act[30], respectively.[31] This conclusion is also supported by the provisions of Croatian Private International

[23] Bonomi, 'Article 3', 2021, p. 215–216.

[24] Wysocka-Bar, 2019, p. 189; Dougan, 2022, pp. 221–223.

[25] Bonomi, 2017, p. 132; Dutta, 2018, p. 152; Vrbljanac, 2022, p. 75.

[26] Andrae, 2019, p. 442; Rudolf, 2018, p. 957; Winker, 2022, p. 266.

[27] See: Commission of the European Communities, Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition, Brussels, 17 July 2006, COM(2006) 400 final, pp. 11–12.

[28] Dutta, 2018, pp. 156–157.

[29] *Obiteljski zakon*, Official Gazette of the Republic of Croatia, Nos. 103/15, 98/19, 47/20 and 49/23.

[30] *Zakon o* životnom *partnerstvu osoba istog spola*, Official Gazette of the Republic of Croatia, Nos. 92/14 and 98/19.

[31] Vrbljanac, 2022, p. 81.

Law Act (hereinafter: PILA).[32] Only by virtue of an 'extending reference provision'[33] may the property relations of extramarital unions be governed by the Matrimonial Property Regulation and the property relations of informal life partnerships by the Regulation on the Property Consequences of Registered Partnerships.[34] This nomotechnical approach shows that the Croatian legislator did not consider extramarital unions and informal life partnerships to fall (automatically) within the scope of the Twin Regulations.

A similar position can also be taken in Slovenia.[35] This conclusion can be drawn from Article 41 of the Slovenian Private International Law and Procedure Act[36] (hereinafter: PILPA), which envisages a special conflict rule for the property relations of *de facto* unions. Slovenian private international law treats such property relations as distinct from matrimonial property relations, indicating that an automatic application of the Matrimonial Property Regulation is not possible (unless the PILPA were to expressly extend its application).

Having established that neither the Matrimonial Property Regulation nor the Regulation on the Property Consequences of Registered Partnerships are applicable to the property relations of *de facto* unions, the question remains, whether property relations stemming from such relationships could be characterised as 'civil matters'. Such characterisation would enable the courts of Member States to establish their international jurisdiction pursuant to the Regulation (EU) No 1215/2012[37] (hereinafter: Regulation Brussels I bis). Furthermore, depending on the characterisation of the claim, the courts could determine the applicable law either in accordance with the Regulation (EC) No 593/2008[38] (hereinafter: Regulation Rome I) or based on the Regulation (EC) No 864/2007[39] (hereinafter: Regulation Rome II).

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32 *Zakon o međunarodnom privatnom pravu*, Official Gazette of the Republic of Croatia, No. 101/17.

33 See Kunda, 2020, pp. 33. Such provisions of national private international law allow the scope of European regulations or international conventions to be extended to cases that would otherwise fall outside their scope. Their effect is constitutive in nature and applies only before the courts of the State whose national private international law includes such a provision.

34 Medić, 2022, pp. 100–101; Vrbljanac, 2022, p. 81.

35 Rudolf, 2018, p. 957.

36 *Zakon o mednarodnem zasebnem pravu in postopku*, Official Gazette of the Republic of Slovenia, Nos. 56/99, 45/08 – ZArbit and 31/21 – CC dec.

37 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the EU, L 351/1, 20 December 2012.

38 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, Official Journal of the EU, L 177/6, 4 July 2008.

39 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, Official Journal of the EU, L 199/40, 31 July 2007.

Upon closer examination of their respective scopes of application as outlined in Article 1 of each regulation, it becomes evident that neither of them is applicable to matrimonial property regimes or to rights and obligations stemming from property regimes of 'relationships deemed by the law applicable to such relationships to have comparable effects to marriage'.[40] Although the wordings of the exclusions differ slightly, it is important to bear in mind that they were modelled on each other[41] and should be interpreted with a certain degree of consistency.[42]

To ascertain the applicability of the three regulations, the courts will have to examine whether a given *de facto* union can be characterised as a relationship having (property) effects comparable to marriage. While the exclusions in Article 1(2) stipulate that such characterisation should be performed in accordance with the 'law applicable to such relationships' (*lex causae*), the Recital 8 of the Regulation Rome I and the Recital 10 of the Regulation Rome II both point to the 'law of the Member State in which the court is seized' (*lex fori*). As proposed by Makowski, the ambiguity arising from these differing references can be resolved if the characterisation begins with the private international law of the forum state and the judge identifying the relevant (domestic) conflict rule. This rule will then lead, either directly or through the use of *renvoi*, to the substantive *lex causae*, which will in turn determine, whether the effects of the relationship are indeed comparable to marriage.[43]

The proposed approach seems to function effectively within the Slovenian context. A Slovenian judge, seized to rule in matter concerning property consequences of a *de facto* union, will first resort to Article 41 of the PILPA to determine the *lex causae*. Afterwards, two potential scenarios may unfold. First, if under the *lex causae*, the *de facto* union produces property consequences (comparable to marriage), the application of the Regulation Brussels I bis and the Regulation Rome I or Rome II will be excluded. Consequently, there will be no impediment to relying on Article 41 of the PILPA. On the other hand, if under the *lex causae*, the *de facto* union will not produce property consequences (comparable to marriage), the application of PILPA will need to yield to the application of the Regulation Brussels I bis and the Regulation Rome I or Rome II.

Finally, it should be mentioned that the Court of Justice of the EU already dealt with disputes concerning cross-border property relations of *de facto* unions in the Ágnes Weil case. It held that such disputes fell within the material scope of application of the

[40] See: Article 1(2)(a) of the Regulation Brussels I bis, Art. 1(2)(c) of the Regulation Rome I and Art. 1(2)(b) of the Regulation Rome II.

[41] Mankowski, 2016, p. 124. Such exclusion was first established in the Regulation Rome II. Similar exclusion later followed in the Regulation Rome I and subsequently in the Regulation Brussels I bis.

[42] See: Recital 7 of the Regulation Rome I and Recital 7 of the Regulation Rome II.

[43] Regarding the Regulation Rome II see: Makowski, 2018, p. 94–95. Similar approach is supported regarding the Regulation Rome I: Von Hein, 2015, p. 67. Such approach is also proposed for the exclusion in Article 1(2)(a) of the Succession Regulation: Weller, 2016, p. 84.

Regulation 44/2001[44] (hereinafter: Regulation Brussels I) since they represent a 'civil and commercial matter'.[45] However, an important difference may be observed between Regulation Brussels I and its successor Regulation Brussels I bis. In Article 1(2), the former excluded only the rights and property arising out of matrimonial relationship, while the latter extended the exclusion to also cover rights and property arising out of a relationship deemed by the law applicable to have comparable effects to marriage. Therefore, the outcome of the case could be different if the Regulation Brussels I bis were applicable.

2.2. Maintenance Obligations Between De Facto *Partners*

In addition to property relations, disputes arising between *de facto* partners often revolve around the existence of maintenance obligations among them, either during their union or afterward. The private international law regulation of this field within the EU is divided between two legal sources. The international jurisdiction as well as the recognition and enforcement of decisions are governed by the Regulation (EC) No 4/2009[46] (hereinafter: the Maintenance Regulation), while the applicable law is to be determined in accordance with the Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligation (hereinafter: 2007 Hague Protocol). The latter represents an international treaty, adopted within the framework of the Hague Conference on Private International Law, which became binding on the EU Member States by the approval of the European Community.[47]

In Article 1, both instruments define their scope of application as encompassing 'maintenance obligations arising from a family relationship, parentage, marriage or affinity'.[48] Indeed the wording of Article 1 of the Maintenance Regulation was modelled

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44 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the EC, L 12/1, 16 January 2001.

45 CJEU C-361/18 Ágnes Weil of 6 June 2019, ECLI:EU:C:2019:473, para. 45.

46 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, Official Journal of the EU, L 7/1, 10 January 2009.

47 Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, 2009/941/EC, Official Journal of the EU, L331/17, 16 December 2009.

48 To this, the 2007 Hague Protocol explicitly adds 'maintenance obligation in respect of a child regardless of the marital status of the parents'.

on Article 1 of the 2007 Hague Protocol.[49] This indicates that their scopes of application fundamentally overlap[50] and necessitate interpretation with some degree of consistency.[51]

The interpretation of the notion 'family relationship' is of key significance in determining whether the scope of application of these instruments extends to the maintenance obligations within *de facto* unions. Although neither instrument contains its definition, it cannot be considered as a mere umbrella term encompassing parentage, marriage and affinity, but should be attributed an independent meaning reaching beyond parentage, marriage, and affinity.[52]

Unfortunately, due to differences in national family laws and different legal nature of the two instruments (one being an EU regulation and the other an international treaty), there appears to be a disagreement concerning the correct method of interpretation. On one hand, some authors contend that the notion 'family relationship' should be interpreted in line with the concepts stemming from the private international law of the forum state.[53] However, it is contended that even such interpretation should be broad[54] and can potentially include the maintenance obligations of *de facto* partners, even if the substantive law of the forum state does not regulate maintenance obligations between them.[55]

On the other hand, several authors support an autonomous interpretation of the notion 'family relationship'.[56] Indeed, such interpretation would be desirable, as it would lead to a uniform application of both instruments across the EU. Regarding the Maintenance Regulation, it is important to note that the notion 'family relationship' is not defined and more importantly, the Regulation makes no reference to the national law of the Member States. Thus, in light of the settled case law of the Court of Justice of the EU, such a situation would necessitate an autonomous interpretation taking into account the concept and the objectives of the Regulation.[57] Considering the close connection between the Maintenance Regulation and the 2007 Hague Protocol, an autono-

[49] Althammer, 2016, p. 630.

[50] Andrae, 2019, p. 659.

[51] Hausmann, 2018, p. 325. See also Recital 8 of the Maintenance Regulation.

[52] Hausmann, 2018, p. 328, Weber, 2012, p. 172.

[53] Regarding 2007 Hague Protocol, see: Bonomi, 2013, pp. 25 and 27 and Althammer, 2016, p. 631. Regarding the Maintenance Regulation and the 2007 Hague Protocol, see: Andrae, 2014, p. 479. Even so, Andrae leaves open the possibility of a single autonomous interpretation applicable between EU Member States.

[54] Althammer, 2016, pp. 630–631.

[55] Regarding German perspective, see: Andrae, 2014, p. 481.

[56] Regarding the 2007 Hague Protocol, see: Weber, 2012, p. 173. Regarding the Maintenance Regulation, see: Althammer, 2016, pp. 631–632; Hausmann, 2018, p. 328.

[57] See, for example: CJEU C-558/16 *Mahnkopf* of 1 March 2018, ECLI:EU:C:2018:138, para. 32; CJEU C-135/15 *Nikiforidis* of 18 October 2016, ECLI:EU:C:2016:774, para. 28. Compare also: Althammer (2016), p. 632.

mous interpretation of the notion 'family relationship' could also be supported with respect to the latter. This is especially pertinent since the 2007 Hague Protocol became part of EU law by virtue of the European Community's approval and that the Maintenance Regulation references it explicitly in its Article 15.[58] Of course, such an autonomous interpretation could only be possible among the EU Member States.

Advocates for autonomous interpretation argue that the understanding of the notion 'family relationship' should be broad and encompass maintenance obligations between *de facto* partners.[59] Such an interpretation aligns with the objectives of the Maintenance Regulation, which seeks to ensure equal treatment of all maintenance creditors (as stated in Recital 11).[60] Furthermore, the form in Annex VII to the Maintenance Regulation anticipates the possibility that the maintenance obligation may be based on a relationship analogous to marriage. It is also worth noting that Article 5(2) of the Regulation Brussels I (before being replaced by the Maintenance Regulation) already governed international jurisdiction for all kinds of maintenance disputes,[61] including those involving *de facto* partners.[62] Consequently, adopting a narrower interpretation would curtail the protection already afforded by EU private international law instruments.

In conclusion, there are compelling reasons to support an autonomous and broad interpretation of the notion 'family relationships' within the EU, allowing the scope of both instruments' to encompass maintenance obligations between *de facto* partners. However, this interpretation will only facilitate the determination of international jurisdiction and applicable law. Whether maintenance obligations exist in a specific case, will still depend on the decision of the competent court based on the *lex causae* as determined pursuant to the 2007 Hague Protocol. It should also be noted that the preliminary questions regarding the partners' status and/or the existence of a *de facto* union are excluded from both instruments.[63]

2.3. Succession to De Facto *Partners' Estate*

As already mentioned, in some legal orders, *de facto* unions may produce legal consequences in the field of succession law. The final question thus remains, whether succession to *de facto* partner's estate may be subjected to the Regulation 650/2012[64] (hereinafter: Succession Regulation).

58 Compare: Weber, 2012, p. 173; and Althammer, 2016, p. 631.

59 Althammer, 2016, p. 632.

60 Novak, 2011, p. 158.

61 Althammer, 2016, p. 632.

62 Hausmann, 2018, p. 328.

63 Althammer, 2016, p. 631.

64 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and en-

The Succession Regulation defines its scope of application in Article 1 as relating to 'succession to the estates of deceased persons'. The notion 'succession' is further clarified in Article 3 and encompasses 'all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession'. Together with Article 1, this definition demonstrates that the Succession Regulation's scope of application is broad[65] and includes 'all civil-law aspects of succession'.[66] Personal qualities of the subjects involved in a succession case are irrelevant for its application.[67] Furthermore, neither the exclusion of 'public law matters' in Article 1(1) nor the exclusion of 'other civil matters' in Article 1(2) indicates that the succession of the deceased's estate by their surviving *de facto* partner would fall outside the Succession Regulation's scope.

This argument is additionally corroborated by Article 23. It stipulates that the *lex successionis*, determined in accordance with Articles 21 or 22 of the Succession Regulation governs the succession as a whole, including 'the determination of beneficiaries' as well as 'the succession rights of the surviving spouse or partner'. It is argued that both the notion 'beneficiary'[68] as well as the notion 'partner' should be interpreted broadly. The latter should not be equated with the notion 'partner' from a 'registered partnership' as defined in the Regulation on Property Consequences of Registered Partnerships, which leads us to conclusion that a registration of a partnership is not a necessary precondition for the application of the Succession Regulation.[69]

On the other hand, whether a *de facto* partner will be entitled to any succession rights will depend on the (substantive) *lex successionis*. In this respect, it is important to note that in accordance with Article 1(2)(a) of the Succession Regulation, the status of natural persons and family relationships (including those that are deemed to have comparable effects by the applicable law) is excluded from the scope of Succession Regulation. Thus, the preliminary question concerning the validity of a *de facto* union will not be governed by the *lex successionis*, but will have to be resolved under conflict rules in national private international law. This leads to two possible approaches. The competent court can either rely on its own conflict rules (independent connection) or on the conflict rules of law applicable to the main question (dependent connection).[70] Considering that conflict rules governing the validity of *de facto* unions (or marriage) are not harmonised at the

forcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, Official Journal of the EU, L 201/107, 27 July 2012.

65 Pamboukis, 2017, p. 11.

66 Recital 9 of the Succession Regulation.

67 Nikolaidis, 2017, p. 20.

68 Lagarde, 2015, p. 133.

69 Dutta, str. 148.

70 Geč-Korošec, 2001, p. 136–137.

EU level, the second approach appears favourable as it facilitates international harmony of the outcomes.[71]

3. Slovenian Perspective

Over the past four decades, *de facto* unions have become a widespread and broadly accepted social phenomenon in Slovenian society. Statistics show that their number has increased significantly during this period, and this tendency may be expected to continue.[72] These social changes could, of course, be attributed to several reasons. However, at least based on anecdotal evidence, it seems that far-reaching legal regulation, which often puts *de facto* partners on an equal footing with spouses, has also contributed significantly to their proliferation.

3.1. Substantive Law

3.1.1. Historic Developments

Slovenia's substantive regulation of *de facto* unions dates back to the 1970s when Slovenia was a part of the Socialist Federative Republic of Yugoslavia. With the 1971 XX-XLII amendments to the Federal Constitution and the new 1974 Federal Constitution, the socialist republics and autonomous provinces gained exclusive jurisdiction over family and succession law.[73] This paved way for the adoption of the Slovenian Marriage and Family Relations Act (hereinafter: MFRA),[74] which introduced one the most progressive regulation of *de facto* unions at the time.

Pursuant to Article 12 of MFRA, an 'extramarital union' (*zunajzakonska zveza*) was defined as a long-term domestic community of a man and a woman who are not married and there are no reasons why their marriage (if concluded) would be invalid. Such unions created the same legal consequences under the MFRA as if the partners had concluded a marriage. In all other legal fields, the partners enjoyed the same legal consequences as spouses if the relevant law so provided.[75]

Despite some initial reservations about such far-reaching equalisation *de facto* unions with marriage, this institution gained acceptance in society and contributed to de-stig-

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71 Weller, 2016, p. 83; Metallinos, 2017, pp. 253–254.

72 See, *inter alia*: Dougan, 2019, pp. 585–586.

73 For a comprehensive overview of the development of family law in Yugoslavia (pertaining to *de facto* unions), see: Šarčević, 1981, pp. 318–325.

74 *Zakon o zakonski zvezi in družinskih razmerjih*, Official Gazette of the Socialist Republic of Slovenia, No. 15/76.

75 See also: Zupančič, 1999, pp. 100–103.

matising couples who chose to live together without marrying.[76] Therefore, it is not surprising that the existing legal regulation of extramarital unions in the MFRA remained in force even after Slovenia's independence in 1991. Moreover, the legal status of extramarital unions was reinforced with the adoption of the new Slovenian Constitution,[77] which elevated them to a constitutionally protected category. Article 53 of the Constitution stipulates that the legal consequences of these unions shall be governed by the law. Therefore, the Slovenian legislator became obligated to maintain the legal regulation of extramarital unions.[78]

In accordance with the definition in Article 12 of MFRA, an extramarital union could only exist between partners of opposite sex. *De facto* unions of same-sex couples did not confer any legal consequences. The 2005 Same-Sex Civil Partnership Registration Act,[79] which for the first time enabled same-sex couples in Slovenia to formalise their relationships, only regulated same-sex civil partnerships that were registered. Thus, the first recognition of same-sex *de facto* unions only came in 2016 with the enactment of the Civil Union Act (CUA).[80] Under the CUA, a distinction was made between a formal and informal civil union. A formal civil union, which was solemnised before the competent authority, created the same legal effects as marriage in all legal spheres except for mutual adoption and the right to biomedical assisted procreation (as stated in Article 2 of the CUA). On the other hand, an informal civil union was defined in Article 3 as a long-term domestic community between two women or two men who have not formalised a civil union, but for which there were no reasons why a civil union between them (if concluded) would be invalid. Such unions created the same legal consequences between the partners as if the partners had formalised their civil union. In all other legal spheres (i.e. outside family law), a non-formal union had the same legal consequences as an (opposite-sex) extramarital union, unless otherwise provided by the CUA.[81]

The adoption of the CUA was soon followed by the adoption of the Family Code[82] (hereinafter: FC), which replaced the MFRA. Apart from some stylistic improvements,

[76] Novak, 2022, p. 169.

[77] *Ustava Republike Slovenije*, Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99, 75/16 – UZ70a and 92/21 – UZ62a.

[78] Novak, 2019, p. 40.

[79] *Zakon o registraciji istospolne partnerske skupnosti*, Official Gazette of the Republic of Slovenia, Nos. 65/05, 55/09 – CC dec., 18/16 – CC dec., 33/16 – ZPZ and 68/16 – ZPND-A.

[80] *Zakon o partnerski zvezi*, Official Gazette of the Republic of Slovenia, Nos. 33/16, 94/22 – CC dec. and 5/23 – DZ-B).

[81] Pursuant to Article 3(4) of the CUA, partners living in an informal civil union could not adopt children together and did not have the right to biomedically assisted procreation.

[82] *Družinski zakonik*, Official Gazette of the Republic of Slovenia, Nos. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – CC dec., 94/22 – CC dec. and 5/23.

the definition and the consequences of an extramarital union remained unchanged. It was deemed that the regulation of extramarital unions had become well-establish in the awareness of Slovenians, and any changes to it might disrupt already established social expectations.[83] In fact, the only changes to the existing regime were indirect, stemming from changes in the legal consequences of marriage.[84]

The most recent changes to the regulation of *de facto* unions in Slovenia occurred in 2023 through an amendment to the FC.[85] This amendment was prompted by two decisions of the Constitutional Court of the Republic of Slovenia, in which it ruled that the existing legislation, restricting the right to marry to couples of opposite-sex, was incompatible with the constitutional prohibition of discrimination.[86] By the same reasoning, the Constitutional Court further held that the exclusion of same-sex partners living in a formal civil union from joint adoption was unconstitutional.[87]

Following the amendment, the FC now defines an extramarital union as a long-term domestic community[88] of two persons who are not married and there are no reasons why their marriage (if concluded) would be invalid. With this, *de facto* unions of opposite-sex and same-sex partners are equalised and jointly regulated by the FC.

3.1.2. Legal Consequences of Extramarital Unions

As mentioned earlier, in the field of family law, an extramarital union in Slovenia creates the same legal consequences between the partners as marriage, as outlined in Article 4 of the FC. These consequences encompass both personal consequences (such as the right and duty of mutual respect, trust and assistance, the right to housing protection, the right to maintenance etc.) as well as the same property consequences (including default property regime or a contractual property regime).[89] In all other legal fields, an extramarital union is equalized with marriage only if the respective law so provides. In Slovenia, such examples are numerous.[90] Pursuant to Article 4a of the Inheritance Act[91],

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83 Novak, 2019, p. 42.

84 Novak, 2017, p. 50.

85 *Zakon o spremembah Družinskega zakonika* (Official Gazette of the Republic of Slovenia, No. 5/23).

86 Constitutional Court of the Republic of Slovenia, U-I-486/20-14, Up-572/18-36 of 16 June 2022.

87 Constitutional Court of the Republic of Slovenia, U-I-91/21-19, Up-675/19-32 of 16 June 2022.

88 The law does not specify how long a living arrangement must last before it can be considered long-term. The necessary duration may, therefore, vary from case to case, with the court taking into account the intensity of the relationship as well as whether the partners have children together. See: Novak, 2022, pp. 172–173.

89 Novak, 2022, p. 174.

90 This frequently leads to an erroneous belief that marriage and an extramarital union are completely equalised.

91 *Zakon o dedovanju*, Official Gazette of the Republic of Slovenia, No. 13/94 – ZN, 40/94 – CC dec., 117/00 – CC dec., 67/01, 83/01 – OZ, 73/04 – ZN-C, 31/13 – CC dec. and 63/16.

an extramarital partner enjoys the same rights, obligations, restrictions and status as a spouse. Provisions, which equalise extramarital partners and spouses, may also be found in the field of social security law, tax law, housing law, etc.[92]

3.1.3. Procedural Aspects of Determining the Existence of Extramarital Unions

After the introduction of extramarital unions into Slovenian law, a discussion emerged on how to establish their existence. Some contended that the existence of an extramarital union could be submitted to the court as the main question in special proceedings, while others regarded it as either a mere question of facts or a preliminary question about the existence of a legal relationship upon which the decision on the main question depends.[93]

The ambiguities regarding the determination of the existence of an extramarital union have since been resolved through the inclusion of an explicit provision in the MFRA, which was subsequently incorporated into Article 4(2) the FC. The issue of the existence of an extramarital union can only be decided as a preliminary question (never as the main question in the proceedings). Furthermore, the resolution of such preliminary question has effects solely within the proceedings, in which it was raised. Furthermore, the resolution of such preliminary question has effects solely within the proceedings, in which it was raised.

4. Private International Law

The inclination to regulate the consequences of *de facto* unions in substantive law was not unique to Slovenia but could also be observed in some other republics of the former Yugoslavia.[94] This trend was reflected in the 1982 Yugoslav Act on the Resolution of Conflicts of Laws with the Laws of Other Countries in Certain Matters.[95] Its Article 39, which regulated the applicable law to property relations of *de facto* unions, is considered to be the first conflict-rule making explicit reference of such unions.[96] When PILPA was adopted in 1999, the exact same provision was included in Article 41.

Considering the scopes of application of various EU regulations in the field of private international law, PILPA continues to be applicable to cross-border disputes between *de facto* partners in two areas: regarding their property relations (given their exclusion from the Twin Regulations' scope) and to determining the existence and validity of a *de facto* union.

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92 Novak, 2022, pp. 175–176.

93 For an overview of the various arguments, see: Wedam-Lukić, 1987, pp. 402 and 404–406.

94 See: Šarčević, 1981, pp. 321–325.

95 *Zakon o ureditvi kolizije zakonov s predpisi drugih držav v določenih razmerjih*, Official Gazette of the Socialist Republic of Slovenia, Nos. 43/82, 72/82 – corr. and Official Gazette of the Republic of Slovenia, No. 56/99.

96 Medić, 2022, p. 94.

4.1. Property Relations Between De Facto *Partners*

Article 41 of the PILPA, which governs the law applicable to property relations of *de facto* unions differentiates between default property regimes and contractual property relations. Regarding the former, it envisages two connecting factors: the law of the state of the partners' common nationality (*lex patriae communis*) and in case the partners are of different nationalities, the law of their common domicile (*lex domicilii communis*). Article 41 does not specify the relevant moment of connection. Legal theory maintains that any change in the circumstances that underlay the determination of applicable law, such as a change of common nationality or common domicile, causes the change of the applicable law.[97] However, the new law only applies prospectively, while a different law will govern the property relations of the partners that existed prior to the change (doctrine of partial mutability).[98]

The abovementioned connecting factors are also envisaged for the property (and personal) relations between spouses under Article 38 of the PILPA. Yet, Article 38 also provides for two additional subsidiary connecting factors: the law of the state of spouses' last common domicile and the law of the state with which the relationship is in closes connection. It is not entirely clear why the legislator decided to omit these subsidiary connecting factors for property relations of *de facto* partners.[99] Considering that pursuant to Slovenian law, an extramarital union can sometimes exist even between partners who do not live together,[100] the inclusion of these additional connecting factors would undeniably be beneficial.[101]

The contractual property relations of *de facto* partners are governed by the law governing their default property regime at the time the contract was concluded (Article 41(3) of the PILPA). However, unlike spouses,[102] *de facto* partners cannot choose the applicable law for their contractual property relations.[103]

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97 Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, pp. 70–71 and 74.

98 *Ibid.*

99 Most probably, the legislator held that a *de facto* union cannot exist between partners, who do not share their domicile. See: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, pp. 73–74.

100 Compare: Supreme Court of Republic of Slovenia, II Ips 264/2010 of 19 December 2013. The Supreme Court held that an extramarital union may exist even between the partners who do not live together if this decision was made by mutual consent and due to justifiable reasons, such as work or housing situation. Nonetheless, their union must include other characteristics, such as economic interdependence, emotional attachment and intimacy.

101 Geč-Korošec, 2002, p. 67.

102 In accordance with Article 39 of the PILPA, the contractual property relations of spouses are governed by the law applicable to their default property regime. However, if this law allows the choice of law, the spouses are also allowed to choose the law applicable to their contractual property relations.

103 Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, p. 74.

Conversely, the PILPA makes no explicit reference to *de facto* unions among provisions pertaining to international jurisdiction. Therefore, pursuant to the general rule in Article 48 of the PILPA, Slovenian courts will hold international jurisdiction if the defendant is domiciled in Slovenia (*actor sequitur forum rei*). This jurisdictional ground allows the competent court to decide on the entire property of *de facto* partners, regardless of its location.[104]

Article 67 of the PILPA also includes subsidiary grounds for international jurisdiction in property disputes between spouses. It is important to note that due to the adoption of the Matrimonial Property Regulation, this provision can no longer be applied to determine international jurisdiction in matrimonial property disputes.[105] However, the question remains, whether this provision could be analogously applied to property disputes of *de facto* partners. The case law[106] and the legal theory[107] seem to support this possibility. Following this line of argumentation, Slovenian courts may still hold international jurisdiction (even when the defendant is not domiciled in Slovenia) if the property of *de facto* partners is located in Slovenia (*forum patrimonii*). However, in this case, the courts' jurisdiction is limited solely to the property of *de facto* partners located in Slovenia and the courts are not allowed to rule on the property located abroad.[108] This is only possible if two additional conditions are met: (1) the majority of property is located in Slovenia and (2) the defendant (domiciled outside Slovenia) consented to the jurisdiction of Slovenian courts.

The international jurisdiction of Slovenian courts will also exist in case of prorogation of jurisdiction (as outlined in Article 52) and in case of tacit prorogation (as stipulated in Article 53). However, prorogation is only possible if one of the parties involved is a Slovenian national.

It should be noted that since the adoption of the Twin Regulations, property relations of spouses have been governed by substantially different rules on international jurisdiction and applicable law when compared to those governing *de facto* unions. No differences of this extent existed prior, since in Slovenia both marriage and *de facto* unions pro-

[104] *Ibid.*, p. 103.

[105] Provisions in the Matrimonial are exclusive in nature.

[106] See: Ljubljana Higher Court, I Cp 628/2019 of 10 July 2019, and Maribor Higher Court, I Cp 653/2017 of 5 September 2017. In both cases, which concerned property disputes between *de facto* partners, the courts based their international jurisdiction on Article 67 of the PILPA. This indicates that its analogous application to *de facto* unions is possible. Nonetheless, it cannot be overlooked that in both cases, the defendants had their habitual residence in Slovenia. Therefore, the courts should rely on Article 48 of the PILPA. It seems that the possibility of an analogous application of Article 67 also stems from the decision of the Supreme Court of the Republic of Slovenia, II Ips 184/2015 of 1 December 2016 (although this issue was raised *obiter dictum*).

[107] Compare: Rijavec, 2005, pp. 259–261.

[108] Compare: Ilešič, Polajnar-Pavčnik and Wedam-Lukić, 1992, p. 103.

duce the same property consequences. As a result, the question arises as to whether the current regulation under the PILPA is still appropriate. The differences that have arisen are probably not in line with the expectations of couples in Slovenia, who have become accustomed to receiving same treatment. In this context, the Croatian PILA can offer an interesting example. In Articles 40(2) and 49(2), it provides that the provisions of the Matrimonial Property Regulation regarding international jurisdiction and applicable law shall apply *mutatis mutandis* to property relations of extramarital unions.[109]

4.2. Determining the Existence and Validity of De Facto *Unions*

In proceedings concerning the legal consequences of a *de facto* union, Slovenian courts will also need to resolve the preliminary question, whether a valid *de facto* union actually exists. Since the unified rules of the EU private international law do not regulate these issues, Slovenian courts will have to rely on Slovenian private international law.

Unfortunately, the PILPA remains silent on how to resolve preliminary questions. In Slovenian legal theory, both independent and dependent connections are proposed as potential approaches. As a possible solution, it is suggested that in choosing the appropriate conflict rules for the resolution of such preliminary question, courts should take into account the legal order with which the relationship is most closely connected.[110]

If Slovenian courts decide to resolve the preliminary question in accordance with Slovenian conflict rules, they may encounter another *lacuna.* PILPA provides no explicit conflict rules pertaining to the existence and validity of *de facto* unions. Pursuant to Article 3 of the PILPA, legal *lacunas* should be resolved by analogous application of the provisions and principles of the PILPA as well as the principles of the legal order of the Republic of Slovenia and the principles of private international law. Following this approach, Article 36 governing the law applicable to the (in)validity of marriage, appears to be the most appropriate for determination of the validity of *de facto* unions. It points to any substantive law under which the marriage was concluded under Article 34 (law applicable to material conditions for marriage) and Article 35 (law applicable to the formal conditions for marriage). As *de facto* unions require no formalisation for their validity, only Article 34 requires closer examination. It stipulates that law applicable to material conditions for marriage shall be the law of each spouse's nationality. In cases where the *de facto* partners have the same nationality, applying this provision poses no issues. However, the situation is different when the partners have different nationalities, potentially resulting in situation, where one legal order regulates *de facto* unions while the other does not.[111] To resolve this issue, an additional conflict rule on formation and

[109] See also: Medić, 2022, pp. 100–108.

[110] Polajnar-Pavčnik, 1987, p. 545.

[111] *Ibid.*, pp. 546–547.

termination of *de facto* unions would be desirable. Inspiration could be drawn from Article 38 of the Croatian PILA, which points to the law of the state with which the *de facto* union has or had the closest connection.[112]

5. Conclusion

The growing number of couples cohabitating without formal marriage, the rising number of countries regulating the legal consequences of *de facto* unions, and the increased mobility of individuals in a globalised world all underscore the mounting necessity to regulate the relations of *de facto* partners within private international law. To date, EU legislative activity has not comprehensively addressed these needs. The regulation of some of the consequences of *de facto* unions within EU private international law has not been based on an awareness of the importance of such unions in modern society, but occurred only indirectly. Moreover, the varying approaches adopted by different Member States make it unlikely that a comprehensive regulation of this area will be adopted in the near future. A well-considered and comprehensive approach in national private international law is, therefore, all the more vital in states that recognise the legal consequences of *de facto* unions and desire to protect such couples in their relations with an international element. From a Slovenian perspective, it should be highlighted that the previously avant-garde regulation in this field has become outdated over time, so it no longer adequately responds to the needs of *de facto* partners. A reform of the existing law would, therefore, be welcome, and the Slovenian legislator could also draw inspiration from the innovative solutions found in Croatian private international law.

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[112] Medić, 2022, pp. 99–100.

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Ljubljana Law Review
2023, Vol. LXXXIII

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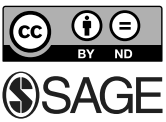

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Scientific article
UDC: 347.7:004:005.7
DOI: 10.51940/2023.1.195-219

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DAOs: Introducing a New Era of Governance

Abstract

Decentralised autonomous organisations (DAOs) are a growing phenomenon that has the potential to transform the organisational landscape. This article explores the implications of DAOs in corporate realms, highlighting their unique features and evolution. It emphasises the importance of understanding the similarities and differences between DAOs and traditional organisational structures. Whilst existing legal frameworks have been successful for traditional forms of organisation, they struggle to accommodate the distinctive characteristics of the democratised governance models introduced by DAOs. To fully leverage the enticing opportunities offered by DAOs, it is necessary to provide appropriate legal treatment that also addresses the risks they pose. The conclusion underscores the interest in community-owned protocols and suggests that further research is needed to effectively integrate DAOs into existing legal systems. It also encourages a broader examination of corporate requirements within the context of emerging data-driven technologies. The intersection of technology and company law principles calls for interdisciplinary efforts to shape the regulatory ecosystem for emerging, less formal formats of activity coordination and ensure their long-term viability and impact.

Key words

Decentralised autonomous organisation, corporate law, decentralised governance.

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1. Introduction

To date, the most successful legally recognised form of organisation for conducting business activities has proven to be a company. This success is partially attributed to the clear separation between the personal assets of shareholders and the assets used in the company's business. This separation is achieved through the doctrines of limited liability for shareholders and the company's separate legal personality.[1]

Shareholders of a company do not directly oversee company management. Instead, decision-making authority is delegated to the board of directors and executives. However, this delegation of power can create conflicts of interest due to divergent objectives and risk appetites, known as the principal-agent problem. Management may prioritise personal gain or diverge from the shareholders' interests, resulting in agency costs and related inefficiencies. As a result, there is an incentive to monitor and regulate managers' conduct and align their interests with those of the company owners. These frictions are addressed by company law.[2]

An alternative approach to establishing companies has emerged in the form of decentralised autonomous organisations (DAOs)—a novel organisational model, where ownership, participation, and the prospect of control are closely linked, if not merged.[3] DAOs offer the potential to fundamentally change how organisations operate, making them an interesting solution for the principal-agent problem.[4]

This article describes DAOs in the corporate realm, outlining their key characteristics, evolution, and differences from conventional organisational structures. The article then presents two ways in which regulators are addressing this new phenomenon:

1. Applying existing legal rules: Without delving deep into the different existing legal structures available to DAOs (legal wrappers), the article argues that none of them fully caters to the unique characteristics of DAOs.
2. Adopting new bespoke legal frameworks: After providing a brief comparative overview, the article focuses on one of the first attempts to draft a model law to regulate DAOs and compares the proposed system with the Slovenian Societies Act.

The last section concludes and suggests areas that may be interesting for further research.

[1] Davies, 2020, p. 2.

[2] Davies, 2020, p. 5.

[3] Brummer and Seira, 2022, p. 3.

[4] See, for example, Kaal, 2019.

2. DAOs in the Corporate Realm

Modern company law provides an organisational structure that allows providers of different inputs to come together and coordinate their collective activities with the consumers of the outputs.[5] An alternative way to coordinate activities is provided by DAOs.

In the broadest sense, DAOs are online communities that connect individuals with common goals and use computational tools to formalise governance protocols and pre-encode them into software. This allows them to automate processes of making decisions and distributing resources among community members automatically and transparently.[6]

DAOs enable greater transparency by providing open access to operational information, promoting trust and accountability among participants. They can also boost inclusivity by eliminating hierarchies and giving every member a voice, fostering democratised decision-making. By aligning incentives with communal goals, DAOs can encourage contributors to prioritise the collective objectives of the organisation.[7] With these characteristics, DAOs are seen as an experiment in reimagining how we connect, collaborate, and create.

However, decentralised governance through DAOs comes with challenges. Search and coordination frictions can arise, and voting-based governance structures can be time-consuming for time-critical decisions. Members can be inactive, and this can be exploited by active voters to affect decision outcomes. Democratic voting processes can be undermined by influential large shareholders. The complexity of DAOs may also create participation barriers. Additionally, inefficient voting processes pose security risks, including malicious attacks and fraud.[8]

Although these drawbacks are acknowledged, they are not the main focus of the article. Instead, we explore what the new phenomenon of decentralised governance means for the corporate world where decision-making power has traditionally been delegated to centralised bodies such as boards of directors and executives.

3. Defining DAOs

For the purposes of this paper, DAOs are online community-oriented, decentralised organisational structures. They are collectively owned and managed by members using software to direct resources, organise activities, and coordinate decision-making processes. DAOs typically operate on public, open blockchains and utilise open-source code

5 Davies, 2020, p. 6.

6 Brummer and Seira, 2022, p. 3.

7 WEF, 2023.

8 Bellavitis et al., 2022.

and smart contracts for their actions and governance.[9] This setup facilitates participants' coordination and self-governance.[10]

This approach offers opportunities to optimise processes, enhance corporate governance transparency, and involve participants more effectively. [11] Consequently, DAOs are predicted to become even more prominent and may even replace traditional companies in certain circumstances.

Importantly, DAO members can participate in decision-making directly, through proposing, ratifying, and voting on proposals in a decentralised manner. Direct participation in operations and decentralised governance align the interests of various stakeholders more equitably and make DAOs more resilient.

The definition of DAOs is, however, still evolving and changing with technological advancements. Additionally, the degree of decentralisation in the governance of each individual DAO can vary significantly. To this point, DAO token holdings have often remained centralised, with decision-making concentrated in the hands of the DAO founders or major investors.

4. The Rise of DAOs

Although the concept of DAOs was theorised in the 1990s,[12] it was only with the rapid advancements in blockchain technology and smart contracts that developers began building these entities.[13]

Notable milestones in the development of DAOs include the creation of "The DAO" on the Ethereum blockchain in 2016. The purpose of "The DAO" was to facilitate collective investment in projects. However, it faced challenges due to vulnerabilities in its smart contract, which led to its abandonment and a subsequent hard fork in the Ethereum network. Although "The DAO" encountered vulnerabilities in its smart contract and ultimately failed, it marked a new chapter in the crypto space. Developers learned from this experience and began creating enhanced tools and infrastructure for DAOs, addressing the limitations encountered by "The DAO".[14]

DAOs have emerged as a rapidly growing phenomenon in the web3 space. The rise of decentralised finance (DeFi) in 2020 played a significant role in the emergence of DAOs, which started to gain traction as they offered a means to manage resources and facilitate

[9] Blockchain is not the only technology that can cater automated decision-making processes and allocation of resources.

[10] Mondoh et al., 2022.

[11] EY, 2023.

[12] Hassan and Filippi, 2021.

[13] Bellavitis et al., 2022.

[14] Mehar et al., 2017.

collective decision-making. In just one year, from 2020 to 2021, the value of DAO treasuries increased by a factor of 40, reaching $16 billion, and the number of participants grew 130 times, reaching 1.6 million.[15]

As of now, thousands of DAOs are estimated to be operating on the blockchain.[16] Although the market capitalisation is not yet significant, the substantial growth has increasingly been attracting the attention of industry players (see, for example VitaDAO[17] backed by Pfizer), international organisations (see, for example UNICEF[18]) and policymakers. Looking ahead, DAOs are expected to find increased implementation within traditional corporate landscapes and other existing infrastructures.[19]

Despite this growth, however, they still face significant challenges in operations, governance, legal compliance, and regulation.[20] As developments have occurred at a rapid pace, the regulatory framework has lagged the pace of innovation in this space.[21] DAOs face a fragmented and uncertain regulatory landscape, as there is uncertainty about their legal status in most jurisdictions, leading to commercial uncertainty in the crypto industry. As a result, they face significant legal uncertainty that can be detrimental to their development and utilisation.[22]

5. Main differences between DAOs and Traditional Organisations[23]

DAOs rely on community-based decision-making and are built on decentralisation principles, with decision-making power in the hands of all members. In contrast, traditional organisations have centralised governance, mostly based on executives, a board of directors, and sometimes activist investors, leading to top-down decision-making hidden from the public eye. In contrast, DAOs can be imagined as "flat" organisations with no formal delegation of power made to specific participants, nor is any participant crowned as having superior powers.[24]

15 WEF 2023.

16 Newar, 2022.

17 According to VitaDAO, Pfizer is the first pharmaceutical company to vote on DAO proposals and participate in the incubation and commercialization of VitaDAO projects. Source: CoinDesk, <https://www.coindesk.com/web3/2023/01/30/vitadao-closes-41m-funding-round-with-pfizer-ventures-for-longevity-research/> (last accessed on 2 July 2023).

18 Matsuda, 2023.

19 EY, 2023.

20 WEF, 2023.

21 EY, 2023.

22 COALA Model Law, 2021.

23 The analysis in this chapter is made based on the following sources: Brummer and Seira, 2022; Bellavitis et al., 2022; Hackl, 2021; WEF, 2023; EY, 2023.

24 Mondoh et al., 2022.

In DAOs, any member can propose and vote on corporate decisions, leading to public and distributed decision-making. This framework fosters collaboration and community engagement among all members who share common goals and ideals. However, decision-making in DAOs may be impeded, as all members may be required to vote for any changes to be implemented, depending on the company's structure.

DAOs promise to transform the global corporate landscape from hierarchical to democratic and distributed organisations. They aim to enable communities to achieve their goals while reducing the need for intermediaries in governance and operations. The decentralisation of governance across stakeholders and the disclosure of operational and financial information in DAOs can reduce information and power asymmetries. DAOs also allow stakeholders to directly participate in operational and governance processes, encouraging a more equitable alignment of interests.

The transparent, distributed, and decentralised decision-making inherent in DAOs can have significant implications beyond internal governance. It has the potential to disrupt and disintermediate not only the internal dynamics of organisations but also the broader economy.

The analysis above is summarised in the below table:

Characteristic	Traditional organisations	DAOs
Governance	Centralised, based on executives and board of directors	Community-based decision-making, decentralised
Decision-Making	Top-down decision-making	Any member can propose and vote on corporate decisions
Agency Costs	Between managers (principals) and shareholders (agents)	Reduced due to overlap between principals and agents
Shareholders Participation	Delegated, limited	Direct

5.1. Tackling DAOs: Current Approaches

Given the novelties DAOs present, the question arises: how can a DAO, which operates differently from traditional corporations due to its technological foundation, be reconciled with traditional corporate entities in the existing legal system? Should DAOs be recognised as a new standalone type of legal entity with their own set of distinct rules, or are they similar enough to existing types of legal entities to enable functional and regulatory equivalence? Different jurisdictions offer different answers to this question.

5.1.1. Tackling DAOs by Applying Existing Legal Rules

Some regulatory regimes try to embed DAOs into existing laws.[25] Countries such as Switzerland, Panama and Singapore are commonly referred to as having regulation, not specifically tailored to DAOs, which is nevertheless most favourable for the registration of DAOs.[26] A similar approach can be seen in the UK, where the Law Commission has called stakeholders to provide information regarding the structure and operation of DAOs, and how existing law can best accommodate different types of DAOs. The Commission is currently reviewing responses to this call for evidence.

5.1.2. Focus on: Legal Wrappers

Most often, DAOs operate without legal recognition. Most DAOs are unincorporated and have unknown members. It is unclear whether smart contracts or token-holders are subject to the law and liabilities. DAOs avoid relying on government authority and resist rigid regulations. As a result, they have pseudonymous, distributed, and *ad hoc* organisational structures.

Consequently, unincorporated DAOs face difficulties in performing economic activities, such as opening bank accounts, hiring employees, engaging with service providers, and paying taxes. Coordination and commerce often rely on the legal framework of legal personhood. A legal identity may be provided by a legal wrapper if a DAO can fit within legally recognised corporate forms.

The spectrum of legal wrappers encompasses unincorporated associations, corporations, non-profit organisations, foundations (especially ownerless ones under the laws of Switzerland, Cayman Islands and the Netherlands), charities, cooperatives, etc. Legal options and regulatory responses vary by jurisdiction. Some are adopting new DAO-oriented structures, while others are evaluating DAOs under traditional structures. The law is, in any event, rapidly evolving.

[25] Chiu, 2021.

[26] Harrington, 2023.

High-level overview of available organisational structures	Benefits	Drawbacks
Unincorporated association	Avoids need for registration but may be subject to default treatment	May not be entitled to legal benefits (limited liability, corporate personhood)
Corporation	Legal person for contracting and litigation, well-established legal framework	Centralised management and equity shareholders, inflexible governance requirements
Partnership	Participants jointly engage in business activities, sharing profits and losses	Unlimited liability and inflexibility
Foundation	Established for public interest purpose, can be flexible in governance	Limited in certain jurisdictions, may not allow for identification of shareholders/managers/beneficial owners
Trust	Acts on behalf of beneficiaries, limited liability	Not recognised in many European countries, unclear and risky tax dynamic

Because each legal entity structure has its own set of trade-offs, choosing the appropriate legal wrapper for a specific activity or set of activities requires careful legal engineering, as well as thoughtful business strategy and operations.[27] The legal structure used by DAOs can affect the nature of tokens (which may be classified as securities or equivalent instruments), taxation, employment and labour law, insurance, banking, AML/CFT, and governance.[28] Utilising a legal wrapper may also result in financial, reporting and other obligations and requirements. Factors such as mission, operational activity, and constituency determine the best legal response to the issues a DAO raises.[29] Building a DAO requires not only code but also a thoughtful approach to enable it to operate in the real world and protect builders and contributors. Yet, the range and complexity of DAO legal structures can leave even the best engineers (and their lawyers) perplexed.[30]

27 Brummer and Seira, 2022, p. 4.

28 WEF, 2023.

29 Ibid.

30 Brummer and Seira, 2022, p. 2.

5.1.3. Critical Analysis of Legal Wrappers

Given the above comparison, which highlights substantial differences between traditional organisations and DAOs in terms of their organisational structures, legal structures modelled after 20th century organisations do not take into account the dispersed and fluid memberships of DAOs, as well as their decentralised governance.

Although none of the legal wrappers appears to be ideal for accommodating the DAO needs, they seem to be the only option available to:

1. Provide a set of useful, or even necessary, legal rights to engage in economic activity, such as entering into contracts, opening a bank account, owning intellectual and other property, having employees, paying taxes, and suing in its own name.[31]
2. Limit legal, tax, and regulatory risks, protect the DAO and its members from liabilities or damages caused by the DAO or other members, promote compliance with applicable laws and regulations, and facilitate the DAO's access to traditional financial services and markets.[32]

Without a legal wrapper, a DAO must either rely on individual participants to perform these functions or associate with a separate legal entity to perform the initial development work.[33] Yet, different DAO wrappers have varying degrees of centralisation and regulatory requirements that can clash with the way many DAOs aim to operate. This is due in part to the unique qualities that DAOs possess that are not available to traditional business associations and firms.[34] Requiring DAOs to be backed by a traditional organisation thus undermines the purpose of establishing a DAO in the first place.

Recent trends revolving around liability of unwrapped DAOs seems to support this.

5.1.4. Unwrapped DAOs and Liability

The question of whether an unwrapped DAO can be considered a legal person is a complex and evolving issue that remains subject to debate. One recent case that has raised this issue is the *Ooki DAO* case[35] brought by the US CFTC. In that case, the court held the Ooki DAO liable for violating the US Commodity Exchange Act, which suggests that, under certain circumstances, a DAO's participants can be held jointly or severally liable.

However, as CFTC Director McGinley's statement indicates, the case revolved around creating a DAO with an evasive purpose and the explicit goal of engaging in illegal activity without legal accountability. The defendants believed that they could cir-

31 WEF, 2023.

32 Brummer and Seira, 2022, p. 4.

33 WEF, 2023.

34 Brummer and Seira, 2022, p. 4.

35 Case No. 3:22-cv-05416-WHO, *Commodity Futures Trading Commission (CFTC) v. Ooki DAO*, filed on 8 June 2023.

cumvent the law simply by adopting a DAO structure.[36] The broader legal recognition of DAOs as legal persons will require the development of new legal frameworks. The decentralised and automated nature of DAOs, which lack a centralised governing body, makes extending legal personhood to them challenging. Smart contracts have limitations compared to traditional legal contracts. The absence of a recognised legal entity within a DAO can complicate accountability, leading regulators to attribute legal responsibility to other identifiable actors.

Another case that raises important legal questions regarding potential responsibilities in the Web3 space is the *Tulip Trading* case.[37] The claimant argues that the developers of the Bitcoin system have control over the Bitcoin networks and the ability to secure its assets. Due to a hack resulting in the loss of private keys, these assets are currently inaccessible. Tulip contends that the developers should be recognised as fiduciaries and owe fiduciary duties to the true owners of Bitcoin. The UK Court of Appeal has not yet determined whether developers indeed have a duty of care to add a software patch in these circumstances. The outcome may prompt a reassessment of digital finance, decentralised governance, and the concept of distributed ledger technology immutability. Questions about whether there are always people behind the code, and who among them can be held accountable are closely tied to the discussion of the DAO personhood. Therefore, it will be interesting to observe what the court will hold.[38]

5.2. Tackling DAOs by Adopting New Bespoke Legal Frameworks

An alternative approach to recognising DAOs in the legal context is to adopt new, customised legal frameworks that consider specific characteristics of DAOs.[39]

In some jurisdictions, novel, specialised legal frameworks have been designed specifically to accommodate DAOs and provide more legal certainty for their members.[40] These

[36] Statement of CFTC Division of Enforcement Director Ian McGinley on the Ooki DAO Litigation Victory, Release Number 8715-23.

[37] *Tulip Trading Ltd (a Seychelles company) v Van Der Laan and others* [2022] EWHC 667 (Ch).

[38] It is acknowledged that both cases pertain to the legal systems of the US and the UK. The debate regarding the legal personhood of DAOs in the common law context is slightly distinct from the Slovenian system. Partnerships in the US and the UK are typically not obligated to register or prepare financial statements, and general partners are subject to unlimited liability. Conversely, partnerships (societies) based in Slovenia can operate as independent legal entities, benefiting from limited liability and certain asset partitioning privileges (Societies Act of the Republic of Slovenia (Official Gazette of the Republic of Slovenia [Uradni list RS], Nos. 64/11 and 21/18). Another distinction is the predominant ownership structure. Common law has dispersed ownership, which results in agency costs between managers and shareholders. In contrast, European ownership structures are mostly concentrated, which creates agency costs between majority and minority shareholders. The following analysis takes these differences into account.

[39] Chiu, 2021, p. 43.

[40] Ibid.

jurisdictions have taken steps to recognise and accommodate DAOs within their legal systems. In 2018, Malta became the first country to legally acknowledge DAOs as distinct legal persons. However, their adoption of DAOs is constrained by concerns surrounding their complexity and centralised requirements.[41] More recently, in December 2022, the Marshall Islands passed legislation recognising DAOs as separate legal entities.[42]

In the United States, several states, such as Wyoming, Tennessee, and Vermont, have introduced specialised Limited Liability Company (LLC) forms tailored for decentralised organisations, such as DAOs, to protect their legal status. These states mandate the presence of a registered agent, allow for decentralised automated governance, and offer limited liability protection to members.[43]

Among them, Wyoming appears to be the most prominent example.[44] There, the first legal DAO entity in the US, American CryptoFed, has been recognised,[45] setting an important precedent for other states to follow. As of July 2023, there are almost 900 registered DAO's in Wyoming.[46]

Wyoming has amended its LLC statute to allow "algorithmically managed" DAO LLCs.[47] Compared to corporations, DAOs are subject to fewer restrictions and more permissive governance structure. Some limitations nonetheless apply. For instance, a DAO LLC cannot be manager-managed (top-down) and must include "DAO," "DAO LLC", or "LAO" in its firm name. Generally, any smart contract directly used to manage, facilitate, or operate the DAO must have a publicly available identifier. Articles of association must also contain disclaimer about different legal treatment.[48]

Colorado permits DAOs to register as Limited Cooperative Associations (LCAs), which offer flexibility in profit distribution and voting mechanisms by combining elements of the cooperative model with the LLC and corporate form.[49] However, LCAs necessitate a board of directors and a registered agent, which may not align with the

41 Ronstedt and Eggert, 2018.

42 Bannermanquist, 2022.

43 Bellavitis et al., 2022; WEF 2023; The Defiant, <https://thedefiant.io/starting-a-dao-in-the-usa-steer-clear-of-dao-legislation> (last accessed on 2 July 2023).

44 Brummer and Seira, 2022.

45 Young, 2021.

46 Wyoming Secretary of State, <https://wyobiz.wyo.gov/Business/FilingSearch.aspx#&&H1PF+T-74FxpgkeNyJo9NjspGdC6wybLpk5cURMKl+Ecixl9WLI+lUkY8Bz6twndO0EccLECRsmb-bhR3MsdKDtMG32sqDVaXHyd1W8wi6UOPxhnH/1jG5nFXrlVZZ8BAZ55DEZdBGMH-NcX0Uzwgox4zr1pTX8VBIlk0jAcJdKndweX5y3> (last accessed on 2 July 2023).

47 Bellavitis et al., 2022.

48 Brummer and Seira, 2022.

49 WEF, 2023.

preferences of all DAOs. Furthermore, Colorado law lacks clear guidance concerning smart contract governance.[50]

In the EU context, DAOs were discussed during the negotiations for the recently adopted MiCA Regulation,[51] but were excluded from the final version for political reasons. The draft regulation included DAOs in the negotiation phase with legal identity and limited liability for community members but was omitted in the final version of the MiCA Regulation.[52] According to Recital 22,

> "Where crypto-asset services are provided in a *fully decentralised* manner without any intermediary, they should not fall within the scope of this [MiCA] Regulation" (emphasis added).

However, the question of how much decentralisation is required remains to be answered, and it will likely be resolved only over the coming years through regulatory technical standards.[53] In addition, recitals can affect the interpretation of the articles but do not have a binding effect themselves. As a result, it is somewhat unclear how the MiCA Regulation might be applied to DAOs.

To establish uniformity, legal certainty, and allow for innovation, the Coalition of Automated Legal Applications (COALA), a global blockchain think tank, has developed a regulatory framework proposal for the legal recognition of DAOs.[54] Unlike other regulatory frameworks for DAOs, this model law does not impose formal registration requirements, promoting adaptability and flexibility. Pursuant to the model law, DAOs are granted substantial leeway to structure and govern themselves as they see fit. The legislation also addresses unique DLT phenomena that have governance implications for DAOs, including contentious forks, DAO restructurings, and failure events.[55] In March 2023, the Utah legislature passed DAO amendments that implemented the propositions outlined in the model law. Under this legislation, unregistered (unwrapped) DAOs are granted treatment equivalent to that of LLCs, provided they meet specific requirements.[56]

The remainder of this article will explore the concept of DAOs pursuant to the COALA Model Law in more detail and compare the proposed suggestions with the reg-

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50 Ibid.

51 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (Text with EEA relevance).

52 Axelsen, Jensen and Ross, 2022a.

53 Ibid.

54 Coala Model Law, 2021.

55 Coala Model Law, 2021, summarised in WEF, 2023.

56 Nwaokocha, 2023. The Utah proposal for a substitute bill on Decentralized Autonomous Organizations Amendments is available at: <https://le.utah.gov/~2023/bills/hbillint/HB0357S03.pdf>.

ulatory framework that applies to Slovenian partnerships (societies) under the Slovenian Societies Act.

5.3. Slovenian Societies Act in the Light of the COALA Model Law

The COALA Model Law has several aspects that share similarities with the existing partnership arrangement in force in Slovenia. This section compares the Model Law with the Slovenian Societies Act, and attempts to infer the approach to regulating DAOs in the context of the Slovenian legal system.

According to Slovenian legislation, a society is an autonomous, not-for-profit union founded by its members to pursue common interests.[57] Members typically pool their knowledge and work for an indefinite period of time to achieve shared goals and objectives.[58] The society's activities are conducted in an autonomous, non-profit, and public manner.

The Model Law defines DAOs as smart contracts deployed on a public permissionless blockchain. These smart contracts implement specific technically decentralised decision-making or governance rules, enabling a multitude of actors to coordinate themselves in a decentralised fashion.[59]

The similarities between DAOs and societies, in the broadest sense, begin with their legal nature. Neither has minimum share capital requirements. Both are independent legal entities[60] with their own assets, separate from their members.[61] As a result, both can enter into legal transactions and acquire rights and obligations.[62] Furthermore, both are liable for their obligations with all of their assets.[63]

In exceptional cases, both the members of a DAO and of a society may be personally liable for the obligations incurred by the organisation. Yet, the conditions for lifting the corporate veil are set out differently in the Model Law and the Societies Act:

– On the one hand, Article 5(3) and (4) of the Model Law state that members of a DAO will be personally liable for: i) monetary payments ordered in enforceable judgments, orders, or awards if they voted against compliance with them, in proportion to their share; and ii) their own wrongful acts or omissions.
– On the other hand, the Society Act sets out the conditions for personal liability in a broader sense. Article 6(3) provides that responsible persons of the society are liable

57 Article 1(1) of the Societies Act.

58 Societies Act Commentary, p. 18.

59 Article 3(7) of the Model Law

60 Article 2(1, 4) of the Model Law; Article 5(1) of the Societies Act.

61 Article 2(1); Article 6(2) and 24 of the Societies Act.

62 Article 2 of the Model Law, Societies Act Commentary, pp. 40 and 46.

63 Article 4(2) of the Model Law; Article 6(2) of the Societies Act.

for the obligations of the society if, for their own benefit or for the benefit of another person, they reduce the assets held by the society or redirect operations and cash flows to another existing or newly created legal person or natural person, thereby preventing an increase in the assets held despite being aware that the society would not be able to meet its obligations to third parties. Additionally, the person is jointly liable with all their assets.

As we see, the conditions for lifting the corporate veil in a DAO are somewhat broader than in a society. This is because all members of the DAO can be held personally liable, whereas in a society, only a responsible individual, such as a representative, can be held personally liable.

The Model Law and the Societies Act, along with the Slovenian legal system as a whole, differ in terms of obtaining legal personality. Societies acquire legal person status upon registration[64]. To register, a society must submit an application to the registration authority and attach the necessary documents.[65] In contrast, a DAO automatically obtains legal personality when it meets the criteria listed in Article 4 of the Model Law. Therefore, the Model Law does not require registration for a DAO to obtain legal personality.[66]

To continue, DAOs and societies are similar with regard to their almost unrestricted autonomy of regulating their internal functioning. A DAO's internal organisation and procedures are set-out by its by-laws[67].[68] Likewise, a society's decisions regarding its management are made directly or indirectly by its members.[69] The members of a society regulate their internal organisation with a charter,[70] which, of course, greatly differs from a smart contract which contains the by-laws, but is nevertheless similar in nature with regards to the autonomy of the organisation to determine its content, and in turn the functioning of the organisation itself.

Both DAOs and societies have autonomy in determining the existence and functioning of their internal bodies. They are composed of a collective of their members, and no additional internal bodies are required.[71] However, societies often establish executive, supervisory, and disciplinary bodies, as collective decision-making may cause organisa-

64 Article 5(1) of the Societies Act.

65 Article 18 of the Societies Act.

66 Article 6(1) of the Model Law and Societies Act Commentary, p. 125.

67 By-laws are the rules and regulations that govern the procedures followed by a DAO and the interaction of its Members and Participants, which must be set out in plain language, in text or sound, visual or audio-visual recording (Article 3(5) ML).

68 Article 11 of the Model Law.

69 Article 1(2) of the Societies Act.

70 Article 4 of the Societies Act.

71 Article 13 of the Model Law; Article 13(3) of the Societies Act.

tional obstacles and excessive costs for societies with a larger number of members.[72] On the other hand, DAOs do not have problems with collective decision-making due to their technological nature, regardless of the number of members. Additionally, DAOs do not require executive organs as their decisions are automatically executed by the smart contract after their adoption.

Nevertheless, a DAO's dispute resolution mechanism[73] may determine a certain type of internal body that decides on internal disputes. If a DAO does not have any additional internal bodies, all powers are vested in the DAO members.[74] Conversely, if a society has no additional internal bodies, it must allocate responsibilities between the general assembly, the society's representative, and (usually) the president of the society.[75]

Both DAOs and societies have the freedom to determine the frequency and method of meetings[76], as well as the conditions for a quorum and the majority required for valid decision-making[77]. However, due to the functional nature of traditional societies, at least some meetings are required. This is reflected in the Societies Act, which includes a dispositive rule of annual meetings[78], and mandates certain decisions to be made only by the general assembly.[79]

DAOs differ in how they conduct meetings. They take full advantage of their technological functioning by usually having a continuous session, where members can propose and vote on decisions at any time. There is no need to set a time and place for a meeting, or for physical presence of members. Article 3(17) of the Model Law defines meetings as both synchronous and asynchronous events, reflecting this flexibility.

Societies can sometimes operate in a similar manner. By utilising modern communication tools, organising meetings without the physical presence of members is possible

72 Societies Act Commentary, p. 89.

73 Article 3(3) of the Model Law defines a dispute resolution mechanism a an on-chain alternative dispute resolution system, such as arbitration, expert determination, or an on-chain alternative court system, which enables anyone to resolve their disputes, controversies or claims with, arising out of, or connected with, a DAO.

74 Article 13(1) of the Model Law.

75 Societies Act Commentary, p. 67.

76 Article 12 of the Model Law; Article 13(2) of the Societies Act.

77 Article 12(4) of the Model Law; Article 13(4) of the Societies Act.

78 Article 13(2) of the Societies Act.

79 The charter and amendments to the charter concerning the provisions of paragraph one of Article 9 of the Societies Act and other decisions of fundamental importance made by the society (Article 13(1) of the Societies Act, the resolution to merge with or join another society (Article 15(2) of the Societies Act), the resolution to establish a federation of societies (Article 16(2) of the Societies Act), the adoption of the annual report (Article 27(7) of the Societies Act), the dissolution of the society (Article 38(1) of the Societies Act) in addition to other decisions with a high degree of importance, such as the election and dismissal of members of the Society's internal bodies, adoption of internal acts etc. (Societies Act Commentary, p. 68).

since such meetings are not explicitly prohibited by the Societies Act.[80] Additionally, members do not necessarily need to be present at the same time, as correspondence meetings are possible.[81]

Apart from the internal organisation, an important distinction between DAOs and societies lies in their external (off-chain) functioning. A society must have a representative,[82] whereas DAOs do not strictly require an off-chain representative to undertake tasks not achievable on-chain[83]. However, in practice, the business world almost certainly requires a DAO to appoint an off-chain representative if it wants to interact effectively with other entities.

Furthermore, DAOs and societies share the common characteristic of granting their members the freedom to choose the purpose for which they gather. A DAO can be established for a wide range of purposes, including mutualistic, social, environmental, or political.[84] Similarly, a society can be established for any purpose, with the exception of those expressly prohibited.[85]

However, DAOs and societies differ when it comes to determining their object or purpose and the resulting consequences. According to the commentary on Article 1 of the Model Law, a DAO's purpose does not need to be determined, while the Societies Act requires such determination in the society's charter[86], in addition to determining the society's main activity in the registration process[87]. Furthermore, as a DAO's purpose and activities do not need to be determined, they are not limited in their conduct. In contrast, a society may only carry out the activities defined in its charter, and carrying out other activities is a punishable offence.[88]

DAOs and societies differ considerably in their approach to commercial activities. While commercial activities and sharing profits among members are often the primary reasons for establishing a DAO,[89] they are much more restricted for societies. Non-

80 Societies Act Commentary, p. 57.

81 Societies Act Commentary, p. 72.

82 Article 5(2) and Article 8(3) of the Society Act.

83 Article 14(1) of the Model Law.

84 Article 1 of the Model Law.

85 The establishing of any society whose purpose, objective and activities are intended to bring about a forcible change to the constitutional order, the commission of criminal offences or the incitement of nationalistic, racial, religious or other forms of inequality, or the propagation of nationalistic, racial, religious or other forms of hatred and intolerance and incitement to violence and war, shall be prohibited. (Article 3(1) of the Societies Act)

86 Article 9(1)(2) of the Societies Act.

87 Article 18(1)(9) of the Societies Act.

88 Article 52(1)(1) of the Societies Act.

89 Nevertheless, the commentary to Article 1 of the Model Law specifically mentioned the possibility of a DAO being used for non-commercial purposes, meaning that a non-profit DAO, which is

profitable activity is a fundamental aspect of a society and it is, therefore, not permitted to establish any society for profit-making purposes or solely for the performance of profit-making activity.[90]

Nevertheless, a society needs assets to function. As a result, it may undertake for-profit activities, provided that they are connected to the purpose and objectives of the society and are only supplementary to its non-gainful activities. Additionally, these activities must be performed solely to the extent necessary to fulfil the society's purpose and objectives, or for the performance of other non-gainful activities.[91]

A society cannot distribute its assets among its members. Any such distribution of the assets of a society among its members is void,[92] and is prohibited even upon the dissolution of a society.[93] If a society generates a surplus income during the performance of its activities, this surplus must be used to fulfil the purpose and objectives of the society and for the performance of non-gainful activities defined in its charter.[94]

A DAO and a society also differ in their taxation. As a legal entity, a society is required to pay income tax on profits generated from its for-profit activities.[95] The Model Law, on the other hand, regulates taxation differently. DAOs are treated as pass-through entities for tax purposes, with no entity-level tax imposed on the DAO.[96]

Furthermore, differences between DAOs and societies can be observed in terms of their members. Firstly, while a minimum of three persons[97] are required to establish a society,[98] a DAO only requires one person at any given time.[99] Secondly, members of a DAO can represent themselves or be represented by a proxy with full powers,[100] whereas the membership of a society is personal in nature, and only legal persons exercise their rights through a representative[101]. Finally, members of a DAO can choose to remain

more similar to a society in this regard, can also be established.

90 Article 3(2) of the Societies Act.

91 Article 24(1) of the Societies Act.

92 Article 24(2) of the Societies Act. That is in line with the purpose of non-profitable activity, which pertains not to the question of what activities are conducted, but to the manner of distribution of the acquired assets (Societies Act Commentary, p. 22)

93 Societies Act Commentary, p. 127.

94 Article 24(3) of the Societies Act.

95 Article 9(2) of the Corporate Income Tax Act.

96 Article 20(1) of the Model Law.

97 Unlike in the previous Societies Act, the present one contains no restrictions regarding the nationality of the founders (Societies Act Commentary, p. 54)

98 Article 8(1) Societies Act.

99 Article 4(1)(h) of the Model Law. DAO's and societies are similar still with regards to the fact that a founder may be a physical or legal persons (Article 8(1) of the Societies Act)

100 Article 9 of the Model Law.

101 Article 11(1) of the Societies Act.

anonymous or hide their real identities using a pseudonym, while the successful registration of a society requires a full set of personal data for all members.[102]

Both a DAO and a society may have different forms or types of participation in the organisation. For example, a DAO may have multiple types of participation rights,[103] and a society may have different types of members, such as honorary members, supporting members, sympathisers, and sponsors.[104]

The difference in nature between a DAO and a society results in a different way of obtaining membership. Although a society is free to determine the criteria and procedure for gaining membership,[105] it can be concluded that a society must, in any case, accept the declaration of adhesion of the new member.[106]

On the other hand, the Model Law takes a different approach in line with the automatic functioning of a smart contract. It states that, if a DAO has tokens providing governance powers (which is common), the token holder will be considered a member of the DAO either a) from the time the ownership of the token is established to be in possession of an address, or b) from the time when the ownership is first acknowledged by the token holder through an on-chain interaction with the DAO, such as staking the tokens, voting with the tokens off-chain (whereby results are implemented on-chain), submitting a proposal, or transferring the tokens to another address. If no action has been taken by a token holder to acquire a token, such as through an airdrop, the token holder will not be considered a member.[107]

Both DAOs and societies have the autonomy to determine the conditions for terminating membership, as outlined in Article 9(1) of the Societies Act, and Articles 6(3) and 7 of the Model Law.

DAOs and societies operate publicly, but there are some differences to consider. To benefit from legal personality, a DAO must fulfil the following requirements: i) provide a mechanism for public contact, ii) offer a unique public address for reviewing the DAO's activities and monitoring its operations, iii) display the DAO's software code in open-source format on a public forum, and iv) make the DAO's by-laws publicly accessible.[108]

According to Article 1(4) of the Societies Act, societies operate publicly. The personal data of a society's representative and founders are included in the public register

[102] Article 18(1)(3) of the Societies Act.

[103] Article 7(1) of the Model Law.

[104] Societies Act Commentary, p. 67.

[105] Article 9(1)(4) of the Societies Act.

[106] Societies Act Commentary, p. 65.

[107] Article 7(2) of the Model Law.

[108] Article 4(1) of the Model Law.

of societies.[109] The society's charter is also accessible to the public without restriction.[110] However, the activities and operations of a society are not fully available to the public. Only the statement of accounts of a society with income or expenditure exceeding EUR 1 million is audited.[111] A society's annual report must also be submitted to the Agency of the Republic of Slovenia for Public Records and Services for national statistical and publication purposes.[112] In addition, competent authorities supervise societies.[113]

The above comparison is summarised in the table on the next pages:

[109] Article 46(3) of the Societies Act.

[110] Societies Act Commentary, p. 24 and 59.

[111] Article 27 of the Societies Act.

[112] Article 29(1) of the Societies Act.

[113] Article 51 of the Societies Act.

Aspect	DAOs (COALA Model Law)	Societies (Slovenian Societies Act)
Legal Nature and asset partitioning	Independent legal persons with assets separate from its members	Independent legal persons with assets separate from its members
Personal Liability	Members personally liable for monetary payments, wrongful acts or omissions	Responsible persons liable for reducing assets or redirecting operations
Obtaining Legal Personality	Automatically upon meeting criteria (registration not required)	Upon registration
Minimum Share Capital	Not required	Not required
Internal Organisation and Procedures	By-laws govern internal organisation and procedures	Charter determines internal organization and procedures
Additional Internal Bodies	Optional, dispute resolution mechanism	Executive, supervisory, and disciplinary bodies
Meeting Flexibility	Continuous session for proposing and voting on decisions — (a)synchronous events	Physical presence or correspondence meetings
External Representative	Not strictly required but recommended for effective interaction with other entities	Representative required
Purpose and Activities	Broad range of purposes and activities; purpose is not required to be determined	Purpose must be determined; any purpose except solely for profit-making activity
Commercial Activities	Common and not restricted	Restricted to supplementary activities connected to society's purpose

Aspect	DAOs (COALA Model Law)	Societies (Slovenian Societies Act)
Distribution of Assets (profit sharing)	Permitted among members	Prohibited, surplus income used for fulfilling purpose and objectives
Taxation	Pass-through entity, no entity-level tax	Required to pay income tax on profits from for-profit activities
Membership Requirements	One person required, proxy representation allowed	Minimum of three persons, personal membership, declaration of adhesion required
Types of Participation and Membership	Multiple types of participation rights	Different types of members (honorary, supporting, sympathisers, sponsors)
Membership Acquisition	Ownership of tokens or acknowledgment through on-chain interactions	Acceptance of declaration of adhesion
Membership Termination	Determined by DAO	Determined by society
Anonymity of Members	Members can remain anonymous or use pseudonyms	Full set of personal data required for registration
Publicity of operations	Publicly accessible	Publicly accessible, but some activities not fully available to the public

In conclusion, DAOs and societies, as regulated by the Model Law and the Societies Act, respectively, share some similarities, while simultaneously being quite different. Yet, there is a reasonable possibility of reconciling their differences in a way, which could potentially enable a DAO to function within the Slovenian legal system as a society. They could retain the features, which are essential for DAOs, as its members could gather to pursue a common purpose, in a public and transparent way, in the form of a separate and standalone legal entity, while freely and autonomously determining the inner workings of their organisation.

However, for this to become a reality, some compromises are necessary. On the one hand, a DAO would have to register and appoint an off-chain legal representative, as it is hard to imagine a DAO functioning within the Slovenian legal system without meeting these essential requirements. On the other hand, the Societies Act would have to be suitably modified or at least broadly interpreted in order to bridge the gap between the charter-based organisation of a traditional society, and the decentralised-led DAO.

This conclusion, however, is limited only to DAOs that do not intend to engage in commercial activities for profitable purposes. The non-for-profit nature is a fundamental aspect of a society which cannot be altered. A for-profit society would be a society no more. Therefore, a commercial DAO must seek a more favourable legal wrapper available in the Slovenian legal system, such as a limited liability company or perhaps a cooperative.

6. Conclusion and Further Research

The emergence of the DAO ecosystem demonstrates a strong interest in community-owned protocols, despite fluctuations in total value locked. As DAOs continue to mature and gain broader adoption, they have the potential to allocate resources more efficiently, resulting in a greater impact. However, the long-term viability and impact of DAOs will become more evident over time, and will also depend on the surrounding legal certainty.

The unique and innovative characteristics of DAOs do not align well with traditional legal frameworks. Often, when founders of DAOs want to engage in business activities, they are required to incorporate the DAO into an existing legal structure. This undermines the conceptual benefits of DAOs and hinders their growth and potential. The legal framework is chosen on a case-by-case basis, which leaves DAOs in a grey area that is unattractive for business collaboration.

Further research is necessary to explore how DAOs can be effectively integrated into existing legal systems whilst preserving their decentralised and trust-minimised nature. The diversity in outcomes highlights the need for researchers, regulators, and venture professionals to develop legal tools that better align with the features of DAOs in ways that serve their users, dependants, and the wider public. Valuable insights into this effort

may be provided by the UK Law Commission, which actively collaborates with the industry in framing the regulatory ecosystem for DAOs.

Finally, the broader discussion could focus on the purpose of corporate requirements within the context of emerging technologies. It is important to revisit the objectives of conventional corporate law, such as addressing market failures and information frictions, in light of technological advancements. For instance, distributed ledger technology, which commonly underpins DAOs, promises to address the issue of information asymmetry by providing real-time data structure recording and synchronisation across a network in a standardised, transparent, and tamper-resistant manner. Could operating on a public ledger partially replace registration requirements or financial reporting?

In this discussion, it is crucial to analyse the risks associated with digital transformation, such as cybersecurity, data privacy, and regulatory compliance risks. It is also important to assess how emerging corporate forms may impact broader policy objectives, including market integrity, financial stability, consumer protection, and fair competition. An interdisciplinary approach is necessary to fully understand how technology intersects with the fundamental principles of company law and to what extent they remain relevant in the new corporate realm.

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Ljubljana Law Review
2023, Vol. LXXXIII

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Short Scientific Article
UDC: 347.962:342.727:004.774.1FB
347.9(497.4)
DOI: 10.51940/2023.1.221-233

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Freedom of Expression of Judges on Social Media: A Case Note on the Order Ds-ss 1/2021 of the Disciplinary Court of the Judicial Council of the Republic of Slovenia

Abstract

A local court judge labelled the Slovenian Prime Minister a "great dictator" on her closed Facebook profile. One of her virtual friends captured a print-screen, propelling the posts into a national scandal. The Disciplinary Court acquitted the judge. The Ethical commission did not pass judgment on her, issuing only non-binding guidelines for public expression of judges on social networks. Nevertheless, the judge suffered significant sanctions. The President of the local court removed her from the leadership position, and she received serious threats and insults by private actors. The case note discusses the broader questions emerging from the case. In relation to which topics can judges express opinions of political nature? Can they expect privacy when they engage in closed social media communication? Which standards should the national authorities employ in assessing these issues? How judges perceive different sanctions and what measures can mitigate the chilling effect such sanctions can create? By analysing both formal and informal responses to the controversial Facebook posts and drawing upon the personal recollections of the affected judge, this case note aims to provide more clarity on the issues relevant way beyond Slovenia.

Key words

Freedom of expression of judges, social media, privacy, chilling effect, political expression.

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1. Introduction

Opinions of proverbially reserved Slovenian judges have reverberated through the headlines surprisingly often in the last few years. The case of a local court judge who labelled the Prime Minister a "great dictator" holds a distinctive place.[1] The reason is counter-intuitively not the crude language employed by the judge, or the extensive media coverage it garnered, but the richness and complexity of legal questions the case illuminates. Some were addressed in the subsequent disciplinary procedure, whereas many others remain poorly examined. The case does more than merely reflect upon the Slovenian judiciary, especially regarding the self-perception of its role in the democratic society and its proneness to apply the European standards. It also contributes valuable insights for the underdeveloped case law of the European Court of Human Rights (the ECtHR), the Court of Justice of the EU (the CJEU) and national courts in an area of an increased interest: freedom of expression of judges on social media.

The analysis of the decision of the Disciplinary court of the Judicial Council[2] is only one of the parts of this case note. The inquiry is broader and covers other formal and informal responses from the judicial leadership and other relevant actors. After providing the factual circumstances of the case, the case note analyses the four most relevant issues: the reasonable expectations of privacy on social media, the correct characterisation of the type of "political" speech of judges, the required standards of review by national authorities, and a comparison between different measures taken against judges from the perspective of the chilling effect they entail. The analysis seeks to determine to what extent the Slovenian authorities complied with the European standards and what insights the case brings for the developing European standards of freedom of expression of judges. The case note concludes by underlining the importance of solidarity and mutual support among judges.

2. Facts of the case and the outcome of formal proceedings

The origins of the case date back to November 2020, when the second wave of COVID-19 pandemic struck Slovenia. The government took laconic measures to contain the spread of the coronavirus. Universities and schools were closed, public transport was limited, a curfew prevented people from leaving their homes from 9 p.m. to 6 a.m. Residents were also

[1] Disciplinary Court of the Judicial Council of the Republic of Slovenia, Order Ds-ss 1/2021, 13 April 2021. Available at: www.sodni-svet.si/doc/Disc.%20sklep_Ds-ss1.2021.pdf (accessed 9 June 2023). For a shorter analysis of this case, see: Fajdiga, 2022a. For the purposes of this case note, the short analysis was extended, deepened and further elaborated. I have also had the opportunity to present this case in a number of national and cross-border workshops, organised under the TRIIAL project.

[2] Disciplinary court, Order Ds-ss 1/2021, 13 April 2021.

not allowed to cross the borders of their municipalities without a valid reason.

Against this backdrop, a local court judge published two posts on her private Facebook profile. She set her Facebook privacy settings in such way that only about 50 to 60 virtual friends could view her posts, but further sharing was disabled. In her initial post, she referred to the "closure" of borders between municipalities. She wrote that

> "this was an order of Janez Janša [the than Slovene prime minister], who, at the government meeting, ordered police to go to the roads and municipality borders to collect fines"

and that

> "it is not about your safety and health, but it is about filling the empty state budget bag".

She added:

> "I hope that the era of Janšism will soon be a bitter memory."

In the second post, written as a comment under a post of a visible opponent of COVID-related measures, she opined:

> "I prefer this kind of rhetoric to Beović, Krek, Bregant, Kacin, and the great dictator Janša […] Virus gave a fillip to frustrated specimen with criminal past and a will to oppress everything on their way. And of course, a great need for revenge."

As previously noted, the judge shared these comments privately only with her small Facebook community. One of her virtual "friends" captured a screenshot of the posts, forwarding them to Mr Gorenak, a prominent member of Mr Janša's political party. Upon making them public, a torrent of media attention followed, escalating the situation into a nationwide scandal. The President of the Supreme Court publicly stated that

> "if these are indeed the statements of a judge, they are utterly inappropriate and indecent for a judge".[3]

The President of the local court, where the judge in question worked, initiated the procedure before the Commission for Ethics and Integrity of the Judicial Council of Slovenia (the Ethical commission). A few days after, the Judicial Council heard a complaint from Mr Gorenak. The Council declined to provide any views on the concrete case. Nevertheless, it held that

> "the users cannot reasonably expect full privacy on social media, which is why judges have to show restraint and dignity while using social networks."

In the explanation of his vote, the President of the Judicial Council argued that in cases that could entail a serious disciplinary offence, the bodies competent to file a formal proposal for the initiation of the disciplinary procedure should not turn to the Ethical commission, since the procedure before the Ethical commission is not a "backup disciplinary procedure". According to the President, in such cases, disciplinary procedures should be initiated to ensure credibility of the judiciary and adequate procedural guarantees for

[3] Demokracija, 2020.

the accused judges.[4] In the days that followed, the Minister of Justice sent a letter to the President of the Supreme Court, the President of Higher Court of Ljubljana and the President of the local court of Ljubljana. In this letter, the Minister of justice first recognised the authority of all three presidents and herself to file a formal proposal for the initiation of disciplinary proceedings.[5] She then hinted that it would be appropriate to open disciplinary action against the aforementioned judge, contending that such matters should be dealt with within the judiciary. By implication, she suggested that one of the presidents of the courts should file the formal proposal for disciplinary procedure. Her letter, perhaps inspired by the opinion of the president of the Judicial Council, seems to have borne fruit: the President of the local court filed the proposal for the initiation of the disciplinary procedure. Moreover, she changed the annual work schedule depriving the judge of the position of the head of the division for commonhold. The procedure before the Ethical commission ended in an uncommon way.[6] The Ethical commission did not find a violation of judicial ethics. Instead, it issued Guidelines for public expression of judges on social networks.[7] This document, while explicitly referencing the ongoing case, opted to detach from the concrete case offering five general guidelines for the use of social media by judges. Before the Disciplinary court, the judge was acquitted. The Court deemed her expressions intended to remain private, and it judged the political expression at hand to be justified under the circumstances of the case.

3. Analysis of the formal proceedings and informal sanctions: Compliance with European standards and the European added value of the case

3.1. A reasonable expectation of privacy?

One can only agree with the primary argument put forth by the Disciplinary court. The fact that the judge never intended her online speech to be public, coupled with her precautionary measures to prevent any further dissemination of her posts, is indeed a highly compelling argument,

[4] Judicial Council of the Republic of Slovenia, *Record of the 54th session of 10 December 2020*, pp. 7–8. Available at: http://www.sodni-svet.si/doc/Zapisnik_54_seja_2020.pdf (accessed 9 June 2023).

[5] According to Article 45 (2) of the Judicial Council Act, Official Gazette of the Republic of Slovenia, no. 23/17 and 178/21 (the JCA), the proposal can be filed by the Judicial Council, the President of the court where the judge works, the President of a hierarchically higher court or by the Minister of Justice.

[6] Generally, the Ethical commission either finds or does not find a violation of the Code of Judicial Ethics. It also has the competence to issue guidelines and recommendations (Article 49 of the JCA).

[7] Ethical commission, *Guidelines for Public Expression of Judges on Social Networks*, 2 March 2021. Available at: www.sodni-svet.si/doc/kei/Smernice_javno_izrazanje_sodnikov_34_seja_KEI.pdf (accessed 9 June 2023).

which could itself lead the court to find that no disciplinary liability arises. Were it not for the Facebook "friend" who abused her trust, and the right-wing politician who subsequently made her post public, the upheaval would never have happened.

However, such holding should not be misconstrued as endorsing unrestricted freedom for judges to voice their opinions within closed social media groups. To avoid such interpretation, the court added an important caveat, akin to the one articulated by the Judicial Council. It acknowledged that any activity on social media can become public and that individuals cannot expect privacy on social media platforms unless they are communicating with only a few trusted persons.[8] This is perhaps the most fascinating aspect of the case, since it underscores the blurring boundaries between public and private communication in the realm of social media. The court seems to have struck a proper balance between the freedom of expression and privacy of the judge on the one hand and the legitimate aim of ensuring public trust in the judiciary on the other,[9] at least in the circumstances of the present case. Imposing a disciplinary sanction, except perhaps a reprimand (the most lenient sanction), would tilt the balancing scales in the wrong direction and create an extensive chilling effect on freedom of expression of judges. It is noteworthy that the Disciplinary court had to adjudicate a situation hitherto unencountered in European courts to the best of my knowledge.[10] It found a balanced solution that could inspire national and European adjudication in the future.

3.2. "Political" speech of judges

Let us now turn to the second argument that led the Disciplinary court to acquit the judge. According to Article 133 of the Constitution, judicial function is incompatible with functions in the bodies of political parties. *A contrario*, judges are permitted to be members of political parties provided they refrain from assuming any functions within bodies of political parties. They can also stand for election to the highest political positions and hold the highest political offices. However, during the time of holding such political function, their judicial mandate is suspended.[11] The court relied on these provisions to come to the following conclusion: if holding such offices and membership of a political party is not proscribed, political expression of a judge in the context of a heated debate on the measures for fighting the pandemic should also not be prohibited.[12]

8 Disciplinary court, Order Ds-ss 1/2021, 13 April 2021, para. 16.

9 Under Article 10 of the Convention, freedom of expression can be limited to maintain the authority and impartiality of the judiciary. The ECtHR case law shows that authority should be understood as public trust in the judiciary (ECtHR, *Morice v. France* [GC], Application no. 29369/10, para. 129).

10 For the approach adopted by United States courts in determining whether a person has a reasonable expectation of privacy in private social media communication, see: Mund, 2017.

11 Article 40 of the JSA.

12 Disciplinary court, Order Ds-ss 1/2021, 13 April 2021, paras. 15 and 43.

This is a controversial holding. It has far-reaching consequences, because it seems to justify various kinds of political activities of judges. The root of this oversimplified and premature conclusion is arguably that the court failed to distinguish between purely political expression and expression about issues relating to the justice system that can have political implications. The Disciplinary court seems to accord both types of expression the same degree of protection.[13]

So far, the ECtHR has had some opportunity to clarify this distinction. In *Wille v Liechtenstein*, the ECtHR ruled that the fact alone that the statement had had political implications could not *per se* prevent the judge from making such statement.[14] This was reiterated in later judgments.[15] Consequently, judges are afforded a certain latitude to engage in political debates, but it does not mean that judges may freely express opinions of political nature. A closer reading of the ECtHR case law seems to suggest that public expression of judges enjoys high protection when judges discuss judicial reforms or when they discuss the issues related to (the functioning of) the judiciary.[16] The reason behind this stance likely resides in the notion that judges, in such instances, are a particularly valuable source of information for the society as they possess a unique understanding of the legal system and have first-hand experience within the judiciary. Consequently, they are permitted to express their opinion, when the issue falls within this category, where they can provide unique insights, even if such expression has political implications.[17]

In *Eminağaoğlu* v *Turkey*, the president of one of the Turkish judicial associations expressed opinions of allegedly political nature. As a result, he was punished with a disciplinary transferal.[18] In this case,

[13] *Ibid.*, para. 15, where the court held that "political expression and public interest expression of judges merits special protection under Article 10."

[14] ECtHR, *Wille v. Liechtenstein* [GC], Application no. 28396/95, 28 October 1999, para. 67.

[15] ECtHR, *Baka v. Hungary* [GC], Application no. 20261/12, 23 June 2016, para. 167; ECtHR, *Kövesi v. Romania,* Application no. 3594/19, 5 August 2020, para. 201; ECtHR, *Eminağaoğlu v. Turkey*, Application no. 76521/12, 9 March 2021, paras. 123 and 134; ECtHR, *Kudeshkina v. Russia*, Application no. 29492/05, 26 February 2009, para. 95; ECtHR, *Żurek v. Poland*, Application no. 39650/18, 16 June 2022, para. 219; ECtHR, *Miroslava Todorova v. Bulgaria*, Application no. 40072/13, 19 October 2021, para. 172.

[16] ECtHR, *Baka v. Hungary* [GC], Application no. 20261/12, 23 June 2016, para. 171; ECtHR, *Kövesi v. Romania,* Application no. 3594/19, 5 August 2020, para. 207; ECtHR, *Żurek v. Poland*, Application no. 39650/18, 16 June 2022, para. 224.

[17] Of course, the manner in which the opinion is expressed and the medium are both of relevance. See, e.g., ECtHR, *Baka v. Hungary* [GC], Application no. 20261/12, 23 June 2016, para. 164; ECtHR, *Kövesi v. Romania*, Application no. 3594/19, 5 August 2020, para. 201; ECtHR, *Kudeshkina v. Russia*, Application no. 29492/05, 26 February 2009, para. 93; ECtHR, *Di Giovanni v. Italy*, Application no. 51160/06, 9 July 2013, para. 80.

[18] After three years, the transferal was annuled and a reprimand was imposed instead

ECtHR neatly differentiated statements concerning the justice system from other statements "not directly relevant to questions concerning the justice system."[19] The case thus offers valuable guidance for determining which opinions fall within the more and which into the less protected category. The ECtHR seems to have understood the expression concerning justice system in a broad sense, encompassing for example the judge's criticism of politicians' statements on judicial decisions or the judiciary in general, and opinions concerning the constitutional reform.[20] As to the statements falling into the less protected category, the ECtHR referred to the judge's criticism of the attitude of the President of Turkey towards international institutions and his position on the wearing of the Islamic headscarf by the wife of the President of Turkey.[21] It ruled that

> "although [judges'] participation in public debate on major societal issues cannot be ruled out, members of the judiciary should at least refrain from making political statements of such nature as to compromise their independence and undermine their image of impartiality."

The ECtHR then found significant, that none of the political statements contained "gratuitous attacks on politicians or other judicial officers."[22] In the end, the main reasons for finding a violation of Article 10 were that the national authorities had failed to distinguish between those two categories and did not provide sufficient procedural guarantees to the applicant, especially given his prominent position of the head of judicial association. The ECtHR acknowledged that the Government rightly pointed to judicial discretion and restraint in relation to statements that fell into the category, which merits less protection.[23] It thus seems as though the ECtHR hinted that the applicant's disciplinary sanction would be upheld in Strasbourg, if the Turkish authorities imposed a milder penalty, such as a reprimand, and if they limited their response only to the political statements unrelated to the justice system.

Applying the findings from the *Eminağaoğlu* ruling to the current case, it is highly likely that the Facebook posts in question would fall within the category that receives less protection. The opinion expressed therein had a very tenuous connection with the (functioning of the) justice system. It was partly related to the defence of the rule of law,[24] since the Government indeed used the pandemic to justify its policies that sometimes had

(ECtHR, *Eminağaoğlu v. Turkey*, Application no. 76521/12, 9 March 2021, paras. 19–24).

19 *Ibid.*, paras. 147 and 148.

20 *Ibid.*, para. 147.

21 *Ibid.*, para. 145.

22 *Ibid.*, para. 148.

23 *Ibid.*, para. 151–152.

24 In the opinion of the Venice commission (2015, p. 20), "[a] democratic crisis or a breakdown of constitutional order are naturally to be considered as important elements of the concrete context of a case, essential in determining the scope of judges' fundamental freedoms."

nothing to do with the virus.[25] When the rule of law is under threat, the ECtHR has indeed called the judges to speak out, but it seems to have limited their voice to "matters concerning the functioning of the justice system".[26] Moreover, the sharp tone and the offensive expressions combined with direct reference to politicians and members of the governmental COVID-19 expert group, argue in favour of a lower protection. Nevertheless, in my opinion, a disciplinary sanction, except perhaps a reprimand, would be unwarranted, since the statements were written in the closed Facebook group and the judge never intended them to become public.

3.3. Review by the national authorities as a central element before the ECtHR

As demonstrated by the *Eminağaoğlu* case, the ECtHR pays special attention to the standards and procedural safeguards before the national authorities. In this respect, the decision of the President of the local court to remove the judge from her leadership position by changing the annual work schedule pursuant to Article 71 of the Courts Act[27] is deeply disturbing. It was clearly a consequence of freedom of expression of the judge or perhaps even worse, the pressure from the Minister of Justice in relation to the judges' Facebook posts. The President had already published the annual work schedule, but subsequently, following the Minister of Justice's letter, which insinuated the need to initiate a disciplinary procedure, the President decided to amend it to deprive the judge of her leadership position. The decision was rendered without the benefit of formal procedure, in which the judge's arguments could have been heard. The judge was stripped of her leadership position solely on the basis of a discretionary decision of the President of the Court.

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[25] Bardutzky, Bugarič and Zagorc, 2021.

[26] ECtHR, *Żurek v. Poland*, Application no. 39650/18, 16 June 2022, para. 222.

[27] Courts Act, Official Gazette of the RS, Nos. 19/94 to 18/23 (the CA). According to the said provision, the President of the Court has the power to assign judges to different divisions of the court. The provision is controversial, since it enables the court presidents to involuntary transfer judges to other courts merely by changing the annual work schedule. In March 2021, the Judicial Council triggered the constitutional review of Article 71 of the CA before the Constitutional Court after a judge who was transferred to a different court under this provision, requested the Judicial Council to safeguard her individual independence. The Judicial Council questions the compliance of the CA with Article 125 of the Constitution (judicial independence). See: Judicial Council of the Republic of Slovenia, *Record of the 56th session of 21 January 2021*, p. 10, <www.sodni-svet.si/doc/Zapisnik_56_seja_2021.pdf> (accessed 9 June 2023); Judicial Council of the Republic of Slovenia, *Request for the Review of Constitutionality, 29 March 2021*, <http://www.sodni-svet.si/doc/Zahteva%20za%20oceno%20ustavnosti%2071.%20%C4%8Dlena%20ZS.pdf> (accessed 9 June 2023); Judicial Council of the Republic of Slovenia, *Record of the 59th session of 4 March 2021*, p. 6, <www.sodni-svet.si/doc/Zapisnik_54_seja_2020.pdf> (accessed 9 June 2023).

Unfortunately, it seems that the Slovenian authorities have not taken the lesson from the *Cimperšek v Slovenia*, where the ECtHR found a violation of Article 10 precisely because the Ministry of Justice and the Slovenian courts had failed to conduct a proper review of the alleged breach of freedom of expression.[28] However, Slovenia would likely not face a condemnation in potential proceedings before the ECtHR. The reason is the failure of the judge to exhaust domestic remedies. The judge could have invoked Article 157 (2) of the Constitution, which affords judicial protection in the so-called quasi-administrative dispute. These are reserved for cases, such as the one at hand, in which constitutional rights are at stake and the legislation ensures no judicial remedy. Had the judge pursued this avenue, a national court could have heard her arguments and safeguarded her fundamental right. This of course does not diminish the inadequacy of the action taken by the President of the local court. A more human rights-centred approach should guide future cases.

3.4. Comparing the different sources of the chilling effect

After the end of all formal proceedings, the judge at hand described how she personally experienced her saga.[29] She provided a valuable account of the impact of different formal and informal measures taken against her. This first-hand account offers invaluable insight for both European and national courts. The ECtHR currently struggles to grasp properly the concept of the chilling effect. Simultaneously, it imposes on the national courts a requirement to take into account the chilling effect when they are reviewing national measures interfering with freedom of expression.[30]

The chilling effect may be defined as a state of fear induced by sanctions and other adverse consequences, which discourages people from exercising their rights or fulfilling their professional obligations. The ECtHR has found the chilling effect to arise from different sources: mere existence of the legislation,[31] which is not applied in

[28] ECtHR, *Cimperšek v. Slovenia*, Application no. 58512/16, 30 June 2020, paras. 66–69. A similar reproach could be raised in relation to the case of judge Radonjić (Vice President of the Supreme court of the Republic of Slovenia, SuZ 53/2020, 11 August 2020; Supreme court of Republic of Slovenia, judgment U 3/2021-33, 7 June 2021). Lack of adequate consideration for freedom of expression of the judge is particularly obvious in the decision of the vice-president of the Supreme Court. For the analysis of this case, see Fajdiga, 2022b.

[29] Klakočar-Zupančič, 2021; Klakočar-Zupančič and Petrovčič, 2021; Kariž and Klakočar-Zupančič, 2021; Grizila and Klakočar-Zupančič, 2021.

[30] Fajdiga and Zagorc, 2023, p. 268, refer to ECtHR, *Miroslava Todorova v. Bulgaria*, Application no. 40072/13, 19 October 2021, para. 177.

[31] In the present case, the judge at hand argued that the new Guidelines for public expression of judges on social networks, adopted by the Ethical commission, were so vague that they in fact sent the following message to judges: "It is better not to use social media, since a judge would surely make a mistake that can be characterised as an ethical if not

the applicant's case, a personalised threat, a sanction ranging from the one with no direct bearing on the position of the person to the harshest penalties.[32] Generally, the ECtHR takes the chilling effect into account as one of the factors in the proportionality stage of the review. However, the Court seems to employ an approach based on intuition rather than on empirical evidence[33] to determine the strength and the personal scope of the chilling effect.[34] In some cases, the ECtHR seems to rule that the chilling effect was strong, since it uses firm language,[35] whereas in other cases a milder wording is used suggesting a weaker chilling effect.[36] Furthermore, the personal scope[37] of the chilling effect is sometimes broader than in other very similar cases.[38] The judge's personal account of the impact of different measures can thus provide new insights that help us understand better the chilling effect.

The first interesting conclusion after reading her recollection of the events is that the chilling effect for her did not stem primarily from formal procedures but rather from the conduct of the judicial leadership. The President of the Supreme Court and the President of the Judicial Council replied to Mr Gorenak immediately, but failed to reply to her emails. The Judicial Council generally anonymises the names of judges in its public records. This time, it decided to include the full name of the judge. Before issuing its opinion, it requested her explanation, but then completely disregarded her arguments by stating that one cannot expect privacy on social media. The President of the Judicial Council added his "separate opinion", wherein he argued that in such cases, the competent authorities should have initiated a disciplinary procedure and not a procedure before the Ethical commission. She was not troubled that much by the fact that the disciplinary procedure was initiated. What struck her the most was that she lost the leadership position and that the President of the local court broke off all communication with her. The cumulative effect of these actions taken by the judicial leadership, led her to perceive their behaviour as intimidating, which had a negative effect on her health.[39]

It is interesting to note how much the support of some judicial colleagues meant to her. In particular, she pointed out to one colleague, who expressed her support publicly. Why others did not decide to raise their voices in her support? She was clear: "Because they are afraid. Afraid of proceedings before the Ethical commission, before the Disciplinary court, afraid of sanctions."[40] The judge's account serves as a warning to both the judiciary as a whole and judges as individuals that when a judge becomes a target of sanctions and other

a disciplinary violation." (Kariž, Klakočar-Zupančič, 2021).

32 Fajdiga and Zagorc, 2023, pp. 261–265.

33 As does the US Supreme court. See *ibid*.

34 As does the US Supreme court. See *ibid*.

35 *Ibid.*

36 *Ibid.*

37 The victims of the chilling effect are not only those against whom the measure is taken, but also other persons in a similar position.

38 Fajdiga and Zagorc, 2023, pp. 265–266.

39 Klakočar-Zupančič, 2021.

40 Kariž and Klakočar-Zupančič, 2021.

negative measures, their reaction is extremely important as it can either mitigate or exacerbate the chilling effect. Judicial associations play a pivotal role in such cases.

She also mentioned that she and her children had been targets of serious threats and insults by private individuals.[41] This is a particularly challenging source of chilling effect. On the one hand, it can be stronger and more often than other measures.[42] On the other hand, it generally evades the radar of the courts.[43] The ECtHR has not yet properly addressed such measures in cases involving judges. Nevertheless, in a case concerning a journalist, the ECtHR has imposed a positive obligation on the state to respond to such private actions and safeguard the journalist at hand.[44] Such approach could be extended to judges in the future.

4. Conclusion

The case analysed in this case note offers much more than a formal decision, rich in interesting legal issues. Its wealth also derives from the personal perspective the affected judge provided after the end of formal procedures. This enabled a holistic analysis and provided insights, relevant way beyond the concrete case. The case is a reminder to all judges, especially those in the leadership positions that, when a judge becomes a target of measures or is otherwise exposed, their response is crucial. Reliance on the support of individual judges is not enough. The frequency of discreditation of judges by the (social) media calls for systemic solutions. Otherwise, the chilling effect could paralyse the guardians of the rule of law and put fundamental rights of all of us in jeopardy.

Acknowledgements

This research would not be possible without TRIIAL (TRust, Independence, Impartiality and Accountability of judges and arbitrators safeguarding the rule of Law under the EU Charter) project founded by the EU under the Justice Programme (Grant agreement no. 853832). This paper was also prepared within ARRS founded project Judicial Selection under Scrutiny: Judicial Independence, Lawfulness and Merit (No. J5-4583).

41 Klakočar-Zupančič, 2021, p. 11; Kariž and Klakočar-Zupančič, 2021.

42 Wyatt *et al.*, 1996; Hyde and Ruth, 2002. A recent survey of the European Network of Councils for the Judiciary (the ENCJ) shows that the (social) media is the most common source of inappropriate pressure on judges (ENJC, 2022, pp. 3, 28, 29, 70 and 71).

43 Wu, 2018; Youn, 2013, p. 1471.

44 ECtHR, *Khadija Ismayilova v. Azerbaijan*, Application nos. 65286/13 and 57270/14, 10 January 2019, paras. 159 and 160.

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