Civil Law Forum for South East Europe
Forum za građansko pravo za jugoistočnu Evropu

I

Civil Law Forum for South East Europe

Collection of studies and analyses
First Regional Conference, Cavtat, 2010

VOLUME I

Forum za građansko pravo za jugoistočnu Evropu

Izbor radova i analiza
Prva regionalna konferencija, Cavtat, 2010.

KNJIGA I

gtz

gtz Partner for the Future. Worldwide.

ON BEHALF OF

FEDERAL MINISTRY FOR ECONOMIC COOPERATION AND DEVELOPMENT

gtz Partner za budućnost. Širom sveta.

U IME

SAVEZNO MINISTARSTVO ZA PRIVREDNU SARADNJU I RAZVOJ

CIVIL LAW FORUM FOR SOUTH EAST EUROPE

Collection of studies and analyses, First Regional Conference, Cavtat, 2010

VOLUME I

FORUM ZA GRAĐANSKO PRAVO ZA JUGOISTOČNU EVROPU

Izbor radova i analiza, Prva regionalna konferencija, Cavtat, 2010.

KNJIGA I

CIVIL LAW FORUM FOR SOUTH EAST EUROPE
Collection of studies and analyses, First Regional Conference, Cavtat, 2010
VOLUME I

FORUM ZA GRAĐANSKO PRAVO ZA JUGOISTOČNU EVROPU
Izbor radova i analiza, Prva regionalna konferencija, Cavtat, 2010.
KNJIGA I

Publisher / Izdavač

Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH
Offener Regionalfonds für Südosteuropa – Rechtsreform

Nemačka organizacija za tehničku saradnju (GTZ) GmbH
Otvoreni regionalni Fond za jugoistočnu Evropu – Pravna reforma

Executive Publisher / Izvršni izdavač

Jugoslovenski pregled, Beograd

Copies / Tiraž

500

ISBN 978-86-7149-057-3

Civil Law Forum for South East Europe

Collection of studies and analyses
First Regional Conference, Cavtat, 2010

VOLUME I

Forum za građansko pravo za jugoistočnu Evropu

Izbor radova i analiza
Prva regionalna konferencija, Cavtat, 2010.

KNJIGA I

gtz Partner for the Future. Worldwide.

ON BEHALF OF

FEDERAL MINISTRY FOR ECONOMIC COOPERATION AND DEVELOPMENT

gtz Partner za budućnost. Širom sveta.

U IME

SAVEZNO MINISTARSTVO ZA PRIVREDNU SARADNJU I RAZVOJ

BEOGRAD, 2010.

Introduction

Dear Reader,

This collection of articles in the field of law is presented to you by the Civil Law Forum for South-East Europe. The Civil Law Forum was founded with the support of the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ), by appointment of the Federal Ministry for Economic Cooperation and Development of the Federal Republic of Germany (BMZ). Under the umbrella of the „Open Regional Fund for South-East Europe – Legal Reform" GTZ has since 2007 been conducting a variety of regional activities with the aim of bringing together legal practitioners, professionals and scholars of South-East Europe around the central legal reform topics arising from the process of approximation towards the European Union. Therefore GTZ supports regional activities and initiatives that focus on cross-border and region-wide cooperation and networking in order to support and foster the reform processes in the various countries.

Against this background GTZ is very proud to present hereby the first collection of legal articles that have been prepared by members of the Civil Law Forum together with legal experts from South-East Europe. The Civil Law Forum consists of outstanding experts in the fields of Civil and Commercial Law who have been appointed by legal and academic institutions in South-East Europe. It was established in April 2009 and consists of the following professors: Ms. Nada Dollani (Tirana), Mr. Gale Galev (Skopje), Mr. Arsen Janevski (Skopje), Ms. Tatjana Josipović (Zagreb), Mr. Branko Morait (Banja Luka), Mr. Ardian Nuni (Tirana), Mr. Miodrag V. Orlić (Belgrade), Mr. Slobodan Perović (Belgrade), Ms. Meliha Povlakić (Sarajevo), Mr. Zoran Rašović (Podgorica), Mr. Petar Simonetti (Rijeka), and Mr. Mihailo Velimirović (Podgorica). These twelve members from South-East Europe are supported by Mr. Ulrich Drobnig and Ms. Christa Jessel-Holst (Max-Planck-Institute for Comparative and International Private Law, Hamburg, Germany).

The aim of the Civil Law Forum for South-East Europe is to develop proposals and opinions for the reform and harmonization of the national legislations in the fields of Civil and Commercial Law in the participating countries, and to monitor the reform measures in those countries from an academic and professional point of view. This will enable the national parliaments and ministries working on the reform of the respective laws to access materials and legal analyses of the highest quality, which take into account not only developments in the field of European Law, but especially focus on the national legal background and developments in the neighboring countries. These legal opinions, analyses and draft laws are presented to the public as well as to decision-makers in the region and beyond.

In preparing the articles for publication, the Civil Law Forum was able to bring together experts, scholars, legal practitioners and young lawyers working together on analyses by countries, comparative opinions, as well as the summaries of the legal frameworks of the countries in question. This exceptional approach has proved extremely successful as you can see from the presented collection. GTZ will continue to support and foster regional professional cooperation and scientific research in South-East Europe. Since 2008 numerous universities in South-East Europe have been working together, establishing a common master program in European Business Law. For that they have set up a joint management structure

that has also been supported by GTZ. This approach will be further developed and widened. The vision is to establish a regional network of law schools of South-East Europe – the South-East European Law School Network (SEELS). Under the auspices of this Network the participating universities will expand their cooperation in the fields of teaching, scientific research and publications, increasing the mobility and networking of students and teachers in the region. Additionally, the increasing cooperation will strengthen the scientific exchange, improve the quality of services, as well as the visibility of the participating universities in the international academic landscape.

GTZ is very glad to have worked together with these outstanding legal experts and hereby expresses its gratitude to the members of the Civil Law Forum for South-East Europe. GTZ would also like to thank all the participating members of the academic community, legal professionals and young lawyers who have assisted in the preparation of this collection and hopes to continue this cooperation in the future.

Mike Falke, PhD

Sector Manager „Open Regional Fund for South-East Europe – Legal Reform"
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

Introduction

Dear Reader,

The collection of articles that you are holding in your hands has been prepared by the Civil Law Forum for South-East Europe together with numerous experts, academics and young lawyers from the region. The Civil Law Forum has worked on several topics that its members identified as priority fields of legal reforms.

These topics are:

1) Extra-legal influences on legal systems
2) Recent developments in the Law of Obligations
3) Recent developments in the field of land ownership and construction land
4) Security rights in movables
5) Security rights in immovables
6) Modern types of contracts
7) EU Consumer Contract Law

The collection will present the results of the working groups in three volumes, so that Volume I contains the working groups one to three, Volume II the working groups four and five, while Volume III contains the working groups six and seven. In this collection the opinions and analyses have been published in two languages. A Macedonian and an Albanian version will follow separately. Since some of the authors prepared their analyses in their local languages and some of them in English, each analysis is marked as either the original or the translated version.

We hope that this kind of collection will contribute to the academic discussion in South-East Europe, as well as give support to the ministries and parliaments currently working on the adoption of the European legislation, by providing them with the sound legal knowledge of outstanding experts in the fields of Civil and Commercial Law. We would like to use this opportunity to express our gratitude to all the participants who have contributed to this publication, and hope for successful future cooperation.

Christian Athenstaedt

Coordinator for the Civil Law Forum within the
„Open Regional Fund for South East Europe – Legal Reform"
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

Uvod

Dragi čitaoče,

Za ovaj zbornik radova iz oblasti prava koji je pred Vama odgovoran je Forum za građansko pravo jugoistočne Evrope. Forum za građansko pravo nastao je uz podršku Nemačke organizacije za tehničku saradnju (*Deutsche Gesellschaft für Technische Zusammenarbeit*) – GTZ, po nalogu Saveznog ministarstva za ekonomsku saradnju i razvoj Savezne Republike Nemačke – BMZ. Pod okriljem „Otvorenog regionalnog fonda za jugoistočnu Evropu – Pravna reforma", GTZ od 2007. godine sprovodi širok niz regionalnih aktivnosti sa ciljem da poveže pravne praktičare, stručnjake, i naučnike iz država jugoistočne Evrope oko najvažnijih tema pravne reforme koje se nameću u procesu približavanja Evropskoj Uniji. U skladu sa tim, GTZ pruža podršku regionalnim aktivnostima i inicijativama koje za temu imaju prekograničnu i regionalnu saradnju i umrežavanje, kako bi se procesu reforme u različitim državama Regiona pružila podrška i podstrek.

Sa ovog polazišta, GTZ ima tu čast da ovom prilikom predstavi prvi zbornik radova iz oblasti prava koji su pripremili članovi Foruma za građansko pravo zajedno sa pravnim stručnjacima iz jugoistočne Evrope. Forum za građansko pravo čine istaknuti stručnjaci za oblasti građanskog i trgovinskog prava koje su predložile pravne i visokoškolske ustanove država jugoistočne Evrope. Forum je nastao aprila 2009. godine i čine ga sledeći profesori: gđa. Nada Dollani (Tirana), g. Gale Galev (Skoplje), g. Arsen Janevski (Skoplje), gđa. Tatjana Josipović (Zagreb), g. Branko Morait (Banja Luka), g. Ardian Nuni (Tirana), g. Miodrag V. Orlić (Beograd), g. Slobodan Perović (Beograd), gđa. Meliha Povlakić (Sarajevo), g. Zoran Rašović (Podgorica), g. Petar Simonetti (Rijeka) i g. Mihailo Velimirović (Podgorica). Ovih dvanaest članova Foruma iz jugoistočne Evrope ojačani su prisustvom g. Ulricha Drobniga i gđe. Christe Jessel-Holst sa Max-Planck Instituta za uporedno i međunarodno privatno pravo iz Hamburga u Nemačkoj.

Cilj Foruma za građansko pravo jugoistočne Evrope jeste izrada predloga i mišljenja za reformu i harmonizaciju nacionalnih zakonodavnih okvira u oblasti građanskog i trgovinskog prava u učestvujućim državama, kao i praćenje koraka u reformi u istim državama sa akademskog i stručnog gledišta. Rezultati njegovog rada će omogućiti nacionalnim parlamentima i ministarstvima koji rade na reformama odgovarajućih zakona da imaju pristup radovima i pravnim analizama najvišeg kvaliteta, koji u obzir uzimaju ne samo skorašnje razvoje u evropskom pravu, već se posebno usredsređuju na nacionalno pravno nasleđe i dešavanja u susednim državama Regiona. Ova pravna stanovišta, analize, i nacrti zakona usmereni su ka javnosti, kao i prema donosiocima političkih odluka iz Regiona, i šire.

U pripremi ovih tekstova, Forum za građansko pravo bio je u prilici da poveže pravne stručnjake, naučnike, praktičare i mlade pravnike, koji su zajedno radili na analizama po državama, uporednim mišljenjima i sažecima o pravnom okviru u državama Regiona. Ovaj izvanredni pristup ostvario je potpun uspeh, čemu je dokaz Zbornik koji Vam predstavljamo. GTZ će i u budućnosti pružati podršku i podstrek regionalnoj stručnoj saradnji i naučno-istraživačkom radu u državama jugoistočne Evrope. Počev od 2008. godine, brojni fakulteti u Regionu započeli su međusobnu saradnju uspostavljajući zajednički master program u oblasti evropskog poslovnog prava (*European Business Law*). U tu svrhu je ustanovljena i zajed-

nička upravna struktura koja je takođe uživala podršku GTZ-a. Ovakav pristup će se dalje razvijati i proširivati. Vizija je da se uspostavi regionalna Mreža pravnih fakulteta jugoistočne Evrope – MPF-JIE (eng: *SEELS*). Pod okriljem ove Mreže, učestvujući fakulteti proširiće mobilnost i umreženost svojih studenata i profesora, odnosno studenata i profesora iz Regiona. Pored toga, uvećana saradnja učvrstiće razmenu naučnih znanja, poboljšati kvalitet usluga, kao i „vidljivost" učestvujućih fakulteta na međunarodnoj akademskoj sceni.

GTZ je imao veliko zadovoljstvo da sarađuje sa ovim istaknutim pravnim stručnjacima i želeo bi da izrazi svoju zahvalnost članovima Foruma za građansko pravo jugoistočne Evrope. Takođe, GTZ bi želeo da se zahvali i svim pripadnicima akademske zajednice koji su učestvovali u ovom procesu, pravnim praktičarima, i mladim pravnicima koji su dali svoj doprinos u izradi ovog zbornika, kao i da izrazi nadu da će se ovakva saradnja u budućnosti nastaviti.

Dr. Mike Falke
Direktor sektora „Otvoreni regionalni fond za jugoistočnu Evropu – Pravna reforma"
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

Uvod

Dragi čitaoče,

Ovaj Zbornik radova koji držite u rukama izradio je Forum za građansko pravo jugoistočne Evrope, zajedno s brojnim stručnjacima, akademskim radnicima i mladim pravnicima iz Regiona. Forum za građansko pravo radio je na nekolicini tema koje su sami njegovi članovi prepoznali kao one koje imaju prvenstvo u procesu pravnih reformi.

Teme su:

1) Meta-pravni uticaji na pravne sisteme
2) Novine u razvoju obligacionog prava
3) Novine u razvoju u oblasti svojine na zemljištu i građevinskog zemljišta
4) Prava obezbeđenja na pokretnim stvarima
5) Prava obezbeđenja na nepokretnim stvarima
6) Moderne vrste ugovora
7) Potrošačko ugovorno pravo EU

Zbornik će predstaviti rezultate rada radnih grupa u tri knjige, pri čemu će Knjiga I obuhvatiti rad radnih grupa jedan do tri, Knjiga II rad radnih grupa četiri i pet, a Knjiga III rezultate radnih grupa šest i sedam. U Zborniku su mišljenja i analize iznesene dvojezično. Verzije Zbornika na albanskom i makedonskom jeziku će uslediti kasnije. S obzirom da su neki autori svoje radove pisali na maternjem jeziku, a neki na engleskom, svaki rad je označen kao izvorna, ili prevedena verzija teksta.

Nadamo se da će Zbornik izrađen na ovaj način doprineti akademskoj diskusiji u jugoistočnoj Evropi, kao i da će predstavljati podršku ministarstvima i parlamentima koji trenutno rade na usvajanju evropskog zakonodavstva u tome što će pružiti kvalitetno pravno znanje istaknutih stručnjaka u oblastima građanskog i trgovinskog prava. Takođe, želimo da iskoristimo ovu priliku da izrazimo zahvalnost svim učesnicima koji su doprineli ovoj publikaciji, kao i nadu za nastavak međusobno uspešne saradnje.

Christian Athenstaedt

Koordinator za Forum građanskog prava u okviru
„Otvorenog regionalnog fonda jugoistočne Evrope – Pravna reforma"
Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)

CONTENTS

Introduction – *Mike Falke & Christian Athenstaedt* **5**

I – EXTRA-LEGAL INFLUENCES ON LEGAL SYSTEMS **15**

Slobodan Perović
EXTRA-LEGAL FACTORS AND LEGAL ORDER UNIVERSAL VALUES AND CULTURAL IDENTITY 17

Tomaž Keresteš
ECONOMIC ANALYSIS OF THE TRANSFER OF INHERITANCE MATTERS FROM COURTS TO NOTARIES IN THE REPUBLIC OF SLOVENIA 58

Rolf Knieper
ECONOMIC THEORIES ON THE LAW IN MARKET RELATIONS 71

Michèle Schmiegelow
INTERDISCIPLINARY APPROACHES TO COMPARING THE QUALITY OF COMMON LAW AND CIVIL LAW 89

II – RECENT DEVELOPMENTS IN THE LAW OF OBLIGATIONS **203**

Tatjana Josipović
CHALLENGES TO CIVIL LAW HARMONIZATION BY WAY OF DIRECTIVES 205

Branko Morait
VIOLATIONS OF PERSONAL RIGHTS AS A REQUIREMENT FOR RESPONSIBILITY FOR COMPENSATION OF NON-MATERIAL DAMAGE 222

Ardian Nuni & Evgjeni Bashari
TORT LIABILITY AND EC DIRECTIVES 233

Miodrag V. Orlić
DELICTUAL LIABILITY BASED ON FAULT IN SERBIAN LAW 247

Slobodan Perović
OBJECTIVE LIABILITY FOR DAMAGE 271

III – RECENT DEVELOPMENTS IN THE FIELD OF LAND OWNERSHIP AND CONSTRUCTION LAND **371**

Ilija Babić
RIGHT OF OWNERSHIP OF BUILDING LAND 373

Nada Dollani
REGULATION OF LAND OWNERSHIP UNDER THE ALBANIAN LEGISLATION . . 394

Borislav P. Rašović
LEGAL REGIME OF DEVELOPED CONSTRUCTION LAND IN MONTENEGRO . . . 402

Petar Simonetti
ESTABLISHMENT OF RIGHT OF OWNERSHIP OF SOCIALLY/STATE-OWNED DEVELOPED CONSTRUCTION LAND IN THE REPUBLIC OF CROATIA AND IN BOSNIA AND HERZEGOVINA 410

Rodna Živkovska & Tina Pržeska
ESTABLISHMENT OF PROPERTY RIGHT AND RIGHT OF LONG-TERM LEASING OF DEVELOPED BUILDING LAND OWNED BY THE REPUBLIC OF MACEDONIA 493

Petar Simonetti
ESTABLISHMENT OF THE RIGHT OF OWNERSHIP OF DEVELOPED CONSTRUCTION LAND THAT USED TO BE SOCIALLY-OWNED OR STATE-OWNED IN COUNTRIES OF SOUTHEAST EUROPE 515

SADRŽAJ

Uvod – *Mike Falke* i *Christian Athenstaedt* **9**

I – META-PRAVNI UTICAJI NA PRAVNE SISTEME **109**

Slobodan Perović
IZVANPRAVNI ČINIOCI I PRAVNI POREDAK UNIVERZALNE VREDNOSTI I KULTURNI IDENTITET 111

Tomaž Keresteš
EKONOMSKA ANALIZA TRANSFERA NASLEDNE MATERIJE SA SUDOVA NA NOTARE U REPUBLICI SLOVENIJI 150

Rolf Knieper
EKONOMSKE TEORIJE O PRAVU U TRŽIŠNIM ODNOSIMA 163

Mišel Šmigelou (Michele Schmiegelow)
INTERDISCIPLINARNI PRISTUPI UPOREĐIVANJU KVALITETA PRECEDENTNOG PRAVA I GRAĐANSKOG PRAVA 181

II – NOVINE U RAZVOJU OBLIGACIONOG PRAVA **289**

Tatjana Josipović
IZAZOVI HARMONIZACIJE GRAĐANSKOG PRAVA PUTEM DIREKTIVA 291

Branko Morait
POVREDE LIČNIH PRAVA KAO USLOV ODGOVORNOSTI NA NAKNADU NEMATERIJALNE ŠTETE 307

Ardian Nuni i Evgjeni Bashari
DELIKTNA ODGOVORNOST I DIREKTIVE EVROPSKE ZAJEDNICE 317

Miodrag V. Orlić
SUBJEKTIVNA DELIKTNA ODGOVORNOST U SRPSKOM PRAVU 331

Slobodan Perović
OBJEKTIVNA ODGOVORNOST ZA PROUZROKOVANU ŠTETU 354

III – NOVINE U RAZVOJU U OBLASTI SVOJINE NA ZEMLJIŠTU I GRAĐEVINSKOG ZEMLJIŠTA **523**

Ilija Babić
PRAVO SVOJINE NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU 525

Nada Dollani
REGULISANJE SVOJINE NAD ZEMLJIŠTEM PREMA ALBANSKOM ZAKONODAVSTVU 545

Borislav P. Rašović
PRAVNI REŽIM IZGRAĐENOG GRAĐEVINSKOG ZEMLJIŠTA U CRNOJ GORI . . . 553

Petar Simonetti
USPOSTAVLJANJE PRAVA VLASNIŠTVA NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU U DRUŠTVENOM/DRŽAVNOM VLASNIŠTVU U REPUBLICI HRVATSKOJ I BOSNI I HERCEGOVINI 561

Rodna Živkovska i Tina Prželska
USPOSTAVLJANJE PRAVA VLASNIŠTVA I PRAVO DUGOROČNOG ZAKUPA IZGRAĐENOG GRAĐEVINSKOG ZEMLJIŠTA U DRŽAVNOM VLASNIŠTVU R. MAKEDONIJE 639

Petar Simonetti
USPOSTAVLJANJE PRAVA VLASNIŠTVA NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU KOJE JE BILO U DRUŠTVENOM/DRŽAVNOM VLASNIŠTVU U DRŽAVAMA JUGOISTOČNE EUROPE 661

I
EXTRA-LEGAL INFLUENCES ON LEGAL SYSTEMS

Professor *Slobodan Perović*, Ph.D.*
Founder of the *Universitas Iuris Naturalis Copaonici*,
President of the Alliance of Jurists' Associations of
Serbia and Republic of Srpska

EXTRA-LEGAL FACTORS AND LEGAL ORDER UNIVERSAL VALUES AND CULTURAL IDENTITY

Introductory Note

Social determinants that have an essential influence on the concept of law and its application in practical life, are diverse in terms of their effect and identity, not only from the viewpoint of space but, as well, from the viewpoint of the time in which they exist. They are subject to changes, in keeping with different processes of evolution, even within the same social and legal system. Thus, it can be said that, although relatively constant, in some periods these determinants undergo certain modifications, or even „revivals" of legitimacy, while in others they express profound changes, which is particularly true for periods of revolutionary transformation of society. At all events, those determinants of law (e.g. economic constitution, moral groundedness, democratic, political and general intellectual culture, tradition of established rules of conduct, social cohesion, respect for proclaimed human rights) may fall into a state of crisis or stagnation or, rather the contrary, may attain a high level of harmony, in terms of the constitution of a state based on the rule of law.

Consequently, certain time may bring forth radical changes to the social basis of the legal system, along the lines of enfeebled power of this system, both in the process of its development and in the process of its application, which may lead to either a crisis in the legal system or to the rule of law as the rule of legitimacy and legality principles, all within the framework of necessary social tolerance.

Before proceeding to the notion of the legal system crisis and the notion of the rule of law, let us dwell on the examination of important social factors that affect one or the other social and legal phenomenon.

Important Extra-legal Factors

Legal or anti-legal state (crisis of the just law) is decided by all the determinants that make a general culture of a community. While it is neither possible nor necessary to list here all the determinants that make an organized sociability, for the purposes of this paper we shall single out certain factors of general culture that are decisive for the fate of a legal order in terms of a just or unjust legal framework, as the following:

The decision is in the hands of all the factors that make a general culture of a community. To recap, these are:

---

* Original text is in local language.

- state of consciousness and conscience with regard to justice and equity as concretized justice;
- tolerance, as the ability and sign of spiritual majority and high level of reason, as the institutes of democratic culture based on universal harmony in diversity by birth or by any legitimate conviction (inter-cultural tolerance, political, class, racial and religious tolerance, national, language, material, property and contractual, tolerance in all the forms of respect for dignity of man and his inviolable rights);
- general state of development of science as a cognitive-empirical discipline, of religion as a meta-empirical learning about the Supreme Being, and of philosophy as a rational system of wisdom of worldview and the question of the relationship between the mind and body, spirit and matter;
- state of moral groundedness, ethical culture, tradition and established rules of conduct;
- economic constitution in terms of the choice of economic model of administrative or market economy, and market order with all the manifestations of such system, including in particular property as the central institute of social and legal order;
- state of political maturity and enlightedness in terms of respect for and development of democratic institutions in the system of the rule of law and the legal state, including in particular the principle of tripartite separation of powers and independence of the judiciary and the judge's function;
- legal, economic and social security as a basis for the forming of legal and moral conscience and trust in the common norms of conduct;
- state of general education, art and intellectual culture in general, including in particular in the form of intellectual creations in the field of copyright and patent law;
- social cohesion in terms of systemic and social integration;
- environmental protection and the state of ecological ethics, or more accurately, of ecological philosophy;
- protection of health as a precondition for living and the natural right of every man to the type of protection that corresponds to his needs;
- labour practices and labour ethics in terms of respect for labour-legal and social justice;
- state of the family and family structure as the basic cell of society;
- culture of peace as the basic determinant of a community that opposes different aggressions that jeopardize life on our planet, such as: threat from nuclear weapons and weapons of mass destruction, genocide, organized crime;
- state of public opinion, particularly in the sphere of media, scientific and expert observations;
- level of technical-technological education;
- level of realized natural rights and principle of equal treatment of equal matters.

As can be seen, if this set of determinants makes up a community's cultural identity, on which the realization, or bearable non-realization, or unbearable non-realization of proclaimed human rights is dependant, the inference is that on a global scale this vital question of the international community cannot be solved in the near future, and this process shall protract to an indefinite time.

On this path, only organized wisdom of humanity can open the door to a humane future, which means to a full realization of human rights proclaimed and codified in an entire mosaic of international conventions, charters, declarations and other documents, as expressions of common conscience and justice as the pivotal virtue.

Law and Human Dignity

All human beings are born free and equal in dignity and rights. Distinctions in regard to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – are constituent parts of the positive law. Natural law is built upon the unity of all these distinctions.[1]

Against the plan of common properties of human dignity, natural right has been built, in the past and particularly today (human rights), as the universal and indivisible right founded on the recognition of innate dignity and of equal and inalienable rights of all the members of the human family.[2]

Rights to human dignity, as *a priori* and by nature given to all men in the same way regardless of their differences by birth or by any legitimate conviction, today are becoming not only universal for the whole of mankind but, as well, enjoy a special immunity, in the sense that they cannot be denied by any legislative intervention, court decision or administrative measure in the framework of individual states, irrespective of different forms of the system of government. Whereas, by accepting corresponding international documents (implementation, ratification), notably by entering generally accepted rules of international law into its own legal system, a state partly waves its judicial sovereignty, in favour of broader international judicial protection, specifically in favour of the European Court of Human Rights.

In this context, protection of immunity-enjoying human rights in the area of the dignity of the human person, must ensure a multi-instance court protection not only in a formal sense but, as well, in terms of efficacious (successful) and effective (and not only efficient) substantive and procedural legal protection.

Hence, the effectiveness of legal remedies in the context of local law must not be laid down or practically resolved by a system of closed doors, but rather by a system of open doors, always and every time when dealing with those human rights that enjoy special immunity, such as the right to life and dignity of man, the right to freedom, with an entire series of derivates of such rights.

---

[1] In this context see, *The Universal Declaration of Human Rights,* adopted and proclaimed by UN General Assembly Resolution of 10 December 1948. *Ius naturale est quod apud homines eandem habet potentiam* (Sec. Ulpianus – D. 1, 1, 1, 3). Natural right is that which has the same force among all men. In this context, see: Jovan St. Popović, *Prirodno pravo* (Natural Law), *Official Gazette*, Belgrade 1995, p. 49, where it is said that natural right is neither partial nor arbitrary, but universal and unchangeable, commeasurable to understanding every nation and every man as a moral-intellectual creature, and it serves as a model to positive law. In recent literature, see, in particular: Yves Madiot, *Considérations sur les droits et les devoirs de l'homme*, Brussels, 1998, pp. 23–107; Frédéric Worms, *Droits de l'homme et philosophie*, Paris 1993, p. 67 and on; Jean-Luc Matheu, *La défense internationale des droits de l'homme*, Paris 1998, p. 19 and on; Robert Derathé, G. W. F. Hegel – *Principes de la philosophie du droit ou droit naturel et science de l'état en abrégé*, Paris 1998, p. 45 and on; Simone Goyard-Fabre, *La philosophie du droit de Kant*, Paris 1996, p. 237 and on.

[2] *The Universal Declaration of Human Rights* from 1948. On the universalization of human rights, see: Yves Madiot, *Considérations sur les droits et les devoirs de l'homme*, Brussels 1998, particularly pp. 23–107; Jean-Luc Mathieu: *Le défence internationale des droits de l'homme*, Paris 1993, particularly pp. 19–57; Arthur Kaufman, *Law and Understanding of Law*, Belgrade–Valjevo 1998, p. 269, and the like, where, *inter alia*, it is said: „Human rights are the basic stock of ethics and rights that can be universalized and that have, as well, actual universal validity. Human rights are a precious legacy granted to us by the 19th century... In recent times much has been written about the universalization of human rights; Ludger Kinhart authored a voluminous book on this topic; recently, Waldemar Schreckenberger and Erhard Denninger very decisively spoke up in support the pretension of human rights to universality. It can be doubted, of course, that human rights show a high level of universality; comparative-law studies have substantiated this." (*ibid*, p. 270)

In other words, the entire system of protection of the immunity-enjoying human rights must not be established in a way that would allow it to become a victim to a narrow interpretation of the letter of the law, but in each specific case it must respond to the purport and culture of reason, both of the specific law text, and of its genus source of proclaimed and generally accepted rules of international law, notably in the sense of all the attributes of a democratic culture, freed from any form of oppression or any meta-legal pressures or influences.

In addition to the philosophic opus, natural rights of man, and particularly the dignity of man as the „absolute purpose" (Kant), experienced a stage of almost complete codification in the second half of the 20th century, within a wide range of UN documents, whose proclamations and elaborations make an immense process, while the realization and practical application of these rules constitutes a chronic difficulty that the modern world is still not able to fully resolve.

This relates, above all, to those rights that are laid down in the Universal Declaration of Human Rights (1948),[3] International Covenant on Civil and Political Rights (1966), and International Covenant on Economic, Social and Cultural Rights (1966); this includes, as well, other factography and chronology of international documents on human rights that followed soon after and that protract to this date. In this regard, the Charter of Fundamental Rights of the European Union (2000) should be specially underlined.

As a matter of fact, all these declarations and international conventions represent a codification of the rights of man or of his natural rights that in the past were stated in charters or declarations of various peoples at different times, and which at the same time were in the focus of important philosophers and legists from our or earlier centuries, specifically and above all, in the framework of the philosophy of justice and natural law studies.

Hence, this allows a conclusion that these conventions, including before and above all the Universal Declaration of Human Rights, are the embracing codifications in which centuries-long evolution of man's natural rights has been impressed. This Declaration has established and expanded natural rights of man and contributed to an aspiration to find in this field common points of reason of a supranational law. Correspondingly, taking as a point of departure the rational concept of natural rights, the Declaration contains, in addition to traditional political and civil rights, a whole sequence of economic and social rights, that shall be subsequently regulated by specific conventions.

According to the Charter of Fundamental Rights of the European Union, human rights are grouped into the following institutes: dignity, freedoms, equality, solidarity, civil rights, and justice.

As regards dignity, the Charter specifies that human dignity is inviolable and that it must be respected and defended. Pursuant to this basic provision, it is said that everyone has the right to life and that no one shall be condemned to the death penalty, or executed. Thereafter it regulates the question of the right to integrity of the person, and specifies that everyone has the right to respect for his or her physical and mental integrity. In the fields of medicine and biology, the following must be respected in particular: (a) the free and informed consent of the person concerned, according to the procedures laid down by law; (b) the prohibition of eugenic practices, in particular those aiming at the selection of persons, (c) the prohibition on making the human body and its parts as such a source of financial gain; (d) the prohibition of the reproductive cloning of human beings. Thereafter the Charter declares prohibition of torture or degrading treat-

[3] Adopted and proclaimed by the UN General Assembly's Resolution 217 A (III) of 10 December 1948, known as the Universal Declaration of Human Rights or Déclaration universelle des Droits de l'Homme, in French.

ment or punishment. And finally, there follows the prohibition of slavery and forced labour, in terms that no one shall be held in slavery or servitude; that no one shall be required to perform forced or compulsory labour; and that trafficking in human beings is prohibited.

As can be seen, the question of human dignity is here regulated in a way that stands to a great extent in continuity of the earlier mentioned provisions of the Universal Declaration on Human rights from 1948, as well as numerous international documents to which this Declaration had served as the source of the culture of reason and virtue of justice in the process of creating common areas of humaneness.

Such and similar provisions are found in the constitutions of many countries. They had either found their way there via implementation and internalization of these universal values, or they already had an established basis in the tradition of respective national legislation. Thus, e.g., the Basic Law (Constitution) for the Federal Republic of Germany lays down in its introductory provision (Article 1) that human dignity shall be inviolable and that it shall be the duty of all state authority to respect and protect human dignity and man's inviolable and inalienable rights as the basis of every community, of peace and of justice in the world. In this spirit, these rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Understandably, the question of practical realization or non-realization of proclaimed rights related to human dignity and integrity of the person cannot be bypassed here. Taking as a point of departure the fact that many proclaimed rights here remain without specific legal sanction (*lex imperfecta)*, as well as the fact of insufficient realization of these rights, or even more, of their drastic violations at different sides of the law universe, even by those who are officially called to protect and realize them and instead replace the rule of law by the rule of will or self-will of some „owner of time" - it can be established that the disproportion between proclaimed and unrealized human rights, particularly in the area of human dignity, today represents the weakest point in the entire system of human rights. All the more so today, whereas there are numerous obstacles to the realization of proclaimed and codified rights to life and freedom, from among which several antagonists to the right to life particularly stand out in the modern world, for their disastrous outcome: the nuclear chemical weapons, genocide, terrorism, possible ecological catastrophe, emergence of new diseases, immense property differences.

Culture of Peace

Right to life and human dignity can be realized in peace only, and not in war and violence as the antipodes of reason. Hence, peace is one of the fundamental universal values, not only from the standpoint of the realization of human dignity and integrity of the person but, as well, from the standpoint of the survival of the world as a whole.[4] Different aggressions that jeopardize life on our planet, and particularly the menacing threat of nuclear and other weapons of mass destruction can be overcome and averted only through the establishment of regional and international peace and security where, in addition to a multitude of other factors, inter-cultur-

[4] Goethe immortalized nature's secret in the following words: Nature! We are surrounded and embraced by her: powerless to separate ourselves from her, and powerless to penetrate beyond her. Without asking, or warning, she snatches us up into her circling dance, and whirls us on until we are tired, and drop from her arms. She is ever shaping new forms: what is, has never yet been; what has been, comes not again. Everything is new, and yet nought but the old. We live in her midst and know her not. She is incessantly speaking to us, but betrays not her secret. We constantly act upon her, and yet have no power over her (quoted according to Kaufmann, *Law and Understanding of Law, Fundamental problems of hermeneutical philosophy of law*, Belgrade-Valjevo, p. 234).

al tolerance is a necessary condition for any harmony in diversity and for the constitution of universal peace.

In other words, the culture of peace with a certain degree of homogenization of universal values through multi-cultural tolerance (economic, political, class, racial, religious, national, language, property and contractual, and any other tolerance that unites differences by birth or by any other worthy conviction) – is the only way that leads to the realization of the proclaimed natural rights of man and the universal values of his sociability.

Contrary to this, the non-culture of war, force and violence, as past centuries tells us, took millions of lives, and contemporary hell of divisions and discord can push us into a clash of civilizations,[5] into a war of major cultural groups of the world which, in consideration of modern means of mass destruction, threatens survival with a universal cataclysm.

Therefore, we conclude: only the world of reason is able to take us to the road of the culture of peace. Specifically, through the realization of human natural rights, not only in the philosophic but, above all, in the legal-normative opus of the proclaimed and codified international documents of the United Nations.

Their exceptional plenitude, permeated with common points of humaneness in different areas of civil, political, economic, social and cultural rights, is based on the goals and principles of the United Nations, that derive from an organized will and effort to maintain international peace and security. To this end, according to the UN Charter, it is necessary to undertake efficient collective measures in order to avert and eliminate threats to peace and suppress acts of aggression and other violations of peace and to resolve international disputes or situations by peaceful means, in accordance with the principles of justice and international law.

Self-conscious Freedom

In any organized sociability, human dignity and culture of peace presuppose self-conscious freedom of man. Man's life evolves in a community, and every man, under the natural law, has the right to live in a community. This is the consequence of his social instinct, which stems from his biological property.[6] Owing to the fact that he lives in a community, man's freedom is restricted by the freedom of others; in other words, he is limited by the co-exis-

---

[5] Samuel Hangtington, *The Clash of Civilization and the Remaking of World Order*, CID Podgorica and Romanov – Banja Luka, 2000; Francis Fukuyama, *The Clash of Cultures*, Zavod za udzbenike i nastavna sredstva, Belgrade, 1997; the same author: *Our Posthuman Future*, CID Podgorica, 2003; Friedrich Hayek, *Law, Legislation and Liberty*, Official Gazette of FRY, Belgrade and CID Podgorica, 2002.

[6] Hugo Grotius is regarded as the father of the scientific-coherent school of natural law in the 17th century, specifically of the one that can be said today to belong to the biological rational line of natural law. In his work *De jure belli ac pacis* (The Rights of War and Peace, published in several editions), taking as a point of departure ancient sources of natural law and the view that the sociability instinct is known in the animal world as well, this author binds unbreakably the related instinct to man's reason, and thereby derives a biological-rational theory which concentrates the general impulse of sociability to human community only, and not to the animal world. Grotius expressed this thought by saying that man's need for socializing does not mean life in „a banal community", but rather „in a peaceful social state organized accordingly to the duties of man's reason" (For more details, see T.Živanović, *Sistem sintetičke pravne filozofije* (*System of synthetic philosophy of law)*, Belgrade, 1959, p. 537). It follows that the biological property of human nature reflected in his instinct for sociability, according to this theory, is not sufficient to explain natural right (animals, as well, have a social instinct), and that, instead, the sociability instinct is augmented by human intellect and reason, so that only a social instinct qualified by reason gets the power of the source of natural right. Natural right becomes a natural biological necessity, and as such, it is universal and just *per se* (For more details see: Henri Roman, *Le droit naturel*, Histoire-Doctrine, Paris, 1945, p. 93 and on).

tence of freedoms. Consequently, freedom should be understood as a possibility to do anything that shall not injury others, which means that the limits for exercising natural rights are determined by the limits of those very same rights held by other people.

Accordingly, the sphere of right is the sphere of freedom, but of such freedom that is in the interdependent relation with the freedom of others. Hence, freedom is self-conscious, rationale and disciplined. Justice is attained here through a proportion of freedoms. It is precisely such freedom that is the goal of all legal systems.[7]

This reciprocity of freedoms is expressed in literature as the principle under which every person should have equal right to a most comprehensive and complete system of equal fundamental freedoms, that is in accordance with the similar system of freedoms for all. Freedom can be limited only for the sake of freedom: a less comprehensive freedom must reinforce a full system of freedom in which all shall have a share, notably, a less than equal freedom must be acceptable to those citizens who have lesser freedom,[8] and further: freedom is unequal when one class of people has more freedom than some other, or when freedom is narrower than it should be. All the freedoms under equal civil rights must be the same for each member of society.[9]

Taking as a point of departure thus defined freedom as an eternal human aspiration, or correspondingly, taking as a point of departure self-conscious freedom as a rational symmetry of freedoms, we derive the following rule: there is no freedom under violence and there is no freedom without responsibility.

These are two pivotal points that determine the area of freedom in its rational meaning. Violence, as other people's forced self-will[10] is the antipode to freedom; unlimited freedom is the antipode to the social group. Violence, as a manner of treating others or as a system of rule, turns freedom of others into obedience to man's sensuality; on the opposite side, absolute freedom turns a man into a Robinson. Between violence and indeterminism, consequently, freedom should be seen as a full exaltation of a person, which carries along responsibility toward other holders of freedom. Understood in rational terms, freedom is, hence, inseparable from responsibility.[11]

The central scope of freedoms is regulated by international conventions and other general acts, as well as by national legislation, which all together make a comprehensive tractate of modern human freedoms.

Taking as a point of departure the rational concepts of natural right as the foundation of universal and regional declarations of freedom, freedom is proclaimed for all persons, completely irrespective of their different properties by birth, national origin or any other orientation or conviction.

Different forms of proclaimed freedoms today constitute an entire legal world that expresses deep trust in those fundamental freedoms that should be the foundation of peace and

---

[7] For more detail see, Hegel, *Legal and Political Tracts*, Belgrade, 1981, pp. 209, 216.

[8] John Rawls, *A Theory of Justice*, translated by M. Ivović, Official Gazette of FRY and CID, Podgorica, 1998, p. 234.

[9] John Rawls, ibid., p. 194.

[10] Jovan Sterija Popović, *Prirodno pravo*, Belgrade, 1995, p.67.

[11] In this context, Friedrich Hayek, *La constitution de la liberté*, Litec, Paris, 1994, p. 69 and sim. In this place, the author says that liberty not only means that the individual has both the opportunity and the burden of choice, it also means that he must bear the consequences of his actions, and take reproof or praise for them. Liberty and responsibility are inseparable. A free society depends more than any other on its members being guided not only by a sense of responsibility, but by a sense of public opinion as well, both in relation to success and failure of their initiatives and efforts.

justice in the world, and that are best realized by a democratic culture and common respect of human natural rights.

The right to freedom was proclaimed first by the *Universal Declaration of Human Rights*, specifically by stating that everyone has the right to life, liberty and security of person.

Correspondingly, holders of the right to freedom are all persons, without distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

They are entitled to freedom of movement, privacy, thought, conscience and religion; freedom of opinion and expression, and association; freedom to marry and to found a family; freedom to vote in periodic and genuine elections; freedom of education; freedom of unobstructed enjoyment of property.

All referred and other rights to freedom of the person are provided for and further regulated by a whole series of documents, both on the general plan, and by regional documents on human rights, from among which the one important for us is the *European Convention on Human Rights*, with its protocols, as well as numerous documents of the Conference on security and co-operation in Europe.

As regards the rule of law, these documents place emphasis on justice as the basis on which all laws should be founded, and separately provide for a whole spectrum of freedoms, including, in particular, freedom of movement, opinion and association, as well as freedom of peaceful enjoyment of own property, either alone or in community with others.[12]

The Charter of Fundamental Rights of the European Union, which constitutes an integral part of the European Union's draft constitution, provides for different types of freedom, including specifically: (1) right to liberty and security, envisaging that everyone has the right to liberty and security of person; (2) respect for his or her private and family life; (3) protection of personal data: such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law; everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified; (4) right to marry and right to found a family, in accordance with the national laws governing the exercise of these rights; (5) freedom of thought, conscience and religion, which includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right; (6) freedom of expression and information, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media are respected; (7) freedom of assembly and of association, which implies freedom of peaceful assembly and freedom of association at all levels, in particular in political, trade union and civic matters. Political parties at Union level contribute to expressing the political will of the citizens of the Union; (8) freedom of the arts and sciences: academic freedom shall be respected. (9) right to education, which implies, as well, access to vocational and continuing training; this right includes the possibility to receive free compulsory education. It also includes freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right; (10) freedom to

[12] In this context, the same Document (op.cit.art.9).

choose an occupation and right to engage in work, which means that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union; (11) freedom to conduct a business in accordance with Community law and national laws and practices is recognized; (12) right to property, which implies that everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in cases and under conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. Intellectual property shall be protected; (13) right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community. (14) protection in the event of removal, expulsion or extradition, which implies that collective expulsions are prohibited. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Natural law brings together all these freedoms, as universal and just, in its code of freedoms, but always under the axiom of freedom as a rational phenomenon, self-consciously understood by all holders who belong to a certain legally organized community. In other words, the field of any freedom of one holder is confined by the same field of another holder.

Consequently, fundamental freedoms are not only confining for each other, but for themselves, as well.[13] And further: the requirement that fundamental freedoms should be the same for all includes a possibility that we shall realize a greater freedom for ourselves only if the same greater freedom is granted to others as well.[14]

As a matter of fact, freedom must have its meaningfulness and purpose, because „it is not a negation of necessity and determinism, it is not a realm of arbitrariness and coincidence, in contrast to the realm of lawfulness and necessity. Freedom is positive and meaningful. To wish freedom for the sake of freedom, freedom without a purpose and meaning, means to wish emptiness, to turn to non-being."[15]

The rational concept of natural law, correspondingly, takes freedom as the co-existence of freedoms of different holders, far from any violence, but connected with responsibility of the holder of freedom, whereby freedom in sociability settings gets its purpose and meaningfulness, and thereby the attribute of a creative power.

---

[13] John Rawls, *Political Liberalism*, „Filip Višnjić", Belgrade, 1998, p. 385.

[14] John Rawls, *ibid*, p. 385. As an example to this statement, this author says: Although we may want to include into the freedom of (political) speech unobstructed access to public places and free use of social resources in order to express our political opinion, such extension of our freedom when applied to everyone, becomes unviable and gives rise to divisions in society, so that, as a matter of fact, it would greatly reduce the effective scope of the freedom of speech.

[15] Nikola Berdyaev, *The Meaning of the Creative Act – An Attempt at a Justification of Man*, Logos, Belgrade, 1996, p.120 and on. At this place, this author asserts: Freedom, when understood in formal terms only, without purpose and meaningfulness is nothing, emptiness, a non-being. Freedom of the Fall of Man was such, a negative formal freedom, freedom for the sake of freedom, notably freedom „from" and not freedom „to". Freedom in the Fall of Man was not a freedom to create, a creative freedom. - *ibidem*, p.121.

An Attempt at Defining Freedom

Freedom has been in the focus of different concepts both in its philosophical sense, staring from ancient and medieval philosophy (Plato, Aristotle), via European philosophical thinking, particularly of the 17th and 18th centuries, to this date (Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Kant, Hegel, Mill, Schopenhauer) and, as well, in its philosophical-legal meaning (Montescue, Kelsen, Taranovsky, Rawls, Hayek, Sorokin, Berlin, Dahl, Held, Dworkin, Živanović).

Numerous types of freedom and plentiful definitions spread not only in the area of law and legal science, but as well in the broad area of philosophy, psychology, axiology, economy, ethics, culture and general civilization – speak about the horizon and immense range of freedoms in which one can more easily find his way than enrich this portrait of liberty with his own contribution.

Faced with these difficulties and with a sense of due scientific responsibility, the author of this paper shall present here a Sketch of the theory of freedom, which starts with the definition of freedom, then touches upon its many attributes, and comes to the question of the extent of realization of proclaimed freedoms.

Further to this impression, here follows an attempt at embracing particles of freedom in a synthesis:

Freedom is a natural right of man to chose by his wilful actions the substance and the way of his activity in different areas of individual and common life, but in such a way that, along with his adherence to just law and tolerance as the expression of the culture of reason, he shall not violate the same and equal freedoms of others.

The following attributes of freedom can be deduced from this definition: (1) freedom is the natural right of man; (2) freedom is the expression of human dignity; (3) freedom is self-consciously limited by just laws, responsibility and universal tolerance; (4) freedom is the general notion that includes specific types of freedoms; (5) freedom is an element of democratic culture and the legal state; (6) freedom is on the perpetual path of realization and non-realization.[16]

Science as an Aspiration Toward Truth

Science, as a cognitive empirical discipline and as the „truth image"[17] of the universal natural and social justice, epitomizes a universal value of mankind. Everyone has the right to share in scientific advances and its benefits.[18] In the mosaic of different scientific disciplines and teachings there are also common points of convergence. These constellations are named objectiveness and publicity of knowledge and new findings that are under the constant scrutiny of science as an organized and truth-seeking questioning.

The conditions of highly proclaimed and realized freedom of scientific creative activity provide for the elimination of any type of octroyed dogma that, *ipso facto*, malignantly closes

---

[16] Considering the limitations of space of this work, the author shall not present in detail individual attributes and types of freedom (existential freedom, statutory freedoms, freedoms of creative acts, political freedoms, property and market freedoms, freedom of work, realization and non-realization of freedom, etc.), and instead refers the reader to his paper „*Vremenske dimenzije pozitivnog i prirodnog prava* (Time Dimensions of Positive and Natural Law)", Belgrade, 2009, p. 417-474.

[17] Scientia est quam veritatis imago.

[18] Article 27 of the *Universal Declaration of Human Rights.*

the area of truth, much the same as death closes the physical part of human personality. Hence, comparably to violence which is the worst adversary to justice and individual equity, all dogmas and dogmatic intolerance, including particularly those based on human discrimination by birth or any worthy conviction, are the antagonists to science.

And such dogma, irrespective of space and time meridians, always comes when sensuality prevails reason, when in the world of infernal discord physical violence prevails over the argument of scientific thought, when a notorious natural and social fact looses the battle in the war „of soul against the body". At least we, as a cell of this civilization, know this well and bear the full brunt of this reality.

A time that closes its scientific thought into a „prayer book" of any type, in a labyrinth of different discriminations (in relation to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status that stems from the same genus of humaneness), is not a time of science, but rather of dogmatic intolerance which leaves behind itself a vacant island of the dignity of life. That is the time of conscious or unconscious perjurers, the time when even concentrated associations of knowledge become victims to delusions that take away individual and universal goods, that take away our natural right to life and our natural right to self-conscious freedom.

Consequently, our overall being needs more scientific knowledge and findings about ourselves and our fellow creatures, today maybe more than before, because we are all part and creation of nature, equal in our coming and equal in our going away.

Taking this givenness as a point of departure, science cannot be ruled by anyone's authority or order by any political, financial or state official, but exclusively by the order of conscientious and scientifically verified knowledge, by the force of better argument in the hypothesis of tolerance as the expression of spiritual freedom and responsibility in the democratic formation of will, irrespective of how numerous or scarce scientifically explained positions might be.

Majority or minority, is not a matter to impress science. Understandably, majority and minority make an important fact from the standpoint of organization and functioning of a whole but, however, these are not decisive values from the standpoint of scientific truth. We know well how the minority that stated the truth that the Earth revolves, fared some centuries ago or, how Socrates fared before the court of Athenian democracy.

Consequently, within science, no one has the right to place himself above others, and turn life pluralism into the monism of a dogma and his authoritarianism. Because such a closed system would never reach the point of „learned ignorance", as the ultimate point of relativity of our existence and limited potential of our intellectual and physical nature.

Religion as the Attribute of Different Civilizations

In terms of its diversity and influence on the constitution and appearance of individual institutes and categories of law and legal order, religion as the system of rational, meta-empirical and irrational notions of human existence (soul – body), spread through all the world civilizations,[19] represents one of the universal human values.[20]

According to an authoritarian opinion, religion is the main determining characteristic of civilizations, and in this sense major religions make the foundations upon which great civiliza-

---

[19] S. S. Perović, *Kulturni identitet i prirodno pravo* (Cultural Identity and Natural Right), Pravni život, no. 9/2004

[20] See, Mircea Eliade, *Guide to World Religions*, Narodna knjiga, Belgrade 1996.

tions rest.[21] Although in comparative literature there is no concordance in respect of the types and number of major civilizations, some are, however, commonly listed, such as: Chinese civilization with the Confucian component; Japanese civilization, which together with the Chinese is often referred to as the civilization of the Far East; the Islamic civilization with its numerous separate subcultures: Arab, Turkic, Persian and Malay; Western civilization in the structure of Europe and Northern America, while the civilization of Latin America is featured by significant aberrations from the stem Western civilization; African civilization which is scientifically disputed due to its huge diversity and substantial belonging to the Islamic civilization.[22]

All such classifications speak only of religious and cultural diversity of the world, where conscience grouped round the fundamental questions of the meta-empirical sphere of human reason constitutes the *fundamentum divisionis.* Hence, no classification in this domain can be full-scale, all the more so as almost each religion and civilization has its variants and different forms, often mutually confronted although belonging to the same source. Thus, according to one standpoint (Encyclopaedia Britannica), 33 religions (more precisely, sets of religion) can be identified, as separate autonomous systems, and yet, however, „all religions are maps of the human mind".[23]

The philosophy of natural law, starting from its infancy in ancient Europe, via medieval Christian doctrine, up to Hugo Grotius (17th century), had its theological form in non-European countries, as well, including, e.g. natural law of the Spanish school transposed to Western India.[24]

Thus, according to the mentioned author, the natural law tradition taken over in America under the influence of Spain was, obviously, of Catholic character: tradition of the so-called Spanish school, in essence Thomistic, generally spread and perfectly applied in 16th century Spain, cherishes God as the Law-Giver, and sees man's part in the natural law, accepting the reality of natural right of divine origin above the positive. This legal notion was well suited to the Catholic context of conquest. One of the basic characteristics of the Hispanic expansion in

---

[21] For more details, see Samuel Huntington, *Clash of Civilizations and the Remaking of World Order*, CID Podgorica and Romanov, Banja Luka, 2000, p. 51, and literature listed there on p. 363 under no. 19.

[22] S.Hantington, *ibid*., p. 48-51. However, this author lists also other classifications of civilizations and major cultures. Thus, according to him, there is a general academic agreement in the identification of major civilizations in the history and those existing in the modern world. Yet, opinions often differ regarding the total number of civilizations that existed in the course of history. Kiggly acknowledges sixteen clear historical cases plus, very likely, eight additional ones. Toynbee listed first twenty-two, and thereafter twenty-three; Spengler described eight major modern civilizations. McNeill mentions nine civilizations in the entire history; Bagby also sees nine civilizations, or eleven, if Japan and Christianity were to differ from China and the West. Brodel identifies nine, and Rostovany seven major modern civilizations. These differences depend, partly, on whether they are cultural groups, such as civilizations, where one came in result of the other. In spite of these differences, the identity of major civilization is not disputable. There is a „reasonable accord", as Melco concluded, at least in relation to twelve major civilizations, including seven extinct (Mesopotamian, Egyptian, Cretan, Classical, Byzantine, Central American, Andean) and five extant civilizations (Chinese, Japanese, Indian, Islamic and Western). Some scholars add Russian Orthodox civilization as an individual civilization separate from the parental Byzantine and Western Christian civilization. For our purpose, it shall be useful to add to these six modern world civilizations the Latin American and, possibly, African civilizations.

[23] Mircea Eliade, *ibid*, p. 19. Here thirty-three religions are identified, including: African, Australian religion, Buddhism, Hanan, Celtic, Central American, Christian religion, Confucianism, Dualist religion, Egyptian, German, Greek, Hellenistic religion, Hinduism, Hetites, Indo-European religion, Islam, Jainism, Judaism, Mesopotamian, mystery religion, North American, Oceania, pre-historic, Roman religion, Shamanism, Shinto, Slav and Baltic, Latin American religions, Taoism, Thracian, Tibetan religion and Zoroastrianism.

[24] For more details, see José M. Castán Vázquez*, Las bases Iusnaturalistas del Derecho privado Hispanoamericano*, published in Actas de las II jornades Hispánicas de Derecho Naturak, Cordoba 2001.

the world was, as a matter of fact, of religious character. Spaniards went to Western Indian mostly with the basic intention of bringing Christianity there.[25]

Speaking of the influence of religion on the concept of natural law in the European legal civilization of Antiquity and the Middle Ages, such influence stretches through history with different interpretations.[26] Yet, irrespective of diversity, a common and essential characteristic of this understanding refers to God's will that is taken as the basis for all rights. According to this, not only natural but positive law as well is interpreted as God's command – *impositio numinis*.[27]

It appears obvious from this, already, that this view, since religious, is connected to the specific religion in whose framework it develops.[28] It follows further that the theological understanding of natural right had existed, as well, in the period of polytheism, much the same as in the period of Christianity, including the medieval period, in particular.[29]

In the medieval Christian civilization, natural law was understood as divine law, while interpretation mainly took two directions. According to the first, the older view, Divine law is reflected in God's will, and as such, it is perfect and infallible. Its authority is based on God's command.[30] According to the other standpoint, influenced by the ideas of rationalism, in the framework of the same Christian philosophy, natural law is understood as objectively perfect,

---

[25] For more details, see José M. Castán Vázquez, ibid., p. 329 and sim., and literature listed there on p. 330, under 2-4.

[26] H. Rommen, *Le droit naturel, Histoire-Doctrine*, Paris 1945, in particular pp. 54–93; Jacques Ellul, *Le Fondement théologique du Droit, Cahiers théologiques de l'actualité protestante,* 15–16, Neuchâtel–Paris 1946, in particular pp. 45–53; Jean-Marc Trigeaud, *Le droit naturel, fondement des droits de l'homme,* in the book Droits de Dieu et droits de l'homme, Actes du IX Colloque national des Juristes catholiques, Paris, dés 11–12 novembre 1988, p. 21 and sim.

[27] For more details, see: Henri Ahrens, *Cours de droit naturel ou de philosophie du droit, complété, dans les principales matiéres, par des aperçus historiques et politiques*, 6th edition, Volume, Leipzig 1868, p. 61 and sim.

[28] „In order to be accepted as such, natural law needs to have something more than divine origin. It needs, as a matter of fact, to be imposed not over one people only, the way the Law of Moses binds Abraham's descendants only, based on the alliance, but over all men, irrespective of historical chance. For the will of God to be the beginning of a natural law, it is necessary that this be a single God, who imposes his commands to the universal state of reasonable creatures, and that the laws he prescribes be known to everyone's fair reason. What laws prescribe and defend must stem from the nature of things, such as created by God. In addition to natural laws, that regulate the course of events, there would be rational regulations that order action in accordance with the nature of things; such regulations are just and binding." (Chaim Perelman, *Law, Ethics and Philosophy*, translated by Guteša and V. Mihajlović, Nolit, Belgrade 1983, p. 12).

[29] According to Perelman (*ibid*), „for the development of the scholastic theory of natural law it is sufficient that Christian thought, such as expressed in the *Decree of Gracian* (*circa* 1140), identifies natural law described by Cicero with the regulations of the Old and New Testament (natural law is comprised in the Law and in the Gospel). The *Decree of Gracian* argues that natural law holds absolute prevalence over customs and constitutions. Here natural law does not serve only to expand or supplement some positive law, as to a Roman praetor, but to judge it as well and, if necessary, condemn it. In St. Thomas's view, natural law is nothing else than rational creatures' participation in the eternal law, that God imposes on the universe."

[30] See, H. Ahrens, ibid., p. 61 and on; T. Živanović (ibid., p. 554) describes this view as follows: According to the original medieval Christian-theological (theistic, theosophical) doctrine, law (much the same as ethics, regarded as its part) is based in God's will. The Divine will has established, via Revelation the *ab aeterno principe* of the just (and ethical), which the law should foster. The positive law, as a whole (its existence) can be, correspondingly, justified only as the divine command (*impositio numinis)*. Representatives of the theocratic understanding of Law (common to all religions) which, as evident, mixes up law and religion, although these are two separate social systems, have expanded it further to the state, representing it as a divine institution, which they regard to be a necessary evil of the sinful world, much the same as law.

as the result of reason, or as the divine reasonable law.[31] It may seem, at first sight, that there are no differences between these two views, yet they are evident, because „just is that which the Divinity must order by the truth of its contents, and not that which the Divinity orders by its will."[32] Compared to „a purely theological view" the source of law here is not, accordingly, the simple will, but wisdom of the supreme being.[33] Hence, this view is also referred to as the theological-rationalistic theory.[34] This theory is represented by Thomas Aquinas,[35] the foremost philosopher of the scholastic school, who argued, particularly in his work „The Sum of Theologies"[36] that the Law is an act of reason[37] and defined the relationship between the natural and the divine law.[38]

---

[31] For more details, see Henri Rommen, *Le droit nautrel, Histoire-Doctrine*, Paris 1945, p. 54 and on; Jacques Ellul, *ibidem*, p. 45 and on; T. Živanović (*ibidem*, p. 555) – a basis to divine reasonable law „that appeared in the second stage of the scholastic philosophy, was a thought expressed in Plato's dialogue Eutiphron (contrary to Eutiphron which expresses traditional Greek doctrine, Socrates argues that something is holy not because Gods wanted it to be holy, but Gods wanted it so because it is holy – hence, holiness precedes a command). Accordingly, a *lex aeterna* principle was set, that just (and good) precedes God's will and consists of the accord with holiness or divine wisdom (*conventia cum sanctitate divine antecedenter ad voluntatem divinam*), and consequently, that just is what the divine must order by its truth. A mixed theological-rationalistic theory developed along these lines according to which the entire law represents a divine-rational reality. It is, as regarded, necessary and universal and, accordingly, unchangeable and eternal. Later, Leibnitz formulated this stance differently in his theory of essentiality. According to him, the source of law is the essence of God, and just and ethical is such by itself, and God could not want it otherwise, by the very law of his essence, much the same as he could not make three angles of the triangle be not equal to two right angles.

[32] T. Živanović, *ibidem*, p. 556.

[33] Jacques Ellul, *ibidem;* Henri Rommen, *ibidem;* Jean-Marc Trigeaud, *ibidem*; Th. Jouffroy, *Cours de droit naturel*, t. I, 4 éd., Paris 1866, p. 113 and on.

[34] This view is found already in the *Decree of Gracian* (Gratiani decretum) *circa* 1150 which, as the first part of *Corpus juris canonici*, elevated and admired natural law, which shall be continued in the works of Thomas Aquinas in the 13th century.

[35] Thomas Aquinas (1225–1274). About the life and work of Thomas Aquinas see, Tomo Vereš , *Thomas Aquinas*, selected work, Globus, Zagreb, 1981, pp. 1-27.

[36] *Summa theologiae*, published in T. Vereš's book, *ibidem*, p. 153 and on; see Thomas Aquinas, Država (State), translation from the Latin original and records by T. Vereš and M. Jeličić, Globus, Zagreb 1990, see in particular, section on Law (pp. 129–209) and section on rights (pp. 209–327).

[37] According to Thomas Aquinas, law is a deed of reason because it obligates to action. The task of reason is to direct things by the end which, according to the philosopher, is the main source of everything a man does. Since law is a rule and measure, it is manifested in two ways. Above all, by setting rules and measures of human action. This is characteristic of reason, and in this sense law is present exclusively therein. Conversely, law is present in that which is subjected to a rule or a measure. In this sense, law permeates all things that seek for something based on some lawfulness. In keeping with this, any seeking derived from lawfulness can be named a law. Admittedly, not in an essential meaning of the word, but in terms of established kinship - participative. The ability of reason to influence developments in life comes from the will: namely, as soon as one chooses an end (goal), the reason shall determine (*imperat*) means appropriate for attaining it. Yet, in order for the orders of will to attain the value of law, they must be weighted by someone's reason (*aliqua ratione regulata*). Thus is to be understood the assertion that the will of the ruler has the value of law. Otherwise, the ruler's will would be lawlessness, and not law.

[38] Regarding this question, it is evident that T. Aquinas adopted Aristotle's theory of justice. Thus, answering the question whether it is appropriate to divide law into natural and positive, Aquinas says that a just act is the one that is by its unique equality proportionate to another. However, something can be proportionate to another man in two ways. The first is by its own nature, for example that a man should get as much as he had given. That is called natural law. Conversely, something is equalized or put into proportion with something else by a contract or a joint agreement, and someone shall be regarded satisfied once he receives such and such amount. This may happen in two ways: firstly by a private agreement concluded by and among private persons; secondly: by a public agreement, when an entire people agrees that something shall be held equal or proportionate to something other, or by a regulation of a ruler, who is bound to take care of his people and to represent it. And this is called positive law.

According to the basic property of this teaching, natural law is sourced in divine reason, and man learns this law through the light of supernatural revelation by his natural reason.[39]

This author defines the purpose of law in the same context, by saying that law is the rule and standard of actions (*regula et mensura*) in human activity that direct a man to do something or not to do something.[40] All this, however, is determined by reason, and not will. This further means that a law must not be contrary to reason and that any will of the legislator cannot be law unless it is compliant with reason.

Along with this, Thomas Aquinas always sees the purpose of law in the common good,[41] so that, correspondingly, law is „an ordinance of reason for the common good, made by him who has care of the community", in such a way that a law must be promulgated in order to be binding.[42]

The Thomaism doctrine of medieval scholastics did not remain intact to the end. In the late 18th and early 19th century it was to a certain extent suppressed, as a consequence of the breakthrough of the general ideas against rationalism. Christian philosophy of that time (France and Germany) resorted to the old doctrine of divine law[43] according to which natural law cannot pertain to reason, but to divine will.

---

[39] According to this view, „natural law is through human reason law revealed by God. And, correspondingly, it is part of the divine law in a broader sense, so that its basic part cannot be challenged. It appears, hence, as the indirect divine law, i.e. as the divine natural law. One part of divine law in a broader sense is concurrently positive (or conventional) law, notably provided that indirect and direct divine law is received in the human, positive law. This is the third part of divine law in a broader sense, the divine positive law." (T. Živanović, ibidem, p. 557).

[40] One of the important points in the philosophy of T. Aquinas is that where he discusses the question whether the law of a people (*ius genitum*) is the same as natural law or, in other words, whether natural law is unique for all peoples or differs in consideration of the differences in space, namely nation. One can say that this author has seriously marked the supranational character of natural law and understood it as universal law. According to him, „just is that law, or natural law, which is by its nature appropriate to another or equalled with another. If viewed in general, then it does not correspond to man only, but to other creatures as well. Therefore the law called natural is in a certain way common to both us and animals. In this sense, however, law of people deviates from natural law, because it is common to all peoples only, while the letter is common to all animals as well. Namely, to view something in relation to what follows from it, is a property of reason (*proprium rationis*). And considering that this is determined by natural reason, it is natural for man. It is therefore that Gai says: what natural reason has established among all men, that is what all peoples shall adhere to, and it is called law of people." (T. Aquinas, *State*, translation from the Latin original and records by T. Vereš and M. Jeličić, Globus, Zagreb 1990, p. 239)

[41] Thus, „the orientation to common good is in the nature of law which is manifested, as well, in the application to individual ends. It is certain that human actions relate to individual things, but they can be directed toward common good. Admittedly, not in that sense as if falling into the goods of the same kind and type, but in the sense that they have the same ultimate cause, notably provided that common good is a common end. In the same way that theoretical reason comes to unwavering certainty in such a way as to reduce everything to fundamental principles that cannot be further explained (*prima principia indemonstrabilia*), so practical reason comes to unwavering when directed to an ultimate end that consists of the common good. The value of law, hence, shall have that what is marked by such contents. (T. Aquinas, *Sum of Theology*, part entitled „On the Essence of Law", in Thomas Aquinas – Selected Work, edited by Tomo Vereš, Globus, Zagreb 1981, p. 225.

[42] As regards the necessity to promulgate a law, this author argues that in order to be binding, which is its essence, a law should be applied to people subjected to it. And precisely such application is performed by promulgation that pronounces a law to people. It follows that a law must be promulgated in order to be effective. Based on all said, a law can be defined as following: law is nothing else but an ordinance (*ordinato*) of reason in the form of common good, promulgated by the person who takes care of the community (T. Aquinas, *ibid*, p.227).

[43] H. Rommen, ibid, p. 54 and on; T. Živanović, *ibid*, p. 558; J. Ellul, *ibid*, p. 45.

The subjective natural right is a set of legal powers that belong to someone directly on the basis of the objective natural right and on the basis of relations that are given by nature itself, such as the right of man to life, inviolability, right to freedom, property.[44]

In spite of these oscillations in the theological teachings of the medieval natural law, views of Thomas Aquinas remain as paramount and shall later on see their „reincarnation" in other meta-theological doctrines, particularly in the works of Hugo Grotius and his followers.

Democratic Equality and Inter-cultural Tolerance

Democratic equality and inter-cultural tolerance are universal values in a world with a higher-level legal culture, as the expression of general cultural identity of a certain community. However, as regards realization of the natural right, as the universal equitable right, it is not sufficient to presume democracy as a simple „law of the majority" that can jeopardize the right of the minority or even turn into its opposite: a dictatorship of the majority over the minority.[45]

From the standpoint of natural law, such democracy would not be able to provide to everyone respect of human rights which must be essentially equal for all men, because they are all, as a part and creation of nature, the same in their coming and going away, and who, on this ground alone, must enjoy the same dignity of life, irrespective of different forms of social order.

Such democracy (vulgar) has not advanced much from the other (simulated) in which democratic proclamations are just „papers", and as a matter of fact, substituted by the rule of violence, either of the minority over the majority (different types of autocratic and similar dictatorships) or of the majority over the minority (different types of „democratic" rule).

Accordingly, the rule of the rational concept of natural law presupposes such level of democratic culture[46] where, in addition to the notorious attributes of democracy,[47] tolerance is its first and last instance.[48]

Obviously, such a type of democracy, which we call here democratic culture, presupposes three properties at least: firstly, political maturity of a certain community which comes as a result of a whole sequence of meta-legal determinants (level of philosophical enlightenment, ethical groundedness, economic constitution, political emancipation, tradition of general rules of conduct, technical civilization), which are an expression of appropriate „historical necessity";[49] secondly, a sense of responsibility, because self-conscious democracy is necessarily accompanied by responsibility (the area of freedom of the one is the limit of freedom of the other holder of freedom, universal or special, e.g. property); and thirdly, tolerance as the expression of highly developed reason, collective and individual, means „to think alone, imag-

---

[44] This is a definition given by Cathrein, for more details see Gény, *Science et Technique en droit privé positif. Nouvelle contribution ou la critique de la méthode juridique*, 4 vol., Paris 1914–1924, p. 291 and on.

[45] For more details see, Božidar Marković, *O pravednom pravu (*On Just Law), Novi Sad 1993, especially pp. 91–147; the same author: *Načela demokratije* (Principles of Democracy), edition Politika i društvo, Belgrade 1998, p. 5 and on; Arend Lajphart, *Models of Democracy*, published by the Official Gazette of Serbia and Montenegro and CID Podgorica, 2003.

[46] In this context see, Yves Madiot, *Considćrations sur les droits et les devoirs de l'homme*, Brussels, 1998, specially p. 168 and on.

[47] David Held, *Democracy and Global Order*, Belgrade, 1997; Slobodan Jovanović, *O državi, osnovi jedne pravne teorije*, Belgrade, 1990.

[48] Arthur Kaufman, *Reflections on the Rule of Law, Democracy, Tolerance*, in Law and Understanding Law, Belgrade–Valjevo, 1998, p. 331–342.

[49] Hegel, *ibid*, p.209.

ine oneself (in communication with people) in the place of everyone else and think always in accord with oneself."[50]

The right of tolerance as an element of democratic culture was scientifically argumented particularly by Arthur Kaufman[51] who had provided a synthesis of this question. We shall present certain parts of this synthesis, and then make an attempt at drawing corresponding conclusions regarding the whole question.

According to this author, in democracy the law of the majority prevails, and this majority can do everything except two things: it cannot remove the very principle of majority, and thereby democracy, and it cannot abolish fundamental and human rights. The reason for this is that those rights are valid before the state, the state does not approve them, it is only supposed to protect them. On the other hand, democracy requires a multi-party system. Those who regard that the only fair stand is their own stand, or the stand of their group, or party, cannot be democrats. In other words, one cannot be a democrat without a certain quantum of relativism. One's own convictions must be joined with the recognition that in addition to one's own convictions, there are other convictions of equal value. Therefore, an anti-relativist, who regards his opinion absolute, can be characterized most precisely by the following words of Montesquieu: „Oh, God, how comes it that we are always right and others are never right."[52] Therefore this author goes on and says: no one holds an undivided whole truth. An individual alone is never right, said Nietzsche, and truth begins with two.[53] Revelation of truth almost never occurs on a solitary road; it requires a cooperative effort. It is comparable to an orchestra. Convergence of the majority of individual knowledge of the same thing is one of the most important criteria of truth.[54]

After these introductory statements, often expressed in an excellent figurative style, this author passes over directly to tolerance and says: equally valuable alternatives lead toward most important spiritual basis of democracy, to tolerance. Tolerance refers to the relationship between truth, freedom and equality, namely, to whether a fallacy because of freedom has the same right as truth. However, this author distinguishes practical tolerance from dogmatic intolerance. The first one, practical or „civil" tolerance is, as a matter of fact, no tolerance at all, while the other „dogmatic non-tolerance" is the recognition of non-tolerance as such. Correspondingly, according to this author, tolerance is undivided, but not unlimited. It is self-implied that the effective laws must be respected, that violation of rights, particularly crimes, cannot be tolerated, that inhumanity must not be maintained. It is mostly said that non-tolerance cannot be tolerated, either.[55] In this generality, according to this author, this is not true. There are many forms of intolerance that do not harm common good. Non-tolerance that cannot be tolerated is the one that jeopardizes common good, and particularly freedom.[56] Thus a person or groups that propagate hatred to aliens and exercise violence against those who are different, do not deserve any tolerance.[57]

---

[50] Kaufman, *ibid*, p. 142. These are, as a matter of fact, Kant's thoughts quoted by Kaufman in the context of his deeply argumented deliberations on the right of tolerance as a necessary attribute of democratic order and the legal state, p. 332 and sim.

[51] Arthur Kaufman, *Reflections on the Rule of Law, Democracy, Tolerance*, in Law and Understanding Law, Belgrade–Valjevo, 1998, p. 331–342.

[52] *Ibid*, p. 333.

[53] *Ibid*, p. 334.

[54] Kaufman, *ibidem*.

[55] Kaufman, *ibidem*.

[56] Kaufman, *ibidem*.

[57] Kaufman, *ibidem*.

Contrary to other attributes of democratic culture, tolerance as its composite part, has its own particularities. Above all, it is not given by birth,[58] but is acquired (more correctly, can be acquired) in the course of life depending on individual and general affinities of a society that aspires to become democratic. This means that a man is not *ab initio* tolerant by nature, but an egoist with the instinct of self-preservation and elementary existence. However, in relation to other natural beings, he is supplied with a greater level of reason and intelligence, so that on the path from „natural to learned ignorance"[59] he stands in a different hierarchy of cultural knowledge. While „tolerance requires communication ability and thereby, above all, a virtue of listening to what others say, of being able to approach others, it presupposes a high extent of spiritual freedom and ability to form for oneself a reliable opinion and requires strength to restart again and again and allow for learning from new situations and information. A reward for tolerance is genuine freedom and independence.[60] Tolerance, therefore, does not unconditionally end at intolerance, but only at intolerance that jeopardizes freedom.[61]

Consequently, the question of tolerance is the question of spiritual freedom, general culture that is reached by educating reason that everyone is entitled to his opinion, irrespectively of how frequent or rare.

Tolerance and dogmatic intolerance, are two companions in the life of man as a social creature. If the level of development of individual and collective reason is enslaved by a dogma of any kind (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status), then that is an antipode to democratic culture, irrespective of the law of the majority that is characteristic to democratic society.

Contrary, if this reason has reached such level of spiritual freedom in terms of rational concept of natural law, then it is a path to democratic culture as the highest level of the constitution of a community.

It is a question, how to give tolerance „right attire", along with preserving legal security; can the minority, invoking tolerance, refuse application of legal obligations (*dare, facere, non facere)* and that we stay in the domain of natural law; finally, can a judge refuse to apply certain law on account of respect of tolerance or „excusable fallacy on account of conscience"[62].

---

[58] Kaufman, *ibidem*, p. 341.

[59] Blaise Pascal, Misli, Belgrade, ed. Kultura, 1961, p. 152, states among other things: The world is a good judge of things, for it is in natural ignorance, which is man's true state. The sciences have two extremes which meet. The first is the pure natural ignorance in which all men find themselves at birth. The other extreme is that reached by great intellects, who, having run through all that men can know, find they know nothing, and come back again to that same ignorance from which they set out; but this is a learned ignorance which is conscious of itself. Those between the two, who have departed from natural ignorance and not been able to reach the other, have some smattering of this vain knowledge and pretend to be wise. These trouble the world and are bad judges of everything.

[60] „It is a big question whether everyone can do this. It seems that many people may not be rebuked, considering the complexity of our modern world, for not being able to help themselves differently but to react to this with indifference and intolerance. Everyone shall hardly have strength to incessantly argue with changeable situations and opinions. To meet such people with understanding, seems to me to be the duty of tolerance." (Kaufman, *ibidem*, p.342)

[61] Kaufman*, ibidem*, p. 342.

[62] Kaufman, *ibidem*, p.208. Here the author exposes Hegel's idea of „objective conscience" wanting to establish in the appearance of a state, in accordance with it, a synthesis of objective duty and subjective freedom, universality and individuality. In this matter, the individual conscience stands as a neuralgic point. Hegel recognizes it by name, but whether „the conscience of a certain individual is proportionate to this idea of conscience, whether what the individual conscience holds and gives out to be good is really good, can be ascertained only by an examination of the contents of the intended good…" (Kaufman*, ibidem*)

The answer to the raised question, in addition to what has been stated so far, constitutes the essence of the power of natural right.

In contrast to positivism that „recognizes legal words only" without understanding its reason and sense,[63] rational natural law offers here a whole dispersion of possibilities for the realization of just law, concurrently taking care of the necessity to preserve the universality of law and legal security as the common good, and (in the hypothesis of democratic culture and tolerance as one of the attributes of that culture) protecting, as well, individual personality as a cell of the common good.

Thus, the right of tolerance can be introduced into the world of positive law in several ways.

The most general is the one under which natural law is the substrate and model for positive law, so that the institutes and norms of positive law are inspired or even coincide with the categories of rational natural law. Namely, to the extent to which it is substantially inspired by rational natural law, both in its development and its application, positive law shall be closer to legitimacy and legality of law as the levers of the rule of law (the legal state), and thereby the right of tolerance, as well, is reduced to a smaller space. This is so because such right is the expression of harmony of all or the vast majority, and not the expression of self-will and violence of the one vs. the other. Understandably, in this hypothesis, as well, the right of tolerance must find its place in positive law, and the following lines shall treat this question.

A great potential for positive law to introduce the right of tolerance more broadly into the world of its legal norms, is constituted by permissive norms, hence, those that allow alternative dispositions of conduct. Prescription of these norms leaves a possibility for each subject of the law to adjust his conduct to one of the alternatives provided by law, whereby the right of tolerance, particularly of a minority, shall be realized to a great extent (sometimes in full).

It is, however, necessary to set here a clear and categorical „demarcation line" between those social relations that by their nature can be regulated by permissive norms and those where, on account of the protection of the common good, this is not possible. This relates to public order that is characterized by imperative norms[64] where there is little room (sometimes no room at all) for permissive norms, as this is a case of compulsory legal regulations and moral imperatives.[65]

---

[63] See article 993*, Code of Bogišić* from 1888.

[64] Simon*: L'ordre public en droit privé*, Rennes, 1941; Malaurie: *L'ordre public et le contrat*, Reims, 1953; Claps-Lienhart*: L'ordre Public,* Lyon, 1934; Vareilles-Sommiéres: *Les lois d'Ordre Public et la dérogation aux lois*, Revue de Lille, 1899, p. 674.

[65] There is abundant literature on the relationship between law and ethics; see particularly: Ripert: *La régle morale dans les obligations civiles*, Paris, 1927; Lévy-Bruhl: *La morale et la science des moeurs*, Paris, 1937; Delos: *Le probléme des rapports du droit et de la morale*, Archives de philosophie du droit et de sociologie juridique, 1933, no. 1-2, pp. 84-111; Cardahi: *Droit et morale*, t. I, II, III, Paris, 1950; Darbellay: *La régle juridique. Son fondement moral et social*, Paris, 1945: Salmans: *Droit et morale*, Bruges, 1924; Mestre: *Morale et obligation civile*, Revue trimestrielle de droit. civil, 1925, p. 51; Savatier: *Des effets de la sanction du devoir moral*, Poitiers, 1916; Saiget: *Le contrat immoral*, Paris, 1939; Dorat des Monts: *La cause immorale*, Paris, 1956; Aillet: *Morale théorique et science des moeurs Archives de Philosophie du droit et de Sociologie*, 1937, no. 3-4, p. 26; Bonnecase: *La notion juridique de bonnes moeurs, Etudes de droit civil a la mémoire de Henri Capitant*, Paris, p. 91; Grospiron: *L'exécution des conventions immorales, Beuvais,* 1938; Perić*: O školama u pravu, Arhiv, 1921, no. 4, p. 241; Taranovski: Enciklopedija prava, Belgrade*, 1923; Marković: *Poštenje i moral u pravu*, Arhiv, 1922, p. 332; Živanović: *Osnovni problemi etike*, Belgrade, 1935.

In this context, we once again point to Arthur Kaufman's[66] conclusions that criminal law must be limited, to the extent possible, to the area of simple, elementary morality which expresses what is universally humane: you should not kill, inflict injury, steal, plunder, deceive, exercise violence, etc. Only such norms are really entitled to acceptance in everyone's conscience.[67]

Essentially, this relates to a minimum of universality of those natural rights of man (human rights) which are (or which should be) protected in all space-time dimensions and which today represent a wreath of codified rights in the framework of corresponding standards of the international community.

Understandably, permissive norms are to be found at every turn, today the same as in the past, particularly in the area of private law, and especially in obligatory and inheritance law.

A legal state that rests upon a democratic culture, however, should ensure, or more correctly, should always take care that these norms are used to the greatest extent possible, this not only in the domain of the private, but of public law as well.

As a matter of fact, whenever they do not encroach upon or endanger certain public good (general benefit) and protected fundamental human rights, permissive norms should be prescribed to a greater extent (notably in the greatest extent possible), not only for the sake of the realization of the right of tolerance, but, above all, because this supports the process of transforming law from „the realm of orders" into the sphere of freedom of man and all his associations.

Only such legislative policy, jurisprudence and legal science should preside over all our volitions, either group or individual.

Finally, as regards the right of tolerance and its introduction into the life of positive law, it is important to dwell on the role of the court in the process of law application to specific life situations.

This role is somewhat simpler when the law instructs application of some meta-legal criterion (e.g. conventional usage, equitable compensation, good faith),[68] than when the law does not regulate certain social relationship at all (legal void) or, which is most difficult, when the law regulates a certain relationship, but in an unbearably unjust way. What is the role of the court in such situations in consideration of those ancient words „to go to the judge is to go to justice", that have outlived centuries and remain topical today.

As a matter of fact, the role of judges in the application of law is reducible to the question of positivism or universalism of law. Already ancient law distinguished *ius* and *leges*, thus the question is whether a judge applies exclusively the law that is in force at the moment of its application, specifically in terms of its letter, or a judge delivers justice adhering to the effec-

---

[66] A.Kaufman, ibidem, p.216.

[67] Developing this thought, this author continues: Contrary to this, demands by high ethos, such as for example a demand that in case of imposed pregnancy children should come into this world (so the Catholic church holds), are not appropriate for generalization in such a way that every legally aware woman would agree with this. This is a decision that can be made only by an individual woman, on her own responsibility. If she were to decide to interrupt her pregnancy, the law cannot object to such a decision on her part. Kaufman, *ibidem.*

[68] This is in accordance with the terminology of tripartite theory, that we had the honour to present and explain in the book *Prirodno pravo i sud* (Natural Law and Court), Belgrade, 1996, p. 23-47, the so-called corrective relationship of the natural law vs. positive law. Such situations are particularly frequent in the Law on Obligations, thus a reference is made to the above mentioned place, to avoid unnecessary burdening of this text.

tive law, its meaning and reason, and even other established rules of conduct that supplement legal dogmatics.[69]

The answer to this question, essentially, sets limits to the role of the judge in the application of legislation and law in general.

When a judge is just an automatized applier of statutory norms, even those that to such an unbearable extent contradict justice that by the force of facts a statute must yield to justice,[70] and when a judge is not allowed to bring such legal norm by interpretation up to a just solution, then the role of a judge in the procedure of law enforcement is reduced to a sort of self opposition. A judge then becomes dependant on the normative power of a dogma, contrary to general opinion and his discretion.

Higher culture of legality manifested in a rational conception of natural law,[71] much the same as the entire civilization of law and the judiciary, warns, points and teaches us that broader space must be here opened to judiciary independence because law is the phenomenon of the good and the just,[72] and it is not, and cannot be an arbitrary fact of violent will of the one versus others.[73] Consequently, in the delivery of justice, a judge is independent from

---

[69] Božidar Marković, *Ogled o odnosima između pojma pravde i razvitka pozitivnog privatnog prava*, Belgrade, 1995, specially p. 9 and sim. According to this author, it seems that there is something lasting that is above the law and positive law. There are principles that govern laws themselves so that positive law is not some arbitrary creation, the last notion, but an expression of certain previously existing reality. Thereafter, the author quotes E. Durkheim *(Revue internationale de l'enseignement*, I, t. 15, p. 47), who argues that viewing the legislative will as the only source of law, means to take the letter for the spirit, outer appearance for the reality. This idea is represented, among others, by Stammler (*Die Lehre von dem richtigen Rechte*, Berlin, 1902, p. 29 and sim.), according to whom, positive law is only a secondary matter, a technique, the external side of reality to be learnt before it is expressed in norms. Positive law is a condition and not the end, means and not the purpose. The whole of positive law is only an aspiration to become a just law (quoted according to B. Marković, op. cit., p.. 11. Given in the same work is other bibliographical information on authors holding this stand).

[70] For more details see, Gustav Radbruch, *Philosophy of Law*, Belgrade, 1980, specially p. 288, where it is stated:

„The conflict between justice and legal certainty may well be resolved in this way: Positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless its conflict with justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice."

[71] Different teachings rest on the explanation of the source, meaning and scope of natural law, starting from the ancient (Aristotle), and theological (Aquinas), over the biological-rational (Grotius), the rational (Decartes) and sublimated rational in the form of transcendent philosophy (Kant). For more details see, T. Živanović, *Sistem sintetičke pravne filozofije* (System of Synthetic Legal Philosophy), Belgrade, 1959, p. 523 and on; (Hegel, *Legal and Political Tracts*, Nolit, Belgrade, 1981, p. 210).

[72] *Ius est ars boni et aequi* (Ulpianus – D. 1, 1, 1)

[73] This is the tyrannical definition of law that reduces the whole of law to the will of the ruling class. According to it, the state exercises its monopoly over physical violence by means of law as the will of the ruling class. In this context see, e.g., Radomir Lukić, all editions of the text book *Uvod u pravo* (Introduction to Law). Understandably, such an approach to law is a political qualification that serves daily political needs. Hence, when law is understood as the violence of the one over other, then the codes of laws built upon such understanding of law are illegitimate codes of laws that shall last for as long as the will of the ruling class or the political party shall last. For more details see, Collected Papers in the book *Pravna država* (State Based on the Rule of Law), published by the Institut za Kriminološka i Sociološka Istraživanja, Belgrade, 1991; Gordana Vukadinović, *Izbor tekstova iz teorije prava* (Selection of Texts from the Theory of Law), Priština, 1996, specially p. 189–211.

every authority, except the authority of legitimate law and he issues unbiased decisions within the procedure governed by the law, based on the evaluation of facts and understanding of the law in terms of the realization of commutative and distributive justice; a judge also applies norms on human rights that stem from affirmed and proclaimed international agreements and generally accepted international standards that constitute an integral part of the internal legal system of every civilized community.

Justice and Active Equity

Justice is an universal and absolute value of natural law that is, to a certain extent, implemented in specific positive law. When positive law is understood and realized in the composition of justice, when the general constitution of a community endorses justice as a „pivotal virtue",[74] the law of such a community becomes legitimate in its source and legal in its application.[75]

For Aristotle, just is always in some proportion, and proportion means equality of relations. From that stand point, equity can be either commutative or distributive - *iustitia commutativa* and *iustitia distributive.*[76]

When justice is achieved by a mean absolute in accordance with arithmetic proportion, when, accordingly, precisely as much damage incurred is subtracted from the damager and such value is added to the damaged, that is a commutative (rectificatory) justice.[77]

However, when justice is achieved via a geometrical proportion that takes into account the nature and attributes of a person, thus, when value, merits or other individual characteristics are acknowledged to members of the community (higher degree of acknowledged individuality concurrently means a greater belonging), that is distributive justice.[78]

As a matter of fact, this division derives from the general notion of justice as perfect (complete) virtue in relation to someone else. As such, justice is the greatest of virtues and „neither evening nor morning star is so wonderful" says Aristotle in the fifth volume of his work *Nikomahean ethics,*[79] and adds proverbially that „in justice is every virtue comprehended."[80]

Within the order of these ideas, justice is a complete virtue, first of all, because it implies respect of laws and treating others (neighbours) as equal to oneself. It is, consequently, a virtue as an ethical norm that comprises in itself all the other virtues. In other words, justice is by

---

[74] Aristotle, *Nikomahean Ethics*, Kultura, Belgrade 1970, vol. V, p. 111 et sim. According to Aristotle, justice is a complete virtue because it implies respect of just laws and treating others as one's equals. As an ethical norm, it is a virtue that comprehends all other virtues. Consequently, justice is by no means just a part of virtue, but rather a set of all virtues.

[75] S. Perović, *Prirodno pravo kao integritet pravde* (Natural Law as the Integrity of Justice), Pravni život no. 9/2003.

[76] Aristotle, *Nikomahean Ethics* (translated from Old Greek by R. Šalabalić), Belgrade, 1970, volume V, p. 111. and sim. ; or, translated by T. Ladan, Zagreb, 1982, volume V, p. 87. and sim.

[77] Aristotle, *ibid*, p.120.

[78] Aristotle, *ibid,* p.117.

[79] From Euridipes' lost tragedy *Melanippe* (Aristotle, *ibidem*, p. 114).

[80] A verse from Theognis, claimed by Phokylides as well, also in use as a proverb (Aristotle, *ibidem*).

no means just part of virtue, but rather a body of virtues, much the same as its opposite, injustice, is not a part of vice but rather „a vice entire."[81]

Aristotle „inherited" the general notion of justice thus understood from his teacher Plato, who had ranked justice as one of the four „pivotal virtues". Still, however, in Aristotle's teaching of universal justice, a quite practical and life dimension of this notion is also observable, in as much as justice, as a complete virtue, is not understood abstractly, but always in relation to someone else, as a virtue that is also another's good (objective good), because it is directly related to another.[82]

Developing the notion of universal justice thus understood, Aristotle arrives at the notion of a particular type of justice, or justice in a narrower and special sense. Both share the same name and fall within the same genus. As part of universal justice, particular justice is related to something which is specific, but at the same time preserves the attributes of universal justice, as a part in relation to a whole. Aristotle sees this, particular justice, as commutative and distributive.[83]

Judicial Independence as an Expression of General Culture

One of the significant determinants of the cultural identity of a community, doubtlessly, is judicial independence in the system of tripartite separation of power.

Further to the above stated, it is not a difficult task to name another truth: judicial independence and impartiality is an inevitable and notorious presumption for the institute of the judiciary. It is like our daily bread, like the water we drink and the air we breathe, for every court of law and justice under the expanse of the rule of law and the legal state.[84]

Therefore, the question of judicial independence is not just a legal question. It is a question of the general culture of a community.[85] That culture is determined by the nature and

---

[81] According to Aristotle , „it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbour, also; for many men can exercise virtue in their own affairs, but not in their relations to their neighbour. This is why the saying of Bias is thought to be true, that „rule will show the man" (Bias of Priene near Miletus, Ionian statesman renowned for his wisdom, one of the Seven Wise Men. Sophocles makes a similar statement in Antigona, p.175). For more details, see Aristotle, *ibidem.*

[82] In this sense „justice is perfect virtue, but not in an absolute sense, but in relation to another… the worst man is he who exercises his wickedness both towards himself and towards his friends, and the best man is not he who exercises his virtue towards himself but he who exercises it toward another, for this is a difficult task." (Aristotle, *ibidem*)

[83] In view of the limited space here, the Author shall not further consider the notion and implications of commutative and distributive justice, but shall refer the reader to his papers *Prirodno pravo i univerzalne vrednosti,* (Natural Law and Universal Values), Belgrade, 2005, and *Objektivna odgovornost za prouzrokovanu štetu (Objective Responsibility for Damage Caused),* prepared for the Symposium on the SEE Law that shall be held in October 2010 in Cavtat.

[84] G.Radbruch, *Legal Philosophy*, Nolit, Belgrade, 1980, p.293. Radbruch uses these terms when wanting to underline democracy as a necessary prerequisite for the legal state. He says that we must seek justice, but at the same time attend to legal certainty, for it is itself a component of justice. And further, according to Radbruch, *Rechtsstaat* is the only one able to satisfy the ideas of both: justice and legal certainty. Besides this, „democracy is indeed laudable … and the best thing about democracy is precisely that it alone is capable of securing for us the rule of law." (*ibid*)

[85] Ivo Krbek, *Garancije sudijske nezavisnosti* (Guarantee of Judicial Independence) (special print from the Album of Jurists' Congress), Belgrade, 1935, p. 2 and sim, according to whom a country without judicial independence can hardly be regarded a civilized country.

scope of basic principles on which a community rests, its philosophic views, economic and political constitution, technical civilization, ethical emancipation, judicial observation.

In this broader field of action of law and justice, on whatever specific space or time level, the principle of judiciary independence[86] sets a demarcation line which separates the field of law from the wasteland of non-law.

In the setting of a non-legal state, where the legitimacy and legality of law is below the permitted level of social tolerance, where the rule of law is substituted by the rule of self-willed fact: Individual or group power, passion or interest, where the principle of separation of powers is eliminated and the entirety of life is reduced to political monism and its strict hierarchy, there judicial independence is reduced to dependence on party, instead of legislative, decisions. Such dependence turns a judge into a derivative of an unidirectional charge (political, national, racial or class) and a judge is then objectively unable to apply just law.

Consequently, in the hypothesis of the non-legal state, the law shall suffer a shipwreck, and the principle of judicial independence shall sink along with it. To go to such „law" and to such a judge is to go to anti-justice.[87]

The entire history of law stands in testimony to this claim. And not just history, but comparative reality as well.

On the other hand, when the democratic principle is organized in accordance with the principle of compliance with the constitution and laws, then judicial independence is ensured by the operation of a legal state. This means that judicial independence, as an inevitable attribute of its function, is an organic part of the legal state.

The presented assertions lead us to the conclusion: judicial independence can be realized only under the hypothesis of the rule of law and the legal state. Understandably, neither shall a state acquire the markings of a legal state, nor shall a judge acquire independence, just by having these words written down in a law or constitution.[88] It shall become this when the result (origin) of law demonstrates the fact that certain law is legitimate in its inception and legal in its application.

---

[86] Regarding judicial independence, see specially: Danilo Danić, *O jemstvima sudijske nezavisnosti* (On the Guarantees of Judicial Independence), Belgrade, 1935; Ivo Krbek, *Garancije sudijske nezavisnosti*, (Guarantees of Judicial Independence), Belgrade, 1935; Đorđe Tasić, *O jemstvima sudske nezavisnosti* (On the Guarantees of Judicial Independence), Belgrade, 1935; Krivic Rudolf, *O jemstvu sodniške neodvisnosti* (On the Guarantees of Judicial Independence), Belgrade, 1935; Nikola Georgiev, *Garanci za nezavisimosta na sudijata* (Guarantees of Judicial Independence), Belgrade, 1935; Živojin Perić, *O sudskoj nezavisnosti* (On Judicial Independence), Belgrade, 1899; Živojin Perić, *O ulozi sudske vlasti po srpskom zakonodavstvu* (About the Role of the Judiciary According to Serbia's Legislation), Belgrade, 1909; Adam Lazarević, *Za problemot na sudskata nezavisnost, postojanost i nepodvižnost*, Skopje, 1960; Zoran Pokrovac, *Sudačka neovisnost, postulat vezanosti zakonom i slobodnopravni pokret*, Collected Papers of the Law School in Zagreb, no. 4, 1992, here, see especially: Hermann Kantorowicz, Der Kampf um die Rechtswissenschaft, Heidelberg, Winter, 1906.

[87] For more details, Giorgio Del Vecchio, *Giustizia e diritto*, Rome, 1934, p. 80 and sim. According to this author, a jurist and particularly a judge must, in as much as possible, master the entire system and, almost, revive it to feel its spiritual unity, starting from the distant and tacit premises to the smallest provisions, as if he alone were the creator of all, and that the law itself speaks through him. In terms of this high ideal, a judge is the living righteous man, as Aristotle put it. (translated by Đ. Tasić, Biblioteka javnog prava, Belgrade, 1940, p. 85)

[88] Thus, „judicial independence is not constituted solely because it said that it is independent, unless measures are prescribed that shall impart practical sense to such independence." (Živojin Perić, *O sudskoj nezavisnosti* [On Judicial Independence], Belgrade, 1899, p. 13)

As a matter of fact, judicial independence in the procedural application of law is reduced to the question of positivism or universalism of law. Ancient law already distinguished *ius* from *leges*, thus the question is whether a judge applies exclusively the law that is in force at the moment of its application, specifically in terms of its letter, or a judge delivers justice adhering to effective law, its meaning and reason, including even other established rules of conduct that supplement legislative dogmatics.[89]

The answer to this question essentially determines the boundaries of a judge's independence in the procedural application of legislation and law in general. At the same time, this is the central question of judicial independence.

When a judge is just an automatized applier of statutory norms, even those that to such an unbearable extent contradict justice that by the force of facts a statute must yield to justice,[90] and when a judge is not allowed to bring such statutory norm by interpretation to a just solution, then the principle of judiciary independence in the procedural application of law is reduced to its opposite. A judge then becomes dependant on the normative power of a dogma, contrary to general opinion and his discretion.

The Law of the Twelve Tables of Judiciary Independence. Based on the above stated, twelve tables of judiciary independence can be set, including the following:

I. In delivering justice a judge shall be independent from every authority, save the authority of legitimate law; II. a judge shall issue unbiased decisions within the procedure governed by law, based on the evaluation of facts and understanding of the law in terms of the realization of commutative and distributive justice; III. a judge shall also apply norms on human rights that stem from affirmed and proclaimed international agreements and generally accepted international standards that constitute an integral part of the internal legal system of every civilized community; IV. a judge shall be a person in public trust; V. the office of judge is based on a high level of judicial and general culture, thus a judge must have access to the opportunity for continuing education; VI. a judge, the same as other citizens, enjoys universal freedom of opinion, speech, expression, professional association, gathering and movement, but always so as to take care of the dignity of his vocation and objectivity and independence of the judiciary; VII. exercise of the office of a judge must not be the subject of improper influence, instigation, pressure, threats or interventions, direct or indirect, by anyone and for any reason; VIII. everyone shall be obliged, within the limits of peremptory norms, public order and ethics, to respect the independence of a judge and refrain from any act of improper influence. Every man who prejudices or violates a judge's independence shall be penalized in accordance with the law; IX. the state shall guarantee judicial independence by consistent application of the constitutional principle of the rule of law and the principle of separation of powers into legislative, executive and judicial, according to which the judicial shall be vested in courts; X. a judge may not be held accountable for an opinion or vote given in the exercise of his duty as a judge. Immunity of a judge shall be regulated by law; XI. a judge may not perform extra-judicial business activities which could compromise his judicial independence or dignity; XII. a judge must be excluded from adjudicating in a specific case when there are such reasons that bring into question his impartiality, or when there might arise a conflict of interest that is incompatible with the exercise of the office of a judge and with judiciary independence.

---

[89] Božidar Marković, *Ogled o odnosima između pojma pravde i razvitka pozitivnog privatnog prava* (Treatise on the Relations Between the Notions of Justice and Development of Positive Private Law), Belgrade, 1995, especially p. 9 and sim.

[90] For more details, see, Gustav Radbruch, Philosophy of Law, Belgrade, 1980, especially p. 288.

Crisis of the Legal System

Having discussed important determinants of legal order at the outset, we are going to dwell now on two possible phenomena: crisis of the legal system and the legal state as high achievements of the mentioned determinants of law.

In this context the question arises whether it is possible for a state ruled by law to face a crisis of its legal system. Any attempt at a response calls for analysis of the notion of crisis of the legal system and the notion of the legal state. Immense areas of existence and functioning of legal systems in general open up. And more than that, since law, in terms of its sources, functions and objectives, rests upon the organic connection with other cells of the social being; it cannot be perceived as an isolated legal technical matter and fact, but as part of integrated social institutions. Hence, the response to the question has to include consideration of meta legal social phenomena and institutions to an extent sufficient to define the notion of a state ruled by law, leading us also to the wide social horizon where in addition to legal, there are anti-legal states, which is yet another difficulty on the path to finding a reply to our question.

Thus, keeping in mind all the conditionality and complementarities of legal and social facts generally, it seems that the reply to the question whether it is possible for a legal state to undergo crisis of its legal system, rests in a labyrinth of the notion of the crisis of the legal system itself and the notion of the legal state. Therefore, this work will try to reply by attempting to offer characteristic features of these terms, and then it will no longer be difficult to trace the reply to the question posed.

Insurgence of fact against law – Law, because of its function, has always been on the path of permanent continuity of process of formation and application of the social rules of conduct.

On that path law, that is its demonstration, could be in line with social needs, requirements and may adequately reflect legitimate awareness and aspiration in the form of results of the crucial requirements and interests of social permanency. We affirm that law expresses then a symbiosis of the social and systemic integration of a society, that the law is in harmony with its material source.

However, on that same path there may appear smaller or not so small mismatches between the social fact and legal norm, the possibility that legal form will fall short of reflecting real social relations, and instead prejudices them in the form of a norm of wishes (program, declaration, vision) or the legal norm lags behind life when it turns into a halting mechanism.

In either case, law does not express real social relations, and substantive and formal mismatches arise between the legal norm and imperative social fact, a gap between social and systemic integration of legal institutions is created, and the „insurgence of facts against law"[91] occurs.

Thus, when such an „insurgence" occurs the situation needs diagnosis and fining a way out of it, of course. In other words, the question of crisis of law arises in individual parts or the entire legal system.

The history of legal civilization teaches us that legal science always focused on the inception, sources, effects, organization of law and legal order. As if it has forgotten that every life, hence the life of a legal system, has to end and that certain stages may be leading just to that end.

In other words, the general theory of law, including the philosophy of law, has not been much occupied with the issue of the crisis of the legal system. Generally, legal works such as

---

[91] G. Morin, *La révoste des faits contre le code*, Paris, 1920.

textbooks and systemic works do not contain a single chapter devoted to the crisis of the legal system. Were we to rate knowledge about this legal phenomenon, hardly a positive score would be earned even by those who, by their vocation, are obliged to educate legal novices.

Simply, there is no coherent theoretical whole on this legal phenomenon with all necessary properties of a theory.

Hence, the question: is it necessary at all to introduce crisis as a legal category and could the crises be separated from the connectivity of state, politics, economy and other areas of social supra structure. In a word, is it necessary to build a theory of crisis of a legal system which would firstly provide for criteria to discern such phenomena with the view to making a „diagnosis" and then showing possible ways out from such a state in the form of recommendation of appropriate „therapy"?

In the context of prevailing social crises, law is also susceptible to its own crisis. Both jurists and non-jurists talk about the crisis of law. The question is: are we going to continue discussing the crisis of law as a sort of comparison and metaphor or shall we start understanding what we are talking about. What sort of legal phenomenon are we talking, what properties, effects, what time span, what directions for emerging out of the crisis.

First of all, are the jurists in future going to know whether they have before them a formed and labeled legal phenomenon, when they pronounce that magic word „crisis", or shall they too get drowned in the waters of irresponsible use of words that spread like epidemics?

Originally, the notion of crisis came from medical terminology where it denotes the decisive stage in the process of an illness of life or death. Hence, this is a turning point in the sense of a situation imbued with the moment of transformation towards recovery or natural end of life of an individual.

In classical esthetics, from Aristotle to Hegel, crisis meant a turning point in an ominous process which with due objectiveness hardly penetrates outside, or dwells beyond the identity of persons confronted within it. In the philosophy of the eighteenth century this figure of though entered the evolutionistic theories of society of the nineteenth century.[92]

The notion of economic crisis, as a problem of economic theory, is found already in Adam Smith, Ricardo, Mill, Sismondi and others. In Marx's economic theory the notion of crisis is introduced in the world of economic science so that it represents coherent theory of the whole, with all requisite theoretical properties.[93]

In modern sociology the theoretical notion of crisis is known, particularly in the works of J. Habermas, professor of political sociology and philosophy at the university „Johan Wolfgang von Goethe" in Frankfurt am Main.[94]

According to him, the crisis occurs when the structure of a new social system allows less possibility for addressing problems than necessary for maintaining the organization of the system. In that sense crises are a permanent hindrance to societal integration.

Further on, according to this author, social crises of systems are not brought about by accidental changes of the ambient, but by structurally founded imperatives of the system, which are unrelated and cannot be hierarchically placed. Therefore, not all structural changes of a social system are crises at the same time, so this author perceives in it so called areas of tolerance, where the desirable values of a social system may cross without threatening it in terms of organization or loss of identity. Only when members of society experience structural

---

[92] J. Habermas, *Problems in the Legitimacy of Late Capitalism*, Zagreb, 1982, p. 10.

[93] Z. Baletić, *Marxist Theories of Economic Crises*, Zagreb, 1965.

[94] J. Habermas, *Problems in the Legitimacy of Late Capitalism*, Zagreb, 1982.

changes as critical for the organization and feel their social identity jeopardized, one may speak of crises.

Consequently, according to Habermas, crisis situations take on the form of disintegration of social institutions. Social crisis is not at work when its members only say so, nor is society in crisis always when they say so. Thus, crisis cannot be determined only by means of the phenomenon of awareness of it, and instead objective criteria must be looked for.

Developing this thought, Habermas came to the conclusion that the notion of social crisis must encompass and threaten the connection existing between systemic and social integration. This author understands social integration as a system of institutions gathering socialized citizens who speak and act so that the system here appears in the aspect of the world of life which is symbolically structured.

On the other hand, under the system of integration this author understands specific activities of directing a self-regulating system, so that social systems appear here within the aspect of capability for maintaining their limits and their organization by overcoming complexities of an unstable environment. Both paradigms, the world of the living and the system have law, but the problem is to connect them. Crises occur when the link gets lost or is significantly disturbed between systemic and social integration of social institutions.[95]

Connexity – As can be seen, the crisis of law cannot be perceived in isolation from the crisis of the system which involves the integrity of social, economic and legal institutions. It is situated in a sort of adhesion with the status of economic organization of the respective social community and its functioning, moral emancipation, philosophical and political concept and order, by the degree of cultural development in general.

When there is economic crisis in a social community, which is diagnosed by means of scientific economic parameters, then the crisis of law appears as a segment of such social basis, which particularly goes for those branches of law that are in organic connection with goods and monetary relations which they legally regulate.

No „automatism" should be seen in it, which functions by itself, proclaiming the crisis of law as soon as economic crisis occurs, but in this „ominously" connected whole lies the ratio of legal crisis, its reach and character, which must come into the focus of the systematic-theoretical view and which would be capable of determining the causes and phenomenal forms of the crisis of law.

Consequently, if crisis of the system as a whole is discussed, particularly crisis of the economic base, it is difficult to presume a normal situation in areas of law, as a specific social system which expresses and reflects the status of the social basis, on the whole.

Still, considerable variation and differences between the crises of individual sectors of social life are possible. Maybe a crises of economy or crises of any other area of social background will not result in a crisis of law, or not at the very same time, to be precise.

Law may then adjust to crisis situations in other areas of social life so as to avoid falling into its „own" crisis, and instead changing, bending like „caoutchouc norms", enabling all modifications in the so-called areas of tolerance which do not yet threaten the legal system and which did not succumb to their „own" crisis.

Under such presumption, the law exercises the so called coupling effect to its foundations and if the crisis of the social base is transformed to the direction of recovery, there are great prospects for the law to move from the area of tolerance into the area of „normal flow" avoiding its crisis. Thus, for instance, the big economic crisis in the early thirties of the 20th century did not automatically, symmetrically and simultaneously cause the crisis of the legal system.

---

[95] Habermas, ibidem.

And vice versa, it is possible, although more in theory than in practice, to have the law stuck in its „own" crisis, without the crisis of the social background. It seems that the prospects for recovery of law (emerging out of the crisis) are objectively easier.

Given the common denominator of social crisis, every area of social life may undergo crisis and its „autonomy". That relative autonomy within the crisis of the system as a cumulative notion, obliges the theory of every sector of social life to establish criteria for recognition of the crisis, to determine its substantive and formal elements with the view to getting out of it (e.g. the crisis of ethics, politics, philosophy).

Definition of the crisis of the legal system – Unlike the „crisis" in figurative terms and way of comparison, we will try here to define the crisis of the legal system exclusively from the standpoint of synthetic theoretical view of a possible coherent theory.

It primarily means that it is necessary to determine the main elements of that notion, attributes of the crisis of law, both substantial and formal characteristics, alternation and accumulation of properties, and particularly certain intensity and degree of „insurgence" of facts against law to be able to speak of the crisis of the legal system.

Hence, it is necessary to recognize the „decisive point" in the process of transformation into recovery or destruction, that bordering line between the area of tolerance and the area of crisis. In other words, the definition of crisis of the legal system should, among other things, demonstrate to what extent and which degree of threat a legal system can „withstand", without the occurrence of the stage of its crisis.

If general knowledge of sociology is taken as a point of departure for the social notion of crisis, and particularly the crisis in terms of jeopardy of the link between the systemic and social integration of social institutions, it may be said that crisis in law has its own attributes, but which are in the final instance the very expression of the gap between the two mentioned paradigms as social integrated wholes.

Hence, starting from this observation, and having in mind the role and the nature of law as a phenomenon on its own of an organized society in a given civilization, we might say, *that the crisis of the legal system exists when its further existence comes to the state of decisive moment of transformation and due to such shortcomings in quality and quantity of law, which resulted in non-application or non-objective application of law, threaten constitutionality and legality to such an extent that in general opinion legal uncertainty becomes a social fact.*

The following crucial elements come from this definition: shortcomings in the quality of law; shortcomings in the quantity of law; non-application or non-objective application of law, threat to the principles of constitutionality and legality and legal uncertainty as a notorious social fact.[96]

Still, we shall indicate here only the aggregate attribute of the crisis of the legal system reflected in an inadmissible degree of legal uncertainty.

In an attempt to define the notion of crisis of the legal system, legal uncertainty figures as an aggregate attribute, as a sort of common denominator for other attributes: quality and quantity of law, non-application and non-objective application of law and threat to the principle of constitutionality and legality.

This is because it seems that through certainty or uncertainty of law and the uncertainty of the subject of law, as to how and to what extent they should behave relative to certain dis-

---

[96] Due to limited space the author shall desist form elaboration of all attributes of crisis of the legal system, and instead refers to his text *Time Dimensions of Positive and Natural Law,* Belgrade, 2009, p. 227-255, and especially to the text concerning nominalism and valorism and the question of impact of changed circumstances on the existence of a binding contract.

position and how and which sanction to apply under the same or similar hypothesis of the norm and whether the law will be equally or unequally applied to equal cases – the aggregate effect of law and its role and adequacy towards the social cause of law is achieved.

In fact, any shortcoming of a normative system is synthesized in a synthesis of legal effects in the process of its application. When, for instance, in the process of application of law (of course in the process of creation of law, alike) a big dose of uncertainty occurs, it brings disharmony into the integrity of social and legal institutions; social, economic and legal uncertainty ensues for the legal subject, credibility of the legal authority gets lost and thereby the law becomes incapable of genuinely reflecting the character and nature of social causes of law.

Therefore, according to the new definition, although aware of its shortcomings, it seems that legal uncertainty appears as a cumulative attribute to the notion of crisis of the legal system, but of course under the very categorical requirement that a certain degree of legal uncertainty must be determined in a socially safe way and therefore the criterion of general opinion is proposed.

General opinion – Any legal system abounds in certain measures of uncertainty, inadequate norms and unequal application of law, because there is no ideal legal system. However, these are areas, as mentioned before, of tolerance, which in themselves do no constitute the attribute of a crisis.

However, when legal uncertainty appears as a consequence of lack of quality and quantity of law, which cause the non-application or non-objective application of law in such a way that legality and constitutionality are threatened to such extent that legal uncertainty in general opinion becomes social fact – then the nature and intensity of such uncertainty appears as qualification of a certain state of affairs.

That qualifier may be established only by means of objective scientific methods, notably in the process of scientific learning of relevant facts. Modern sociology, being exact, offers many relatively secure ways of determining the real state of affairs and attaining awareness of people about certain social phenomena. Let us mention just the classical ones: collection of facts, observation, study (in-depth), measurement (sociometry), statistical data, experiments, data comparison or comparison of observed phenomena etc.

Understandably, within the mentioned sociological methods of scientific learning of relevant facts and social phenomena, an important role is assigned to the findings and judgments of the status among the public at large and in professional circles.

In this context it may be said that generally known facts need no proof. However, whether a phenomenon is generally known, whether it is an expression of a general view is a question which may provoke different reactions in science as „organized questioning". Hence, when speaking about recognition of whether legal uncertainty in a system is notorious or not, a scientific method should provide a notorious answer.

Possible Conclusions

If the definition of a crisis of the legal system is taken as point of departure, it will be possible to establish that a given legal system has come into the state of crisis, if legal uncertainty, as a notorious social fact, comes up as a result of threatened constitutionality and legality in terms of non-application or non-objective application of law, which has its relevant shortcomings in its quality and quantity.

Cumulative rather than alternative elements of the notion of a crisis of the legal system are a consequence of the above, since intensity of legal uncertainty is measured by its appear-

ance in the form of an aggregate or an independent attribute, and of whether legal uncertainty in the process of scientific knowledge receives the qualification of notorious social fact.

If legal uncertainty, against the application of the mentioned criteria, appears as uncertainty of lower intensity (it is not a notorious social fact, or it is not a common denominator of all other attributes of the crisis of the legal system), which is established under the appropriate procedure of scientific knowledge, then such a legal system exists in so-called areas of tolerance which may possibly denote its pre-crisis status, but such a legal system is not in crisis.

On the contrary, if examination of all relevant elements of crisis, through application of the mentioned criteria, has shown that all those elements are connected into one whole, which in its totality gives a common denominator of legal uncertainty scientifically established as a notorious social fact, then such a legal system has come to a stage of crisis.

Since the crisis constitutes a decisive point of transformation of one legal system, and in the direction of recuperation or comatose status, the question is what the ways of emerging out of the crisis are.

One of the possible logical observations is that emergence out of the legal crisis occurs through elimination of the attributes of crisis and their social causes by bringing about the main social assumptions for a better law which shall be objectively applied and which shall not result in threats to constitutionality and legality and legal uncertainty.

At a first glance, this observation may seem to be „a vicious circle", but if a responsible society, systemically and scientifically opens up processes leading to harmony between the legal norm and social fact in a selected social system and if it efficiently, objectively and consequently implements its law with respect to its constitutionality and its legality, then emergence out of the crisis of law is not unreachable, and is instead quite a realistic social phenomenon. But there is another point - it all depends on the execution.

In other words, if one legal system were to eliminate elements of legal system crisis which have been discussed so far, then such a system may carry the epithet of the legal state.

Main Characteristics of the Legal State

Terminology – To be able to know what we are talking about we should first of all look into different meanings of the expression „a state based on the rule of law". The more so as in our jurists' and even more in non-jurists' circles this is often used and abused whenever someone wants to politically „justify" a measure taken by the legal or anti-legal state.

So, this expression also tends to take on the strength of a magic word, which should explain everything and nothing. But, here, this „trouble with words", apart from learned ignorance, hides an animus of trained knowledge: in front of laymen anything can be obfuscated by pronouncing the words „a state based on the rule of law" or „functioning of the legal state."

It goes without saying that this is not and cannot be a general phenomenon. In many cases the expression legal state (state based on the rule of law) is used in its well defined, professional and scientific meaning. But that genuine echo is too weak to prevent noise and confusion which by use and abuse of this term spreads like an epidemic. It is hardly consoling, but nevertheless such meta-scientific tones share the destiny of moonlight and will leave no trace in the world of science.

The origin and comparison - As a phenomenon and as an expression, a state based on the rule of law is first found in the German political and legal theory at the end of the 19th century and the beginning of the 20th century (Rechtsstaat), in particular in the works of Laband and

Jellinek. According to these sources, a state based on the rule of law ensures respect for the principle of legality and legal equality of citizens before the law, because the administration and the judiciary were placed under the „rule" of legislation. It provides for the continuity of constitutional constitution based on the legitimate authority of elected bodies.

In the period of absolutist feudal monarchy, judicial and in particular administrative authorities were not under the rule of legislation, but they exercised their function „freely" according to their discretional assessment and interpretation of national interests. It was the ground where the legal uncertainty of citizens reigned. Pursuant to the assumptions of democratic bourgeois revolutions, surrender of legislative power to parliament elected under general suffrage meant, among other things, the creation of a state based on the rule of law as "a juristic form of democracy."

In fact, „the state based on the rule of law" appeared in the process of limiting and „halting" a monarch's absolutist power, as the holder of all the administrative authorities, and that process opened the period of democratic bourgeois revolutions, overcoming absolutism and ushering in the period of sovereignty of parliament. Considering the delay of this process in Germany, where the monarchist government outlived the bourgeois revolutions in other European countries (England, France), it was, yet, the German legal and political literature, where the term and expression „legal state" (state based on the rule of law) appeared at the end of 19th century and in the beginning of 20th century, although the idea of the rule of law was conceived earlier in this literature.

At a time when the German legal and political literature conceived and built the concept of the Legal State, in England the theoretical doctrine of „the rule of law" (rule or supremacy of law) had been already established and structured. That theory formulated by Dicey[97], modified or even denied by some authors, remains to this day as a „cornerstone" theory of the rule of law in English constitutionalism.[98]

Situated in the context of individualism, of the common law system, Dicey's theory of the rule of law, in addition to the principle of sovereignty of parliament, will figure in English constitutionalism as one of the highlights to this day. Hence, Dicey himself would say that sovereignty of Parliament is a form and rule of law, the substance of the modern British Constitution.[99]

According to this theory, the rule of law is opposed to any system of government that allows holders of public office to perform large, arbitrary or discretionary powers of coercion. With this, the theory of the rule of law, in fact, raises a wall against any arbitrary authority and political voluntarism. Furthermore, the rule of law in particular insists on the principle of legal equality of all subjects before the law, regardless of their possibly different political, property or other status. Finally, the rule of law means legal security, which in case-law has a different meaning than in continental law.

The liberalistic essence of the theory of the rule of law set by Dicey was the subject of theoretical criticism in the thirties of the 20th century even resulting in „an anti doctrine of the rule of law" (Lask). Complaints concern lack of clarity and uncertainty about the rule of law theory, which can have multiple meanings (Jennings). However, the theory of the rule of law has survived its critics, and even spread to the contemporary Anglo-American literature

---

[97] Dicey, *The Law of Constitution*, 3rd ed., London, 1899, p.393.

[98] For more details, see the excellent study by L.Basta, *Politika u granicama prava* (Politics Within the Limits of Law), Belgrade 1984, p.92.

[99] L. Basta, *ibidem.*

(Hayek), despite the „incompatibility" of the theory of the welfare state and the theory of the rule of law.

However, Anglo-American theory of government under law, despite its „originality", is essentially a substituted and continued theory of the rule of law, in spite of the different terms and even some elements that make up the attributes of this theory.

If we were to compare the German theory of the legal state and Anglo-American theory of the rule of law, we would find some common denominators, because both represent the juristic form of the liberal state[100] and as such put legal certainty and legal equality in the foreground as necessary attributes of the legal system. As for the differences, let us rely on a formula: while the legal state, under the pervasive influence of legal positivism, ends up in the ultimately formalized generality of law, the principle of the rule of law rests on the claim that justice in accordance with law acts as a factor in the decision or as a factor of control.[101]

In the French political and legal literature, instead of the legal state or rule of law, the term „constitutional state" is accepted. However, despite the difference in terms, essentially the problem is always placed in the same light and with the same issues discussed so far in this paper.

So when it comes to the expression „the legal state", its meaning can be seen also in the normativistic „pure theory" of law (Kelsen), where the state based on the rule of law is seen externally, as a fact, itself as such. Duality is recognized in it: it creates law, but is itself created by law and, therefore, the state in its being is „the legal state", no matter which state is in question.

Thus, when it comes to the state based on the rule of law it is necessary to specify previously the meaning of the term, to know what we are talking about. Before we move to an attempt to determine the term, let us mention some standpoints of our pre-war theory of the state based on the rule of law. For M. Marković (*Pravna država* - The State Based on the Rule of Law, Belgrade, 1939, p. 10), we have the state based on the rule of law when the entire country is organized according to the principles of law and when there are sufficient guarantees that power will be exercised in keeping with those principles. In a legal state power is placed in the service of law and there is no legal state in fact without freedom of speech, as there is no freedom of speech without the legal state.

According to this thesis, in a democratic social order, which assumes that any individual will is of equal value as any other, the legal rule is considered as the highest social category to which, not only all of the individual wills are subordinated, but the will of the state itself is subordinated. When entire national governments, especially government administrative bodies, are placed under the legal system, then we can speak of the state based on the rule of law.

Otherwise, features of the rule of law, according to this opinion, that we should mention are: the equality of all before the law, both for those who are controlled, and for those who control; the relationship of the individual to the state, in the police state the individual is a subject, while in the state based on the rule of law the individual is a citizen; freedom of citizens, anything not prohibited by law is permitted; the principle of separation of powers as a first and necessary element of the rule of law; judicial control over administrative acts of government; the principle of legality as a cornerstone of the modern legal state; the legal state cannot be imagined without the control of public opinion.

---

[100] Neumann, *The Democratic and the Authoritarian State*, Zagreb, 1974, p. 25.

[101] L. Basta, op. cit., p. 116.

Attempt at Defining the Term

Evidently, the notion of the rule of law can be approached from different points of view. In addition, to be immediately pointed out, different terms: „legal state", „rule of law", „constitutional state", despite the differences that are hidden somewhere in numberless cells of this or that social organism, stem from the same essence and the same question: what properties should a legally organized community have in the form of state structures so that members of the community behave according to the rules that correspond to their common will and in a manner that these rules apply equally in all equal cases.

Starting from this observation, and keeping in mind the social causes of law, it seems that the notion of the state based on the rule of law should, above all, express the intimate consent of the majority of members with the quality and quantity of legal norms by which they will *pro futuro* abide in their organized community. It is necessary therefore in the legal state that law becomes „their ownership", an expression of collective desire, and not to be imposed by aggression of the minority. On the other hand, when that harmony between the formal expression of law and the fact of its origin is attained, another essential need arises, for such law to apply to all members without any discrimination.

Since due to the nature of things, both claims cannot be achieved in the literal and the consequent terms, it is necessary to designate areas where social tolerance variations are possible and for the identity and integrity of these requirements not to be threatened.

The process of creation and even more the process of application of law requires a necessary degree of legal certainty, which is based on the security of systemic and social integration of social institutions. The state based on the rule of law should, therefore, provide for this social need.

Taking into account its given characteristics, it seems that the notion of the state based on the rule of law could be expressed in the words that *the state based on the rule of law is a state in which its legal system provides such a degree of legitimacy and the rule of the principles of legality that they are within the limits of social tolerance.*

Legitimacy

In the state based on the rule of law authority and arbitrariness are halted by the constitution and the law and in such a way as to protect the inviolable basic rights and freedoms. The moment when constitutionality and legality are replaced by the principle of expediency, when anyone's interests are put above the constitution and law, then the state becomes less and less legal and falls ever deeper into crisis. When illegitimate authorities are added to such a situation, hence alienation of state authorities from citizens, then the state and its legal system overstep legitimate rights and democratic order.

Order in the state based on the rule of law must stem from democracy, from a system of human freedoms and rights When policy becomes arbitrary and alienated, when by the strength of its power and dictate it imposes on the law and the legal system, then the legal system loses legality. Then one enters the area of political expediency, dominated either by revolutionary consciousness or political loyalty, and the agony of law and the creation of an anti-legal state ensue.

The fate of law is not decided in plenums, closed cabinets or important political meetings, often isolated from the public, but in national-legal life, in the social being as the material source of law. The legitimacy of law is acquired by the decision of majority, and not the decision of the minority.

To do this it is necessary to ensure free expression, and no free expression exists under conditions of totalitarian monism. Where there is such a monism, legitimacy is fictitious, also

because such „legitimacy" is not suitable for a man as a thinking and individual being. If it were otherwise, people would not differ much from non-human beings. Man is but a reed, but he is a thinking reed (Pascal), and just because he is a thinking being he has integrity, which means his particularity and difference relative to other people. If all the millions of people of a community think the same, then they are not thinking beings. Hence, the legitimacy of law is not achieved by coercion, by violence or „marching steps" of members of a legally organized community, or false display of the actual status. It is only acquired through a free and democratic voting process.

Hence, when legitimacy and legality are abandoned and the side of alienated political power is taken, then the owners of public functions appear, indoctrinated judges and other executors of orders of another who overstep the law, unobstructed and unpunished, whenever it stands in their way. The principle of legal certainty then gives in to self-will, and this is the end of law.

Since legitimacy and the limits of its social tolerance are determined by the degree of the attained possibility for the members of one community to opt for one of several solutions offered by their free will, the question is whether this may be accomplished under conditions of totalitarian political-legal monism, which by its notion and nature offers no room for demonstration of any pluralistic social values and interests.

Practice has shown that under such conditions a strong, merciless, even temporarily steady legal order may exist, but such legal order is no exaltation of the state based on the rule of law, it does not have an adequate degree of legitimacy, and it inevitably falls into a crisis with disastrous historical-legal consequences.

How far the monistic exclusion can go is demonstrated by an example of the definition of law provided by the Congress of German Jurists in 1933 – „law is everything that is useful for the German people, and non-law, everything that is harmful" – where the useful and harmful is judged from the point of view of exclusiveness of national fascist ideology, where the supreme criterion is the understanding of the leader. Understandably, any idea of the state based on the rule of law and its legitimacy are buried.

The threat to the principle of legitimacy is possible also where no dictatorship of one man or one party exists, and instead the aspiration to free administrative power from legal control and public opinion occurs under the pretext of „the iron fist", „complete security", „national unity".[102]

Hence, when legitimacy of any power is at stake, the axiom of legitimacy is always topical, it seems: „The strongest is never strong enough to be always the master, unless he transforms his strength into right, and obedience into duty."[103]

Evidently, this formula of legitimacy promotes two of its characteristics: the rule of law and not of force, and submission of all, even the master, to conduct compliant with the law, in terms of duties. In reality, those are the realms of the state based on the rule of law.

Legality

The rule of law, or in other words, the state based on the rule of law, is achieved through pursuit of legality. When „submission" to law becomes the obligation for all, even for the „master", when all are equal before the law and the law is equally applicable to all equal cas-

---

[102] Cf.. M. Marković, op. cit., p. 54.

[103] Rousseau, *Social Contract*, Belgrade, 1949, p. 11; more in. Tadić, *On the Notion of Legitimacy of State Power*, Yugoslav magazine, 1–2, 1979.

es, then it becomes the other characteristic of the notion of the state based on the rule of law. That characteristic of the notion of the state based on the rule of law does not exist in a separate field. It is not isolated, but is taken in a cumulative sense with the requirement for legitimacy.

The principle of legality, more precisely, its violation is best seen in the fact of non-application of the law or non-objective application that was already discussed in this work in the exposé on the elements of the notion of crisis of the legal system.

Let us mention here another point, that the issue of objective application of law, as a general norm to concrete cases, has always been in the history of legal civilization in the very focus of the idea of law and legal order in general. The age of this issue is not measured in years but centuries.

For Aristotle, passion spoils and perverts even the best magistrates and the best people, while law and its application is intelligence without passion; people are not ashamed when applying to others what they consider neither equitable nor useful for themselves. The state ruled by law should hence ensure through the requirement of legality that those who create, study or apply law never „blush" for doing so.

Discussion of the distant retrospective of the principles of legality requires here the mention of the Code of Tsar Dušan, according to whose order, the law, promulgated at the Assembly is stronger than the Tsar himself; and null is the Tsar's writ that transgresses the Code, and be not according to justice and law; such writ, that the Tsar issued either from anger or from love or by grace for someone, shall not be carried out by judges; all judges shall judge according to the law, and shall not judge out of fear of the Tsar.

The domain of social tolerance – If an ideal legal state denotes a state that secured the rule of the principles of legitimacy and legality to the degree of the imagined consequence, that each law is the expression of the will of all, and that every law is always and in each case applied in an equitable and „equal" manner, then such a state is nonexistent and never will be. Hence, in those terms no state is genuine. Because, if we were to imagine that it could be realized in these „ideal" terms, then it could be more of a sort of apostolic than human creation.

Therefore, in an attempt to define the notion of the state based on the rule of law, we pointed out in the very definition the so called area of social tolerance where the principle of legitimacy and legality rules. Thus, when limits of that area are violated, then we exit the stage of the state based on the rule of law and enter the „wild" fields of anti-law.

Understandably, the question of criteria for recognition of such a state inevitably arises, the question of more reliable signs, where in a given case the area of social tolerance is in jeopardy, the legal state loses this property.

As to the criteria for benchmarking the degree of application of the principles of legitimacy, and possible threat of the area of social tolerance, it seems that the single relevant criterion could be the establishment of the fact whether in a given situation free will is secured, along with its free expression by all those who are called on to take a certain decision.

It goes without saying that this is impossible to ensure under circumstances of the dictate of any monism, political, economic, legal or moral. Pluralism of all those social conditions is a prerequisite for the realization of the principle of legitimacy, but is not its merit. The principle of legitimacy, to reach the area of so-called social tolerance, under conditions of the mentioned pluralism, must be expressed in such a way that through it truly rather than fictitiously the relevant will of the majority is expressed, which can be determined in an exact way.

On the other hand, in considering the criterion for determining whether the principle of legality is within the limits of social tolerance or whether those limits are endangered, seem-

ingly the degree of legal certainty that is uncertainty would be the „key" in the hand of exact examination. Moreover, legal uncertainty here implies the aggregate and cumulative notion demonstrating all the causes which led to this phenomenon, as a notorious social fact.

Concluding Opinion

In the introductory part of this chapter the question was posed whether the state based on the rule of law can come to the stage of crisis of its legal system.

Since here we attempted to define the notion of the crisis of the legal system and the notion of the state based on the rule of law, evidently the answer to the posed question will start from such an attempt.

Having said for the crisis of the legal system that it exists in the case when the existence of the legal systems assumes the condition of the decisive moment of transformation, due to such lack of quality and quantity of law which resulted in non-application or non-objective application of law, jeopardizing constitutionality and legality to such an extent that it is generally upheld that legal uncertainty has become a social fact – and having said for the state based on the rule of law that is exists when it secures the rule of the principles of legitimacy and legality in its legal system and to such an extent that the application of these principles ranges in the areas of social tolerance, then it is concluded that those two social phenomena cannot coexist in a single legal state construct.

The crisis of the legal system is an antipode to the state based on the rule of law. Whatever makes up the elements of crisis of the legal system is counter proportional to the properties of the state based on the rule of law. In addition, it is superfluous to say that neither social phenomenon is „petrified in eternity" and that the transformation from one characteristic into another is not only possible but in the contemporary world, realistic and topical.

Hence, when from the crisis of the legal system, by attempting to eliminate its attributes, the domain of recovery is reached, then it shall not be difficult to find the way leading to the state based on the rule of law.

Equitable Law as an Attribute of a State Based on the Rule of Law

Let us dwell for a little longer on the theoretical concept of equitable law, particularly from the aspect of the amount of justice or injustice possibly present and demonstrated in a specific positive law. More precisely – obedience to bad law or response to justice and conscientiousness.

The dilemma is ancient, but always alive: „Socrates and his judges dissented in one essential point – the relation between the state and the individual. The judges advocated the state's right to impose commands, while Socrates advocated personal freedom of thought. According to the opinion of the judges, Socrates exaggerated the freedom of opinion. If everyone would like to think about everything with his own head, what would be left of the state's right to command? Everyone would hold to be smarter than the state, and this would leave no one under its command. Socrates on the contrary, was of the view that without freedom of opinion there can be no moral progress for man. Moral progress is a matter of our consciousnesses which recognizes no power over itself.

In the case of Socrates the question was, clear as clear may be, of the relation between state authority and personal freedom. That question overwhelmed Plato who was aware of its

great difficulties and made several attempts to address it. In his Apology (Socrates' defence before the court) Plato stood firmly by his position that in the area of his convictions a man owes submission to no one, including the state. The state, when suffocating freedom of opinion, perpetrates the biggest crime against humanity. To quench freedom of opinion is the same as to extinguish the voice of conscientiousness in us."[104]

Although Socrates, „faired much better before the court of history than before the court of Athenian democracy,"[105] still modern legal civilization, led by experience and philosophy of equity and equitability, does not set the principle of domination of individual will over the law as a general enactment of a community.[106]

In other words, legal and social certainty, as one part of general justice, imposes obedience of laws, even in the case of tolerable injustice, but not in the case of intolerable injustice.

In those terms, the works of two authors deserve attention. First, Gustav Radbruch[107] who had looked at unjust laws of the period of WWII (hence his work „Statutory Lawlessness and Supra-Statutory Law") and second, John Rawls, who some three decades later, hence in different historical circumstances and in the presence of human rights codified by the UN saw the same problem with the eyes of his „Theory of Justice" (1971). The work that provoked considerable comment worldwide, which together with the mentioned work could be hardly bypassed in contemporary literature devoted to the relations between justice and law.[108]

Already in the „First Minute" of his Legal Philosophy[109] Radbruch raised his voice against blind positivism of law, and in favour of higher principles of natural law or rule of reason that are stronger than any legal regulation. He said: an order is an order, the soldier is told, and a law is a law, says the jurist.

The soldier, however, is required neither by duty nor by law to obey an order whose object he knows to be a felony or a misdemeanour, while the jurist – in the absence of natural law, recognizes no such exceptions. This view of law, according to positivistic teaching, has rendered jurists and the people alike defenceless against arbitrary, cruel, or criminal laws,

---

[104] Slobodan Jovanović, *Iz istorije političkih doktrina* (From the History of Political Doctrines), volume 9, Belgrade, 1990, p. 17.

[105] Slobodan Jovanović, *ibidem*, p. 15. The following is also stated here: Civilized humanity celebrates him as the first martyr of freedom of thought. He is seen as a man who put his moral convictions above all else, and hence above the command of state authority, a man who rather preferred to be sentenced to death, than to err against his consciousness. Rising against the state's omnipotence on behalf of moral autonomy of the individual, he asked the question about the relation between policy and morality, and since the time he raised it, the question still remains open.

[106] For more details see, Gounot, *Le principe de l'autonomie de la volonté*, Dijon, 1912; Waline, *L'individualisme et le droit*, Paris, 1945; Coumaros, *Le rôle de la volonté dans l'acte juridique*, Bordeaux, 1931; Ripert, *La régle morale dans les obligations civiles*, Paris, 1927.

[107] Gustav Radbruch, *Legal Philosophy*, Nolit, Belgrade, 1980. Gustav Radbruch (1878–1949), in the aftermath of WWII returned to the University of Heidelberg in 1945, and soon became Dean of the Faculty of Law and a member of the Academy of Sciences in Heidelberg and Berlin. More in S. Vračar's Foreword to the mentioned edition of Radbruch's Legal Philosophy.

[108] John Rawls, *A Theory of Justice*, Harvard University Press, Cambridge, 1971; some chapters of this book were published in the magazine „Naše teme", Zagreb, 1990, 34(5) and 34(6). More about the book: Tatjana Glintić, *Pravda, sloboda, jednakost – Rols i Volzer* (Justice, Freedom and Equality - Rawls and Volzer), Belgrade, 1995; Milorad Ivović, *Nepravedni zakoni i njihova primena* (Unjust Laws and Their Application), magazine Pravni život, no. 12 of 1995, p. 95 and further; particularly, Raymond Boudon, *Le juste et le vrai, Etudes sur l'objectivité des valeurs et de la connaissance*, Fayard, Paris, 1995, p. 406 and on.

[109] G. Radbruch, ibidem, *Five Minutes of Legal Philosophy*, p. 265.

however extreme they might be. In the end, such a view equates law with force; according to him, there is law only where there is force.[110]

That is why already in the „Third Minute" of Legal Philosophy, Radbruch proclaimed law as the will to justice. The justice being that which Aristotle called commutative and which was already discussed here.

In this context, Radbruch says if one applauds the assassination of political opponents, or orders the murder of people of another race, all the while administering the most cruel and degrading punishment for the same acts committed against those of one's own persuasion, this is neither justice nor law.

If laws deliberately betray the will to justice – by, for example, arbitrarily granting and withholding human rights – then these laws lack validity, the people owe them no obedience, and jurists, too, must find the courage to deny them legal character.[111]

However, according to the author (Fourth Minute), of course it is true that the public benefit, along with justice, is an objective of the law. And of course laws have value in and of themselves, even bad laws: the value, namely, of securing the law against uncertainty. And of course it is true that, owing to human imperfection, the three values of the law – public benefit, legal certainty, and justice – are not always united harmoniously in laws, and the only recourse, then, is to weigh whether validity is to be granted even to bad, harmful, or unjust laws for the sake of legal certainty, or whether validity is to be withheld because of their injustice or social harm. One thing, however, must be indelibly impressed on the consciousness of the people as well as of jurists: There *can* be laws that are so unjust and so socially harmful that validity, indeed legal character itself, must be denied them.

Finally, linking the laws to the higher principles of natural law (Fifth Minute), Radbruch says that the legal principles of natural or the law of reason are weightier than any legal enactment if those are in conflict with them. To be sure, their details remain open to question, but the work of centuries has in fact established such a core, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could still entertain doubts about some of them.

Elaborating these ideas, Radbruch, in his work „Statutory Lawlessness and Supra-Statutory Law",[112] having once again criticized the application of inequitable laws by justices[113]

---

[110] According to Radbruch (*ibidem*, p. 281): By means of two maxims, 'an order is an order' and 'a law is a law', National Socialism contrived to bind its followers to itself, soldiers and jurists respectively. The principle 'an order is an order' has never been unlimited in its applicability. Soldiers had no obligation to obey orders serving criminal purposes (Military Penal Code, 47). The principle „a law is a law", on the other hand, knew no restriction whatever. It expressed the positivistic legal thinking that, almost unchallenged, held sway over German jurists for many decades. 'Statutory lawlessness' was, accordingly, a contradiction in terms, just as 'supra-statutory law' was. Both problems confront legal practice time and time again. Thus, for example, the *Süddeutsche Juristen–Zeitung* published and commented on a decision of the Wiesbaden Municipal Court, according to which the 'statutes that declared the property of the Jews to be forfeited to the State, were in conflict with natural law, and null and void the moment they were enacted.'

[111] For more details about the importance of natural law through history and the possibility of application of the idea of natural law in different times, see Mihailo Đurić, *Iz istorije antičke filozofije* (From the History of Ancient Philosophy), Official Gazette, Belgrade, 1996, p. 322.

[112] G. Radbruch, *ibidem*, p. 281.

[113] G. Radbruch, *ibidem*, p. 286, which states: „A judge can never administer justice by appealing to a statute that is not merely unjust but criminal. We appeal to *human* rights that surpass all written laws, and we appeal to the inalienable, immemorial law that denies validity to the criminal dictates of inhuman tyrants;" and further, „In light of these considerations, I believe that judges must be prosecuted who have handed down decisions incompatible with the precepts of humanity and have pronounced the death sentence for trifles " (for these positions see p. 286 of Radbruch's already quoted book of Legal Philosophy)

derived the possible scale of validity and respect of laws from the point of view of the amount of injustice contained by law.

According to him, the conflict between justice and legal certainty may well be resolved in this way: positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless its conflict with justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law.

For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice. Measured by this standard, whole portions of Hitler's National Socialist law never attained the dignity of valid law.[114]

Radbruch's theory of statutory lawlessness and supra-statutory law paradigmatically expresses the relation between positive (often unjust) law and natural law. Statutory lawlessness and supra-statutory law – are words representing a syntagm, more precisely a synthesis of centuries long evolution of the issue of positive and natural law. In that context, this is juristic algebra, like Kant's categorical imperative or a priory formula of equitability of Hugo Grocius.

However, Radbruch's categorical judgment on the invalidity of intolerably inequitable laws, remains somehow vague in the face of the question of the ways and means of getting rid of such laws. Is it the evolution or revolution of laws? But, given the fact that such laws are already in existence (it is supposed that they enjoy legal force), shall the court reject to apply them (which is seemingly closer to the quoted text) or shall it apply them, which would be an unreasonable act by the court.

Understandably, the best way of getting rid of such laws is their revocation by the competent legislative body.

However, if such laws are „persistently" maintained in force, then it seems that the court could not formally reject their application, but what it must do is „to bring such laws to reason" by means of targeted interpretations, and apply laws thus interpreted in the manner suitable to indisputable principles of rational (reasonable) natural law that have acquired nowadays full legitimacy in the codifying acts of the international community, acts which in most part became the integral part of internal legal orders and that have already been discussed in this paper.

In a somewhat different, probably „more modest" tone, John Rawls spoke on justice as the fundament of laws in his already mentioned work „Theory of Justice".[115] According to him, justice is the foremost value of social institution, as is truth of the systems of thinking. Whatever the theory, however elegant and economic, it must be rejected unless true. Also, laws and institutions, however effective and well organized, unless equitable must be reformed or abandoned. Neither the welfare of the entire society can prevail over inviolability of personality based on justice. Hence, justice does not admit that the loss of one's freedom can be justified by greater good of other people. It does not allow that the deprivation of a few be justified by greater total gain enjoyed by many.

---

[114] G. Radbruch, *ibidem*, p. 288 and the similar.

[115] For more details see, M. Ivović, *Nepravedni zakoni i njihova primena*, Pravni život, no. 12/1995.

Therefore, according to the author, equitable society starts from the fact that freedoms of equal citizens are established. Laws founded on justice cannot be the subject of political negotiation or calculation of social interests. The only reason why we can accept the wrong theory is that we do not know better; in the same vein, injustice can be tolerated only as much as necessary to avoid even greater injustice. Given that truth and justice are the ultimate values of human activity, they are inviolable. We can imagine public understanding of justice as a fundamental charter of a well organized human community. Further to that, Rawls formulated two principles of justice: every person should have equal rights to the widest fundamental freedoms which are commensurate to the same freedoms of others; social and economic inequalities should be arranged in such a manner that it would be simultaneously (a) reasonable to expect that they shall be beneficial to everyone and (b) that they belong to the positions and jobs open to all.[116]

In conclusion: positive law relative to natural law may be situated in three positions: firstly, positive law is in line (or largely in line) with the principles of rational natural law; secondly, it is in a tolerable „disparity" with mentioned principles and as tolerably unjust may be applied with adequate assistance of interpretation; thirdly, it stands in an absolute contravention with those principles (e.g. different discriminations on account of birth or conviction), so that, according to the general opinion, it is intolerably unjust. The criterion of this qualification can be found in the limits of social tolerance, which may be determined in an exact way (degree of legal uncertainty, respective statistical data, and attitude of public opinion, indices of sociological studies, comparative survey, tradition, and indisputable facts of legal and moral civilization). In the first two cases the court applies law and in the third one, via interpretation, it applies reasoned solution corresponding to the notorious principles of law and justice, which is compliant with the accepted standards of the international community.

[116] John Rawls, *ibidem*, published in the magazine „Naše teme" (op. cit.), pp. 1156 and on, and p. 1428 and on.

Assist. Prof. Dr. *Tomaž Keresteš**
University of Maribor
Faculty of Law

ECONOMIC ANALYSIS OF THE TRANSFER OF INHERITANCE MATTERS FROM COURTS TO NOTARIES IN THE REPUBLIC OF SLOVENIA

Short Synopsis: *The present Inheritance Act in Slovenia governs the whole civil succession procedure as a strictly judicial jurisdiction. However, a new bill is now entering the legislative procedure according to which the jurisdiction for all non-contentious inheritance matters shall be transferred to the notaries. This new legislative solution will have considerable economic consequences for the public finances as well as private persons involved in such cases. This paper discusses economic effects of the present reform taking place in the Republic of Slovenia in a perspective of private as well as public sphere*

1. Introduction

This paper will discuss economic efficiency of inheritance matters' transfer from courts to notaries in Slovenia. At the time of writing these lines a draft of the new act (New Inheritance Act)[1] was in a phase of intra-governmental adjustments and also stuck in the procedure due to some legislative issues.[2] This New Inheritance Act provides for a transfer of inheritance matters to notaries and thus changes the existing system in the Law of Succession where traditionally the courts had a deciding jurisdiction over such cases. The new notaries-based system does not only foresee their role in assisting courts dealing with inheritance matters, but it also terminates the traditional specialised departments for inheritance matters at District Courts, as well as the role of a specialised judge dealing with such cases only. The basic assumption is that the involvement of notaries in the inheritance matters serves as a cost-minimising tool and that their fees are more then compensated for by the gain in security and institutionalised trust (Knieper, 2010: 119). The new draft has opened several important issues in the Slovenian legal system; however, this paper is concentrating on the issue of economic efficiency only. Every legal system must have a certain level of social efficiency to deserve to be called law. And the same is true for the institutions and rules of such system. Nevertheless, this paper does not deal with social efficiency of law in general, but economic

* Original text is in English.

[1] The draft is available at: http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/zakonodaja/091202_deovanje_medresorsko.pdf (February 28, 2010).

[2] There are conflicting opinions as to whether the law should be adopted in a form of an amendment or a completely new act.

efficiency in particular. It tries to analyse the wider economic impact of the reform proposed and to investigate the effects that this reform might produce for the individuals as well as the public sphere as such.

2. Economic efficiency in law

Efficiency of law is a very important prerequisite for law and can be understood in at least three different ways. Firstly, it can be interpreted in a formal and rational way, where it would be attained by applying a previously accepted procedure. The results so achieved would be fair and rational. Efficiency in this interpretation calls upon the concept of instrumental rationality. Secondly, rightness may be ascribed only to a positive result with the assumption that an argumentative dispute of law has to be won at any price. Such efficiency has nothing to do with ethics. Thirdly, the criterion of efficiency may be ascribed to empirical reality rather then the social world governed by our normative considerations. Accordingly, a practical discourse of law can be described as efficient if it functions in the real (i.e. empirical) world. Utilitarianism, pragmatism and (American) legal realism suggest that the law in action is the law that produces real effects in a given social sphere (Stelmach, Brożek, 2006: 128–130). It is this third notion of efficiency with its empirical grounding that enables various empirical methodological approaches. And one of them is the economic analysis of law.

2.1. Pareto efficiency

Most basic notions of economic analysis of law, including efficiency, have been originally introduced to solve objections to the moral theory of utilitarianism. Utilitarianism holds that the principle of utility is the criterion of right conduct. Applying utilitarianism requires interpersonal comparisons of utility, which can pose a serious problem. The Pareto criteria of efficiency were first introduced to obviate the problem of interpersonal comparability (Murphy, Coleman, 1990: 182).[3] Efficiency is one of the most important economic criteria. It is related to the economic ways of allocating resources in the market. In general economic efficiency is considered to occur when it is impossible to move resources to make people better off without making others worse off. As long as the factors of production can be moved so that some people gain without others losing, then economic efficiency has not yet been reached (Glanville, 2003: 158). When no possible reorganisation of production can make anyone better off without making someone else worse off, we reach an allocation efficiency or Pareto efficiency (Pareto optimality). Under such conditions one's further satisfaction or utility can be increased only by lowering someone else's satisfaction (Samuelson, Nordhaus, 2005: 158).

[3] The basic understanding of economic efficiency exists when one of the two conditions apply: a) it is not possible to produce the same amount of output using lower-cost combinations of inputs; or b) it is not possible to produce more output using the same combination of inputs. Pareto efficiency is other kind of efficiency, relating to the problem of allocation – hence allocation efficiency (Ulen, Cooter, 2004: 16).

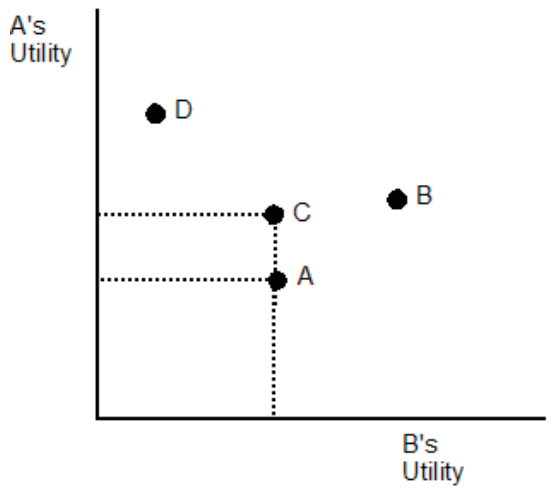


Diagram 1: Pareto efficiency

In Diagram 1 we can see that if we move person A's position from point A to C it is Pareto efficient as it does not affect person B's position. A movement from point C to B is also Pareto efficient as it improves both A's and B's position. A movement from point C to D is, however, not Pareto efficient as it improves person A's position, but makes person B worse off. The Pareto efficiency is thus limited in a very basic way. It enables us to order or rank social states and to evaluate policies only when there are no losers. Most social policies and legal rules however, produce losers and winners. The Pareto test is therefore nearly useless in respect of evaluating most activities of interest (Murphy, Coleman, 1990: 186).[4] The Pareto criterion of efficiency has some serious limitations. While one could postulate that every Pareto-efficient state is preferable to an inefficient one, doing so goes well beyond the Pareto principle itself and relinquishes any notions of distributive justice (Schäfer, Ott, 2004: 28; Posner, 2007: 13). We can easily imagine that there are situations where a change of social position (redistribution) is necessary, but would be impossible without making someone worse off.

2.2. Kaldor-Hicks efficiency

Nevertheless, there is a solution to the Pareto problem. It is an *ex post* compensation for the individual who finished worse off. The proposed solution is a Kaldor-Hicks criterion, a different measure of efficiency. The Kaldor-Hicks criterion is not concerned with whether or not

[4] Kaldor-Hicks has been subject to moral criticism (it ignores the issues of income distribution and actual distribution and approves of projects that affect those who should be helped. The other criticism is of technical nature. According to Scitovsky the Kaldor-Hicks has the status quo bias and preference reversals (Zerbe, 2001: 8). This position has been further developed lately: ″Instead of taking the Paretian definition of efficiency in terms of vector maximisation as an opportunity to explore non-welfare approaches to normative economics, the economics profession has largely bridled at the 'impracticality' of the definition. The rehabilitation of the Marshall-Pigou approach was inaugurated by introducing the Kaldor-Hicks principle for potential Pareto improvement (the winners in a proposed change could compensate the losers but do not necessarily do so) and by the modern treatment of consumer's surplus." (Ellerman, 2009: 96).

a reallocation of resources would make certain individuals worse off, but rather with whether or not society's aggregate utility has been maximized. According to the Kaldor-Hicks criterion of efficiency, a reallocation of resources is efficient if those who gain from it obtain enough to fully compensate for those who lose from it, although there is no requirement for actual compensation to occur (Malloy, 1990: 40).

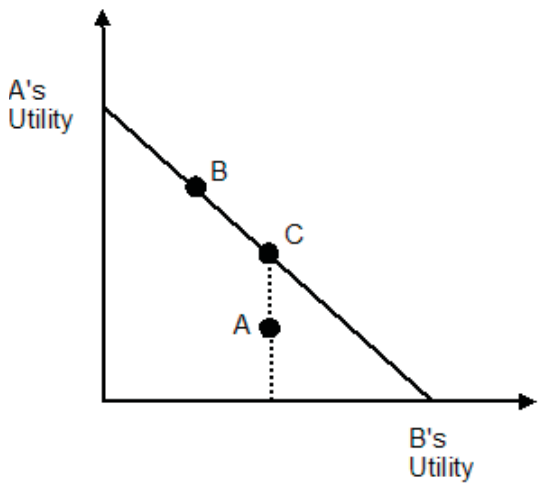


Diagram 2: Kaldor-Hicks efficiency

In Diagram 2 we can see how the Kaldor-Hicks efficiency works. The diagonal line represents a utility possibility curve for a set amount of resources in a society. Points along the diagonal line maximize society's aggregate utility for a given level of resources. If person A moves from point A to B, this is not Pareto efficient, because person B is worse off. However, person B can be compensated for his loss by a move along a diagonal line from B to C, which would leave him with the same utility he had before the move. As person A would still have more utility than he had in point A, the move is considered to be efficient under the Kaldor-Hicks theory. Even if person B is not actually compensated for his lost utility, society is better off moving to point B, because there is more total utility as a result of the move then there was before the move.

There is also a variation on Kaldor-Hicks criterion of efficiency developed by Posner. It is a criterion of wealth maximisation. Every position in which wealth exceeds that in another is better. Generally, this looks similar to Kaldor-Hicks and leads to similar results. As in Kaldor-Hicks, Posner's efficiency does not necessarily assume compensation to all those who end up worse off by such wealth maximisation. It suffices that they can be compensated (Eidenmüller, 2005: 54).

The approach adopted by Kaldor and Hicks attempted to separate economic efficiency from the income distribution issues. The general idea is to obtain a value-free measure by separating distributional considerations from aggregate gains. The change in aggregate gains was to be the measure of efficiency, so that there was a separation of effects into those of efficiency and those of distribution. This separation aimed at putting economics on a firm base as a policy instrument (Zerbe, 2001: 5). However, such position, regardless of how sane it might

seem in the light of economics, poses enormous problems in the field of law as it can be in conflict with legal values and measures.

2.3. Economic efficiency as a goal

The application of economic efficiency in law has its limitations as well. Wealth and efficiency in itself do not represent the goal of society. Efficiency is rather an instrument for achieving other social goals and no trade-off between the means and ends makes sense. Efficiency in general and economic efficiency in particular should be seen as a means of striving towards another possible goal, such as increasing social utility. And the criterion of such efficiency is the Pareto and not Kaldor-Hicks (Mathis, 2009: 191). Economic analysis of law does not aspire to presenting the only acceptable description of law. Even less does it attempt to dictate what the law shall be. It does however, help develop alternative legal proposals, help ascertain their consequences, and assess which consequences best assist the established ideals of law (Georgakopouls, 2005: 2). And these ideals are not exclusively, if at all, established by the economic analysis of law. More often they are selected by social mechanisms outside economics.

3. Inheritance matters in Slovenia

3.1. Present situation

The inheritance in Slovenia is governed by the Inheritance Act (1976).[5] In the present legislation of Slovenia the jurisdiction for inheritance matters at first instance is given to the one of forty-four District Courts (Courts Act Art. 99/II/2).[6] In larger District Courts the specialised departments for inheritance and non-contentious matters exist with specialised judges, and in smaller District Courts there is no specialisation in judge's work. The system of inheritance law is tailored after the German model of *ipso iure* passage of inheritance to heirs. In judicial inheritance proceedings only a declaratory decision on distribution is issued (Zupančič, 2002: 113). Where inheritance matters include real estate as well, a judicial proceeding is mandatory and is initiated *sua sponte*; otherwise the proceeding is initiated only upon the parties' request. In judicial proceeding the parties have to pay a fee and, if applicable, inheritance tax according to the value of inheritance as appraised by court decision on distribution (Rijavec, 1999: 161). As a legal remedy against the decision on distribution a special appeal to the Higher Court of Appeal (Višje sodišče) is permitted.

3.2. Proposed reforms

According to the proposed reform the entire procedure in inheritance matters at first instance shall be transferred to public notaries. The public notaries in Slovenia are of Latin type and established after to the Austrian model. However, at present the notaries have very limited competences in the field of inheritance matters, related mostly to wills and codicils.

---

[5] Zakon o dedovanju (ZD), Official Journal SRS, no. 15/1976, 23/1978; Official Journal RS, no. 17/1991-I-ZUDE, 13/1994-ZN, 40/1994 Odl.US: U-I-3/93-17, 82/1994-ZN-B, 117/2000 Odl.US: U-I-330/97-28, 67/2001, 83/2001-OZ.

[6] Zakon o sodiščih (ZS), Official Journal RS, no. 19/1994, 45/1995, 26/1999-ZPP, 38/1999, 45/1999 Skl.US: U-I-144/95, 28/2000, 26/2001-PZ, 56/2002-ZJU, 16/2004-ZZZDR-C, 73/2004, 23/2005-UPB1, 72/2005, 100/2005-UPB2, 49/2006-ZVPSBNO, 127/2006, 27/2007-UPB3, 67/2007, 94/2007-UPB4, 101/2007 Odl.US: Up-679/06-66, U-I-20/07, 31/2008 Skl.US: U-I-304/07-11, 45/2008, 47/2009 Odl.US: U-I-54/06-32 (48/2009 correction), 96/2009

Therefore the aim of reform is to widen the notaries' competences in the inheritance proceedings according to the model of some other countries (Austria, Croatia, France, Germany and Hungary). The technical aspect of reform is to execute it by a novel to the Inheritance Act (1976) with introduction of a new chapter on notaries' competences in inheritance matters. In the proposed reform there shall exist no more general judicial jurisdiction for inheritance matters at the first instance. The notaries shall be the only body conducting inheritance proceedings, unless there is a dispute regarding the facts of the case, which shall be resolved in a contentious proceeding in court. This would lead to the *de facto* abolition of specialised departments and judges for inheritance matters.

Upon receipt of coroner's certificate the notary shall initiate the inheritance proceedings. The competent proceedings shall be defined by the rules of the Notaries Chamber, while certain elimination grounds shall apply. The judicial decision on distribution shall be replaced by the notary's act on inheritance with the same effects and value as a judicial decision. The parties shall be bound to pay a fee to the notary and, if applicable, inheritance tax according to the value of inheritance as appraised by the notary. A special legal remedy against the notary's act in the form of appeal shall be permitted to the Higher Court of Appeal.

3.3. Basis for the reform

There are several different grounds for the proposed reform listed in the draft bill of the novel to the Inheritance Act (1976). The problem of judicial delays and frequent violations of the right to receive a court decision within reasonable time are mentioned as the most important ground for the reform. Procedure before a notary should be more expedite than in court, thus making it possible to include the released judges into a special plan for decreasing judicial delays. The other reason is a need to ensure that notaries receive the necessary competences. Notaries in Slovenia perform public service and it is therefore necessary to provide them with adequate competences so that they could exist. In the past, notaries in Slovenia lost some competences regarding legalisation of documents and their number increased (from 68 to 98). The transfer of inheritance matters to notaries would hence compensate the notaries and enable them to exercise their office of public service. And finally, it is believed that a reformed inheritance procedure would be more efficient.

4. Efficiency of transfer in perspective of the public sphere

In the detailed commentary of the New Inheritance Act a statement can be found that implementation of the new law does not require any additional funding from the national budget. Does it mean that the new law is neutral in the light of economic efficiency and, especially, public finances? Due to the incomplete data of judiciary this is rather difficult to calculate, but we can still make some basic estimation.[7]

4.1. Present situation

There is no exact data on the total sum of all judicial fees collected in inheritance matters. The average judicial fee collected at the Ljubljana District Court (which handles 14.68% or 3,393 of a total of 23,107 inheritance matters that the Slovenian courts received in 2008) is

[7] All calculations in this chapter are based upon data contained in Keresteš, 2009 and deviate slightly from the data presented in the draft bill of the New Inheritance Act. As all figures are mostly approximation this deviation is negligible.

€600. This means that the Ljubljana District Court alone collected €2,035,800 fees in inheritance matters in 2008. The only other applicable data is the average estimation of collected fees by the District Courts in Vrhnika, Slovenj Gradec and Tolmin, which is approx. €300 per case. This would lead to conclusion that the remaining courts in Slovenia collected €5,914,200 in 19,714 cases. The rough estimation would be therefore that Slovenian courts collected some €8,000,000 in 2008. This estimation is based on partial data for the District Courts of Ljubljana, Vrhnika, Slovenj Gradec and Tolmin only. No other statistics exist, thus rendering it impossible to make a more precise estimation at present. This tells us that the average collected fee in Ljubljana is double the fee collected in the rest of Slovenia. This can be explained by at least double prices of immovable property in Ljubljana comparing to the rest of the country.

According to the final account for 2007 Slovenia collected €35,788,372 in judicial fees and this figure remained approximately the same over several years. A more detailed distribution of fees according to the type of proceedings does not exist. However, €8,000,000 collected in 2008 represent 22.4% of all collected judicial fees. This data should be compared to the percentage of inheritance matters in a total number of judicial matters. In 2008 the courts received 681,069 new cases, out of which 23,107 or 3.4% were related to inheritance matters only. This also means that for 3.4% of inheritance cases 22.4% in all judicial fees are collected. According to the data in 2008 there were 1,067 judges in Slovenia, of whom 503 were in District Courts. According to the official statistics prepared by the Supreme Court of Slovenia inheritance matters should have been covered by 38.2 judges;[8] or 3.6% of all judges; or 7.6% of all judges in District Courts. The official norm for inheritance cases[9] would lead us to conclude that there must have been more judges working on inheritance matters – at least 51. In this case the judges working in inheritance matters would represent 4.8% of all judges; or 10.1% of all judges in District Courts.

As an interim conclusion we can see that from the aspect of public revenue inheritance matters in judiciary represent a very efficient way of filling the state's budget. The inheritance matters represent only around 3.4% of all court cases and are dealt by approx. 10% or less of all judges in District Courts (or less then 5% of all judges). However, the inheritance matters represent 22.4% (i.e. €8,000,000) of all collected judicial fees. From the aspect of public finances inheritance matters represent one of the more financially efficient judicial proceedings.

4.2. Proposed reforms

The transfer of inheritance matters to notaries would represent a loss of approximately €8,000,000 in the state's budget *per annum*. Assuming that the volume of inheritance matters does not change much from year to year and taking into account that the notaries had to concede a 10% decrease of the existing tariffs in inheritance matters, the notaries' revenue should be approximately €7,200,000.[10] Nevertheless, the notaries dealing with inheritance matters would represent a source of revenue to public finances by VAT and income tax. With a VAT rate of 20% the state should receive approximately €1,440,000. The estimation of income tax

---

[8] This data was based upon assumption that certain judges do not deal with inheritance matters only. It is also estimated that only 37 judges are dealing with inheritance matters. This estimation is made upon the accounting data (MFERAC) and is even less reliable. These 37 judges represent 3.5 % of all judges in Slovenia and 7.4 % of all judges in District Courts.

[9] This was 450 cases *per annum* at the time.

[10] The notaries conceded to a 10% decrease of the existing tariffs in inheritance matters to silence the public concern about this service becoming more expensive as there is general perception in public that notaries are expensive.

revenue is more difficult to make. The applicable tax rate for notaries is 41%; however, it applies to the income less the material costs of a notary's office. There is no credible appraisal of notaries' costs related to the dealing with the inheritance matters. The unofficial estimation made by the Notaries Chamber is that the costs would be approximately 25% of all income.[11] This means that the taxed income of €7,200,000 would be only €5,400,000. At the income tax rate of 41% the state account would receive an influx of €2,214,000. This means that budget revenue from inheritance matters would be approximately €3,654,000 or only 45% of what the state receives now. From the aspect of public finances the transfer of inheritance matters to notaries does not seem very efficient. Even the 10% decrease of the existing tariffs made as concession to general public contribute to this inefficiency in the light of public finances. The picture is even darker when we consider that at least 38 judges (or even 51) remain in office on state budget although not dealing with inheritance matters any more.

However, there are some other arguments supporting the transfer efficiency than it seems from the "loss of fees" perspective. The first argument is related to the acute problem of court delays or lags in Slovenia. The delays in inheritance matters are decreasing gradually from 86.52% in 2005. The situation is similar with all judicial matters, especially in District Courts. This is a direct result of a complex program "Lukenda" which was introduced after Slovenia started to regularly lose cases in the European Court of Human Rights for not assuring judgments in a reasonable time.[12] Broadly speaking, it seems important that the transfer of inheritance matters to notaries would release up to 51 judges in District Courts. These judges could be then relocated to courts and fields with high rate of delay and help improve the overall picture. Without any doubt we can agree that these judges represent the released resources in the judicial system which can be employed somewhere else and hence contribute to decreasing the overall court delays. The question of quantifying this benefit is more of a problem. This seems impossible without further analysis of the judicial system. Nevertheless, it is clear that such shortening of court delays would indeed have a positive economic impact on economy as a whole, and on parties involved in such cases.

The theory of microeconomics sets three preconditions for institutions to be efficient: a) the respective institutions are well defined; b) all necessary information is verifiable; and c) the absence of costs for transferring or securing property rights. In such environment bargaining can lead to the Pareto efficient allocation of goods. In reality there are no such perfect conditions. Inefficiencies are usually related to information asymmetries where not all contingencies can be foreseen and included *a priori* in contracts. One such information is a prediction that judges will follow a set of given rules (Köhling, 2000: 5). A weak and corrupt administration can affect economy by extorting a fee for economic activity of parties solely based on their discretionary power. It is up to judiciary to exercise control over such corrupt administration and hence an unbiased and efficient judiciary is essential for economic development (Köhling, 2000: 6). This is not the only effect of efficient judiciary. It also affects the whole system of exchange and use of property rights which drives economic activity. Most contracts in everyday affairs are not disputed, but they rely on assumption that the underlying contract can be enforced. Hence, it is essential for economy that the state provides an efficient and effective judiciary. In case of no judiciary or non-functioning judiciary, even the simplest con-

---

[11] It is difficult to make such estimation as it is related to the proportion of all cases processed in a notary's office. For some notaries the inheritance matters would represent a higher proportion then others.

[12] According to Art. 6(1) of the Convention for the protection of human rights and fundamental freedoms (ECHR). More information about "Lukenda" project is available at:
http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/projekt_Lukenda.pdf

tracts might not be fulfilled, posing an additional risk for parties involved in economic activities. The role of judiciary is thus to set up a framework in which the bargaining for property rights would follow predetermined rules, and provide a clear and quick decision in cases of doubt. Clearly defined and efficiently enforced property rights are the core of all economic activity (Köhling, 2000: 8).

Although it is impossible to quantify direct effects of released resources in the judiciary system by transfer of inheritance matters to notaries, it is clear that these resources can be employed in decreasing judicial delays that exist in Slovenia. Such decrease would have a direct effect on economic situation in that it would make enforcement of property rights more efficient and a definition of legal rules more clear. Combined, this would consequently decrease transaction costs and benefit every single individual taking part in the system of exchange. The further savings can be achieved in the judiciary system on account of some new competences given to District Courts where the released resources can be employed.

The other less obvious benefit of transfer is related to inheritance taxes. When succession involves persons who are not the closest of kin, the inheritance is taxed. At the first glance, this process should not be directly affected by transfer of inheritance matters to notaries. In a present system it is up to the courts to estimate the value of inheritance which then serves as a basis for taxation. In the reformed system this duty shall be taken over by notaries and in general there should be no change. It is nevertheless expected that revenue arising from inheritance taxes should increase. The reason for this development is simple. The notary's income depends upon the value of inheritance and it is in his direct economic interest to ensure fair estimation of inheritance value. The judge's monthly income is his salary and hence s/he is not strongly motivated to seek a real and fair value of inheritance. This consequently affects the amount of collected inheritance taxes. However, if this assumption is true it would also mean that the overall state revenue from inheritance matters processed by notaries would be higher up to an uncertain degree, although probably not significantly.

Regardless of the above presented calculation of effects, the transfer of inheritance matters to notaries in a draft bill is deemed a neutral act in terms of the budget. The main reason for such estimation lies in the predicted costs of new competences given to the District Courts by the Mental Health Act[13] and the Act Amending the Civil Procedure Act (D),[14] which both cause additional costs. The costs of the Mental Health Act should altogether be €3,847,788, of which only €570,043 represent costs of labour force (10 judges and 15 administrative persons). The costs of the Act Amending the Civil Procedure Act (D) are not elaborated. This means that only €570,043 in additional costs can be alleviated by transferring inheritance matters to notaries and releasing the district court judges for other duties. The rest is an additional cost to the state's budget by no means affected by the transfer. The transfer of inheritance matters will generate a loss of €4,346,000 *per annum* to the state budget. Even if we consider the savings of €570,043 on behalf of Mental Health Act and assume a similar figure (1,140,086 altogether) on behalf of the Act Amending the Civil Procedure Act (D), there is still at least a €3,000,000 gap.

The transfer of inheritance matters would clearly contribute to the welfare of notaries. However, this increase in notaries' welfare comes on the other hand (at least in short terms) with the worsening of the state's budget position. Such transfer is hence not Pareto efficient. However, it can still reach Kaldor-Hicks efficiency if the overall wealth of society would be

---

[13] Zakon o duševnem zdravju (ZDZdr), Official Journal RS, no. 77/2008.

[14] Zakon o spremembah in dopolnitvah Zakona o pravdnem postopku (ZPP-D), Official Journal RS, no. 45/2008.

increased enough that the notaries would be in position to compensate the others. This would be possible if such reallocation would lead to an improved productivity. And this would be possible only if the savings regarding the Mental Health Act and Act Amending the Civil Procedure Act (D) of €1,140,086 are realised. In this case we can see (Figure 1) a newly generated wealth of €340,086 from savings in the system. The notaries would in theory be capable of compensating the state for the whole loss of budget revenue, while still keeping €340,086.

	STATE	NOTARIES	TOTAL
Present revenue	8,000,000	0	8,000,000
Future revenue and savings	4,794,086 (3,654,000 + 1,140,086)	3,546,000	8,340,086

Figure 1: Distribution of revenue and savings

The apparent winners of this distribution would seem to be users of services in inheritance matters. Due to the certainty of life's end this would be all of us as individuals. At the 10% decreased notary tariff we would pay less for the same or better service. However, this gain might be nullified by the more realistic appraisal of inheritance value by notaries. If that is not enough, then we should add that a budget gap of approx. €3.000.000 would have to be filled by some other means (most likely taxes or higher fees).

5. Efficiency of transfer from the aspect of an individual

From the aspect of an individual the quality of service in inheritance matters should not significantly change by transfer to notaries. It is even expected that the quality of service improves over time, although courts do their job rather well. The more direct impact of the transfer should be in the amount of fees paid in the proceedings. The reform envisages a 10% decrease of fees (VAT included) by notaries comparing to the existing tariffs. The aim of this decrease is to calm down the general public which usually connects the notaries with high prices and does not necessarily recognise the benefits of their services. This would apparently mean that such transfer is Pareto efficient as individuals are not only unaffected by the notaries' gain – but even profit from it. Even if there was no 10% decrease of fees such transfer would still be apparently Pareto efficient as the individuals would not be worse off by the notaries' gain. This is however, not true. The transfer of inheritance matters to notaries will leave an approx. €3,000,000 gap in the state budget as less judicial fees would be collected (See Ch. 4 above). At the same time the size of the judicial sector will not decrease, which means that these €3,000,000 will have to be covered by other means (e.g. increase of judicial fees or taxes). This actually means that for the notaries' gain everybody would have to pay more. And the same is true for the individuals involved in the inheritance proceedings who would benefit from a 10% decrease of fees. For their gain everybody else would have to pay and be hence worse off. This means that from the aspect of individuals this transfer is not

Pareto efficient. We have to add that some also predict that notaries would be more realistic in appraising inheritance value as their fee (and income) depends upon it. This would lead to higher inheritance taxation and would slightly reduce the budget gap. However, the higher taxes would still have to be paid by individuals who would at the same time pay higher notary's fee as well (due to a more realistic value of inheritance). This all leads to a conclusion that the individuals would still be in a worse off position and Pareto efficiency could not be achieved.

This does not mean that Kaldor-Hicks efficiency cannot be reached. The transfer would still be Kaldor-Hicks efficient if the gaining party is so much better off that it can, at least in theory, compensate those who are worse off. The gaining party are of course the notaries and the worse off are the state (directly) and individuals (indirectly). The Kaldor-Hicks efficiency can be reached only when the transfer of inheritance matters to notaries generates an added value, e.g. savings in the judicial sector. Otherwise, this transfer would be merely a reallocation of property to notaries which would leave individuals worse off and notaries not in position to compensate them.

	INDIVIDUALS	NOTARIES
Before reforms	0	0
After reforms	-3,000,000	+3,000,000

Figure 2: Gains and loses

As we can see in Figure 2, before the reforms the situation is neutral. The individuals have to pay €8,000,000 in fees to support the judicial system dealing with inheritance matters and notaries gain nothing. After the reform the individuals would still have to pay to the notaries approximately the same amount (or 10% less) but would also have to cover a €3,000,000 gap in the judiciary budget, and the notaries would gain these €3,000,000. However, if the notaries compensated the individuals for their additional loss of €3,000,000, they would gain nothing and such reallocation would not even be Kaldor-Hicks efficient. Only when the notaries create an additional value by generating savings to the judicial system would a Kaldor-Hicks position be reached.

6. Conclusion

It is clear that economic (and financial) measurement of efficiency cannot be the only argument for whether some legal reform should take place or not. Such analysis can only contribute valuable data needed by the legislators to predict the social and economic impact of certain legal solutions. No thorough economic analysis has been conducted regarding the proposed transfer of inheritance matters from courts and there is also no reliable data for such analysis. All figures presented to public are mere estimations based on statistical samples and, consequently, there are significant deviations among different estimations. Nevertheless, this analysis tries to summarise all the publicly available data and apply it to the two main economic criteria – Pareto and Kaldor-Hicks efficiency. The transfer of inheritance matters would be Pareto efficient if one man's gain would not put another in a worse off position. And regard-

less of the Pareto efficiency, it would be Kaldor-Hicks efficient if one man's gain would be high enough to provide for, at least in theory, a compensation of all loses sustained by other individuals.

In a present situation we have to consider positions of three main players: notaries, individuals and the state. The clear winner of the transfer of inheritance matters are notaries. Before the reform they gain nothing from inheritance matters and after the reform they would gain approximately net €3,546,000 *per annum* in notary fees relating to inheritance matters. An apparent loser in this reform is the state. Before the reform it gained approximately €8,000,000 per annum in judicial fees relating to inheritance mattes. After the reform it would lose all €8,000,000 of revenue in fees relating to inheritance mattes, but gain €3,654,000 from collected VAT and income tax from notaries. It would also generate some savings inside the judicial sector by releasing the judges involved in inheritance matters and engaging them in other cases, which might generate additional savings, maybe even up to €1,140,086 *per annum*. Nevertheless, this still leaves approximately €3,000,000 gap in the budget as no judges can be laid off on behalf of the reform. This gap could be somewhat smaller due to the positive effects of employing additional judges in the process of decreasing judicial delays. Due to the lack of data it is impossible to quantify this gain, but we can make a fair estimate that a huge gap in the budget would still remain. However, this gap will have to be filled by the individuals paying taxes and fees. Although at the first glance the individuals also benefit from the reform by a 10% decrease of fees, they are in reality paying for the huge gap in the budget remaining after the reform. It would be a fair estimation that the gap in the budget exceeds the gain by the decreased fees. Such situation would leave us with one player (notaries) better off and two players (individuals and the state) worse off. Thus we can conclude that the reform is obviously not Pareto efficient.

The question whether the reform is Kaldor-Hicks efficient remains unresolved. Considering only the reallocated financial gains it does not appear to be. The notaries' gain does not allow them, due to the 10% fee decrease, to compensate the state and individuals for the reduced public revenues. However, we still have to consider the released potential of the judicial system in the form of judges and administrative personnel that had previously been engaged in inheritance matters and could now be employed in other cases, thus generating savings. In case that such savings are sufficient to compensate for the worse off, particularly individuals bearing the burden of financing the judiciary, then the transfer of inheritance matters would be Kaldor-Hicks efficient and would generate new wealth. The only problem is that this is very difficult to calculate with the data at hand.

Notwithstanding the issue of Pareto and Kaldor-Hicks efficiency, this analysis fails to provide an answer to the question whether such reform and transfer of inheritance matters to notaries should be executed. It only explains who the winners and losers of such allocation are and whether new wealth is created or not. However, the question or redistribution is not only an economic, but social issue as well. Additionally, some other value can be generated by such reform that is not considered in a purely economic model. The final decision thus remains with the legislator. But with a proper economic analysis this could be an informed decision.

Bibliography and Sources

Cooter, R., Ulen, T. (2004) *Law and Economics*: Pearson Addison Wesley.

Eidenmüller, H. (2005) *Effizienz als Rechtsprinzip*. Third edition: Mohr Siebeck

Ellerman, D. (2009) *Nomeraire Illusion: The Final Demise of the Kaldor-Hicks Principle*. In: White, M. (ed.) Theoretical Foundations of Law and Economics: Cambridge.

Georgakopoulos, N. L. (2005) *Principles and Methods of Law and Economics. Basic Tools for Normative Reasoning*: Cambridge University Press.

Glanville, A. (2003) *Economics from a global perspective*. Second edition: Glanville Books Oxford.

Keresteš, T. (2009) *Finačne posledice zakona o dedovanju in prenosa zapuščinskih zadev s sodišč na notarje - vmesno poročilo o raziskavi* [Financial consequences of Inheritance Act and transfer of Inheritance Matters from Courts to Notaries - Interim Report on Research]: Institute for Economic Analysis of Law

Knieper, R. (2010) *Eine ökonomische Analyse des Notariats*: C.H. Beck.

Köhling, W. K. C. (2000) *Economic Consequences of a weak Judiciary. Insights from India*: Centre for Development Research

Malloy, R. P. (1990) *Law and Economics: A Comparative Approach to Theory and Practice*: West Publishing Co.

Mathis, K. (2009) *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*: Springer.

Murphy, J. G., Coleman, J. L. (1990) *Philosophy of Law. An Introduction to Jurisprudence*: Westview press.

Posner, R. (2007) *Economic Analysis of Law*. Seventh edition: Wolters Kluwer.

Rijavec, R. (1999) *Dedovanje. Procesna ureditev* [Succession. Procedural regulation]: Gospodarski vestnik.

Samuelson, P. A., Nordhaus, W. D. (2005) *Economics*, Eighteen edition: McGraw Hill Irwin.

Schäfer, H.-B., Ott, C. (2004) *The Economic Analysis of Civil Law*: Edward Elgar.

Stelmach, J., Brożek, B. (2006) *Methods of Legal Reasoning*: Springer.

Zerbe, R. O. Jr. (2001) *Economic Efficiency in Law and Economics*: Edward Elgar.

Zupančič, K. (2002) *Dedovanje* [Succession]: Uradni list RS

Professor Dr. Dres. h.c. *Rolf Knieper**

ECONOMIC THEORIES ON THE LAW IN MARKET RELATIONS

1. Model assumptions of neo-classical economics

Economists assert to be primarily committed in their research to the improvement of the living conditions of people in their daily environment,[1] and to sustainable development of mankind in general.[2] The economic sciences proceed on the assumption that humans have, in principle, unlimited needs, while the resources available to them to satisfy their needs are limited,[3] and set out to examine how these scarce resources can be used most efficiently for the production of valuable commodities and how the commodities produced can be distributed most efficiently within any given society.[4]

A focus on the individual presents the basis for self-commitment to individualism, both from a methodological and normative perspective. First of all, the methodological assumption is made that individuals legitimately endeavour to increase their own benefit and utility and that, from an economic point of view, the value of goods, services and rules as well may therefore be assessed solely in terms of their utility to one or more individuals. In this context, the concept of utility is neither materialistic nor psychological nor is it inherent in the goods. Rather, utility must be understood as a notional construct representing the manner in which humans utilise their scarce resources in order to satisfy their needs through goods.[5]

Individualism is normative in that it claims that social, public and state functions should be directly limited through their orientation towards the preferences of individuals.[6]

No one claims that the world of dual individualism is populated by real people. Rather, its inhabitants are modelled on the basis of multiple assumptions, i.e. that they have differing preferences, both of an objective and subjective nature, which they egoistically endeavour to enforce by rationally utilising their scarce resources. As to the 'correctness' of their preferences, they are not accountable to anyone. However, the option of acting rationally requires (i) an awareness that the selection of any specific good will result in opportunity costs and will preclude the realisation of other preferences, (ii) that the model individual is fully informed of the good to be acquired, also in comparison to other goods, (iii) that the economic system is pop-

---

* Original text is in English.

1 Thus, representative of many others, *P. A. Samuelson/W. D. Nordhaus*, Economics, 18th ed. 2005, p. 6.

2 *S. J. Roth*, VWL für Einsteiger (Macroeconomics for beginners), 2006, p. 1.

3 *Schäfer/Ott*, *H. B. Schäfer/C. Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts (Textbook on the economic analysis of civil law), 4th ed. 2005, p. 58.

4 *Samuelson/Nordhaus*, loc. cit., p. 4.

5 Thus, representative of many others, *Samuelson/Nordhaus*, loc. cit., pp. 84 et seq.; *Schäfer/Ott*, loc. cit., pp. 3, 57 et seq.; *Roth*, loc. cit. pp. 1 et seq.

6 *Schäfer/Ott*, loc. cit., p. 3; *R. Nozick*, Anarchy, State, and Utopia, 1974.

ulated by intelligent, information-processing beings,[7] and (iv) that the realisation of preferences will not be hampered or even prevented by the intervention of public or private powers. However, the fact that the rationality of real-life human beings differs from the rationality of an artificial *homo oeconomicus*, and is not only limited[8] but also beyond the grasp of controlled rationality,[9] is given scant consideration (of no consequence), if it is given any consideration at all.

The place to realise individual preferences is, par excellence, the market, where consumers reign supreme and endeavour to compile, casually and without following any central plan, a consumer goods bundle that ensures maximum utility within the confines of any given resources. In doing so, they keep an eye on the opportunity costs – even without ever having heard of the concept – and are aware, firstly, that, as the quantity of any given good increases, the marginal utility of the unit of that good, which is the last at any given time, decreases and, secondly, that it is sensible to be flexible in the selection of goods, perhaps substituting one good for another if it is capable of providing the same or similar utility. Consumers choose from a wide variety of goods and services that enterprises offer them. These enterprises are, in turn, not compelled by any plan to act in a certain way, but rather by their selfish desire to increase their utility through rational means. They achieve this by maximising their profits through the realisation of the largest possible differential between their market proceeds on the one hand and their production cost on the other hand. Their method for keeping the cost as low as possible is to purchase and utilise the various production factors as cheaply as possible. To increase an enterprise's proceeds, the enterprise will endeavour to sell its goods at the highest possible price.

Within this system, the market is a sensitive and highly flexible mechanism, via which the aggregated individual (i.e. the macroeconomic) demand and the aggregated individual (i. e. the macroeconomic) supply meet. The price is the regulator for the millions of decisions made by buyers and suppliers. As both sides are looking for the best possible solution, prices are moving towards a point where supply and demand are in equilibrium and the market is cleared. This is based on the assumption that no one is able to force a price through. As the price does (shall) not express an objective value, but only the subjective preferences of the market participants, and as prices are expressed in monetary terms, which only makes the complex exchange or – better – purchase transactions possible, it is a further prerequisite for the smooth operation of this mechanism that money itself is such that it is acceptable as liquidity, as a medium of exchange, as a bearer of value.[10]

If these requirements have been met and, in addition, all model individuals fully informed and acting in a rational manner, the optimum and efficient allocation of scarce resources will

---

[7] *Samuelson/Nordhaus*, loc. cit., p. 705.

[8] See *O. E. Williamson*, The Economic Institutions of Capitalism, 1985,in particular, pp. 47 et seq., pp. 64 et seq.

[9] With regard to the various forms of limitations, cf. *Schäfer/Ott*, loc. cit., pp. 65 et seq.

[10] Money can only 'exist' if it has been removed from the market mechanism. In modern economies, where money is no longer tied to a commodity such as gold, it can only be governed by the state. This means that, whenever 'neutral' money, free of political manipulations, is demanded, this certainly constitutes a normative statement directed at the legislator and the executive, which cannot be formulated as a market mechanism. With regard to this central point on the raison d'être of freedom from state interference, see *R. Knieper*, Gesetz und Geschichte – Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuches (Law and History – an essay on the existence of and changes to the German Civil Code), 1996 (short: The Code), pp. 234 et seq.; *Samuelson/Nordhaus*, loc. cit., pp. 510 et seq., pp. 531 et seq., pp. 667 et seq.

materialise without planning or intervention and without further input. This results in a rise in welfare, as the benefit to individuals is increased through transactions without decreasing the benefit to other persons. This does not imply a content-related assessment of results, but rather a strictly subjective assessment of the utility derived by market participants. From the perspective of methodical individualism, this is self-evident. The increase in the utility to market participants results from the fact that they voluntarily entered into the exchange of goods.[11]

The general consensus is that the examination of market mechanisms, price determination, allocation of goods and individualism is not concerned with the colourful diversity of the real world. Similar to the workings of jurisprudence or experimental physics, focusing on individual and well-defined and modelled parameters, examining the action of variables by ascertaining that other variables remain unchanged and focusing on what has been defined by itself – *lege artis* – as the vital issue for achieving results, economic sciences operate with model assumptions, assumptions and abstractions. Thus, they produce results and, often, time reliable forecasts.

2. The Distance of neo-classical theory from law

Surprisingly, the (neo)classical economics do not seem to see a need for learning about the legal framework conditions, within which the trends for balancing supply and demand, for determining the equilibrium prices and for allocating efficiency develop. This applies to both the determination of initial historical appropriation and ownership distribution, from where the dynamics of the market relationships originate, and the legal manifestation of these market relationships itself.

It is indicative that the 1,100+ page international standard textbook on macroeconomics by *Paul Samuelson* and *William Nordhaus*, which is frequently quoted in this analysis, fails to make any mention whatsoever of the law on the formation, performance and termination of contract or the law on the creation, content, transfer and encumbrance of property, yet underlines the reality of the millions of daily exchange acts. Another textbook on macroeconomics succinctly states that, naturally, market economies, too, would need the framework of a state governed by the rule of law to safeguard property rights and to render contracts enforceable.[12] However, the fact that each of these millions of exchange acts would require a contract, which needs to be negotiated, executed and performed and which could be potentially breached at any stage, is being ignored by the model.

If ever the role of the state is examined, then such examination focuses primarily on interference with the competitive resource allocation, intervention in a state of equilibrium and redistributions that counter the market process. According to the doctrine, as a deviation from the state of *laissez-faire*, any such measures require justification, with the existence of market failure possibly providing legitimate, albeit insufficient, grounds. *Walter Eucken* is an exception. Although devoted to the liberal, market-oriented tradition of macroeconomic

---

[11] The formulation of the concept of allocation efficiency dates back to the work of the Italian sociologist and economist Vilfredo Pareto (1848-1923) and is therefore also known as the 'Pareto efficiency'. Cf. *Roth*, loc. cit., pp. 18 et seq.; *Samuelson/Nordhaus*, loc. cit., pp. 158 et seq.; *Schäfer/Ott*, loc. cit., pp. 24 et seq.; *R. A. Posner*, Recht und Ökonomie: eine Einführung (Law and economy: an introduction), printed in excerpts in: Assmann/Kirchner/Schanze, Ökonomische Analyse des Rechts (Economic analysis of the law), 1993, pp. 80 et seq., p. 87.

[12] *Roth*, loc. cit., p. 142.

research, he argues against the common characterisation of the *laissez-faire* economic policy as an economy free of state intervention:

> "A quick check of historic reality would have revealed this answer to be flawed. It was during these times in particular that the state devised strict legal rules for ownership, contracts, companies, patents and so forth. Each enterprise and each household operated, day in, day out, within the parameters of such state-imposed rules of law, whether they sold or purchased something, raised a loan or transacted any other commercial action."[13]

Moreover, neoclassical economics has, arguably with good reason, been denounced for its unrealistic assumption that economic actors maximise their own utility while at the same time acting in full compliance with laws and contracts.[14] The criticism levelled from the perspective of economic science is as follows:

> "Thus whereas neoclassical transactions take place within markets where 'faceless' buyers and sellers … meet … for an instant to exchange standardized goods at equilibrium prices' (*Ben-Porath*, 1980, p. 4), exchanges that are supported transaction-specific investments are neither faceless nor instantaneous".[15]

Evidently, it is principally due to the ideal-typical construction of equilibrium prices and markets as part of the development of macroeconomic doctrines that the models used to map the exchange relationships are largely disassociated from the law and its rules. The concept of the rule of the market – not to be confounded with law – is complemented by the notion of a minimal state. However, with regard to the legal manifestations of the original appropriation and ownership distribution, from where the allocation efficiency of market relationships originates, the doctrine of the minimal state does in fact concede that "some people have robbed, defrauded and enslaved others", but that, for the sake of social peace, the historical slate would need to be wiped clean of injustices by way of prescription since times immemorial.[16]

3. Mingling models and reality

This would be quite acceptable and would have no detrimental effect, if it was clearly revealed as a line of thought within abstract models and ideal-typical constructions and if these ideal types were not, all of a sudden, re-labelled as statements of fact or even normative role models. This occurs whenever the liberal principles that constitute the rationale of a minimal state are not only applied to state-interventionist rules but also to the subject matters of state-prescribed property and contract law, which form the framework of market relationship. This intertwining and commingling of the issues may have serious consequences if used in connection with an *ideal-typical* equilibrium model assumption to level criticism at the *reality* of the existing law and/or to make legal policy suggestions for improvements in the field of property and contract law that would enable the functioning of the equilibrium in the real world.

After *Max Weber*, *Elisabeth Göbel* recognised the risk of developing economic doctrines with normative intent, describing this approach as follows:

---

[13] *W. Eucken*, Grundsätze der Wirtschaftspolitik (Principles of economic policy), 1959, p. 34. (translation by author)

[14] *Schäfer/Ott*, loc. cit., pp. 109, 397.

[15] *Williamson*, loc. cit., pp. 55 et seq.; the quoted work of *Ben-Porath* has been published in: Population and Development Review 6 (1980), pp. 1 et seq.

[16] The doctrine of 'Let bygones be bygones': *Nozick*, loc. cit., p. 150.

> "First of all, the notion of an ideal-typical situation is conceived, arriving at an optimum initial allocation of resources that is perceived as being just by all. Then resources are exchanged, solely by means of voluntary contractual agreements, with all individuals being fully informed of the exchange conditions. There are no external effects and no public goods. All assets are in well-defined private ownership, held by individuals (...). It is not difficult to recognise the microeconomic ideal world in this model. All of a sudden, this theoretical model turns into a statement of fact and eventually even a role model. If the market with its exchange relationships functions so perfectly, it is only logical that the state should refrain from interfering in the market. However, as the perfection of the market is not a reality, this conclusion is a fallacy (...)."[17]

A prominent example for such an unsatisfactory methodological approach, which is not even tenable from the perspective of a minimal state concept, is the *Doing Business Reports* of the World Bank Group.[18] I have selected this publication because it intends, backed by the authority of the World Bank, to exercise a liberalising influence on the civil, commercial and company law of all the countries around the world.

Making microeconomic model assumptions and depending on the criterion examined, the *Doing Business Report* conceives a limited liability company having five shareholders, which has full and complete information available to it,[19] employs between 50 to 201 staff,[20] who are, on average, male, 42 years of age, not organised in a trade union and belong to the same ethnic group and religion as the majority of the population within its particular economy.[21] The company complies with the law,[22] adheres to the rules of the market, adjusts its prices in line with demand and is prepared to either leave or re-enter the market depending on the competitive situation.[23] The Report repeatedly stresses that it does not include the macroeconomic conditions of any given country, the quality of its infrastructures and institutions and the level of education of its populous in its assessments of an enabling, favourable, advantageous and superior business climate,[24] arguably because this would make it more difficult to treat all countries – from Afghanistan to Zimbabwe[25] – in accordance with the same formula.

In terms of modelling, this is all legitimate, in the same way as it would be legitimate to base the model on the assumption of notoriously law-breaking and opportunistic companies and a totally unskilled and illiterate labour force. What is, however, extremely problematic and misleading – both from a practical and an academic perspective – is the endeavour of suddenly proclaiming model assumptions to be the ideal prototype and to even go so far as redefining the model as a reality to be aspired to and then calling upon the countries of the world to realign their laws and their institutions to fit this model. Indeed, the Report chooses to ignore

---

[17] *E. Göbel*, Neue Institutionenökonomik – Konzeption und betriebswirtschaftliche Anwendungen (New Institutional Economics – concept and business administration applications), 2002, p. 354 (translation by author).

[18] I am using the 2009 edition of the six reports: The World Bank and the International Finance Corporation, Doing Business – 2009, Washington D.C., 2008 (short: „Business").

[19] Business, p. 61.

[20] Business, pp. 63, 64, 66, 67, 73, 75.

[21] Business, p. 66.

[22] Business, p. 66.

[23] Business, p. 10.

[24] Business, pp. V, 1, 79.

[25] Business, p. III.

– that *Adam Smith*, no less, linked the potential positive effects of the 'invisible hand' to the creation and maintenance of physical and social infrastructures by the state and their funding via progressive taxes;[26]
– that *John M. Keynes* demonstrated the possibility of a market equilibrium between aggregate supply and aggregate demand in an economy while at the same time unemployment, with its disastrous consequences, is high;[27]
– that the reality of market failure has been comprehensively discussed by the economic sciences;[28] and
– that *Ronald H. Coase* identified the inevitable information deficits of market participants, and the resulting – just as inevitable – transaction costs as a principal reason for the creation of companies and indeed as the *movens* of the "nature of the firm".[29]

These are not only key tenets of macroeconomics; they are also based on a solid empirical foundation. That is not to say they must be followed. However, it would surely contravene fundamental methodologies, even those of economic science, to ignore any such tenets across the board and to reject them purely on an argumentative basis. Only the contravention of the minimum standards imposed by scientific methodologies permits the qualification of countries that lack any employee protection whatsoever as a particularly positive environment or to ascribe, no less than in 2009, a role-model function to the laws of the US with regard to transferring and registering property of land, the creation of loan security, the protection of (small) investors and the enforcement of contracts, precisely because there are no public registers and no notarial authentication.[30]

The ideological aim of all this is to demonstrate a nexus between regulation and commercial inefficiency. The possibility of a nexus between insufficient regulation and commercial inefficiency is not even being considered. Once again, the ideal-typical model of market processes that are most efficient at self-regulating is presented as a model, while devising the market participants as comprehensively informed, independently responsible and rational *homines oeconomici* going about augmenting their respective utilities. Market failure is not considered a possibility.

This was one of the – now shattered – key-stones of world wide deregulation and of the Washington Consensus concerning the transformation of the post-soviet economies[31] and is now a hallmark of various EU reform programmes that are under pressure to justify market liberalisation.

---

[26] *A. Smith*, Eine Untersuchung über Natur und Wesen des Volkswohlstandes, 1776 (Deutsche Ausgabe von 1923), Book Five, Chapter I, Part 3.

[27] *J. M. Keynes*, General Theory of Employment, Interest and Money, 1936, see in particular Book V.

[28] Thus, representative of many others, *Samuelson/Nordhaus*, loc. cit., pp. 166 et seq.

[29] . R.H. *Coase*, The Nature of the Firm, in: Economica 1937, 386-405386 et seq.

[30] Business, pp. 24-53; only gushing patriotism can support these results in the face of empirical data from the global market. In addition, eight of the ten highest scoring civil and commercial law systems world-wide are common law jurisdictions, some of which experienced particularly severe financial and economic crises during 2008/2009, with these crises being – according to the general consensus among economists – largely due to insufficient laws and regulations. It is indeed quite astounding that the World Bank, which is duty-bound to the global community, deigns to spread this patriotism, and it is equally startling that the Executive Directors of France and Germany, for example, fail to insist on having a method explained to them that results in France being ranked 31 after Latvia and Lithuania and Germany dropping, in 2009, from rank 20 to rank 25 (Business, p. 6).

[31] For more details see *Knieper*, Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht (Possibilities and limits of the transplantability of law), in: RabelsZ 72 (2008), pp. 88 et seq.

4. The neo-liberal conception of the State

Against the backdrop of these phenomena, it appears to be necessary to explore the question as to whether the structure of market interactions permits the conclusion that a developed substantive and procedural civil law is not required, as the market forces themselves will provide the appropriate regime, or whether neoclassical economics disassociates its models from the law only because it takes market participants' compliance with the law for granted or because it sets compliance with the law as a parameter to keep the model 'clean'.

Before addressing more recent economic theories that deliberately assess the law and other institutions that impose "humanly devised constraints on human interaction"[32] as integral parts of an economic system fostering efficiency and wealth, we must ascertain whether or not a pure market theory can consistently and realistically claim that market forces alone would be capable of creating interaction efficiency. If this was the case and provided that market failure does not exist, a sophisticated law for the allocation, encumbrance and transfer of property or the conclusion and performance of contracts as well as the sanctioning of contractual breaches and the levying of execution would indeed be dispensable. After all, it could be argued that in perfect competition all actors who defy the natural laws of exchange by reneging on their promise to deliver goods or appropriating third-party property without payment would, sooner or later, disappear from the market. The other market participants, who are presumed to be fully informed, would simply avoid any business dealings with those black sheep, thereby driving them out of the market.

While neoclassical economic theory has not addressed this question, the philosopher *Robert Nozick*, who is steeped in the neoclassical tradition, has presented a detailed argument in his work "Anarchy, State, and Utopia". This argument is based on the concept of freedom embedded in normative and methodological individualism which prohibits any transgression of the bounds of the minimal state and any intervention in the interest of distributive justice, social equilibrium or the welfare of society.[33] With regard to the interactions between individuals or groups of individuals, he examines whether commitment can be created through private arrangements, social control or moral barriers, and arrives at the conclusion that unbiased third-party entities that are not involved in the transaction would be required to make a determination on the validity of any claims in the event of disputes between the parties. While this process could be undertaken without input by the state, by way of privately agreed arbitration for example, the compulsory execution of interpersonal claims and the enforcement of contracts necessitate the state's monopoly on the use of force. The state's monopoly on the use of force has to extend to all individuals and not just those who subject themselves voluntarily to this monopoly, although this would to a certain degree have a redistributive effect.[34] The author himself has described this position as strictly "libertarian". But even this extreme argument in favour of a minimal state does not question the necessity of the state for effective contract and property law. The self-healing powers of the market have their limits even without market failure.

Moreover, the realisation that the weeding out of black sheep cannot be left to the market is also being supported by the concept of allocation efficiency, which is a central criterion of neoclassical theory. After all, allocation efficiency describes a state in which the improve-

---

[32] *D. C. North*, Institutions, Institutional Change and Economic Performance, 1998 (1990), p. 3.

[33] *Nozick*, loc. cit., pp. 149 et seq. (with regard to the proximity to liberal economics, see p. 302).

[34] *Nozick*, loc. cit., pp. IX, 12 et seq., p. 149.

ment of one person's situation must not be brought about by the deterioration of another's situation.[35] The model assumes that this is documented in the contract – however, one could argue, only in a contract that is properly concluded and performed. Where breaches of contract are not sanctioned and the non-compliant actors would only be pushed out of the market as part of the information-processing market participants' learning curve, some individuals would necessarily be disadvantaged during such learning process. This is inefficient. Moreover, they would be instrumentalised on account of a market mechanism. The statement by *Richard Posner*, according to which a net increase in efficiency is presumably achieved when resources are transferred in voluntary exchange, as such transfer would not have taken place if both parties did not have the expectation to be better off as a result of the transfer,[36] can therefore only be accepted as being of an ideal-typical nature. It does not describe the reality of market activities. At the same time, it ignores, for example, a factor which the German Federal Constitutional Court (Bundesverfassungsgericht) considers to be one of the actual premises of private autonomy, namely, a proximate balance of power between the exchange partners, without which an appropriate reconciliation of interests cannot be achieved[37] – which means, for the purposes of methodical individualism – no efficiency.

We can therefore proceed on the assumption that even the most liberal market concept still requires effective contract and property law as a precondition. However, this gives rise to the question as to the meaning of 'effective' under this conception. Clearly, for the purposes of normative and methodological individualism, this does not include criteria of equality of distribution, but rather rules that counteract uncertainty while at the same time contributing to the information of market participants, enabling the realisation of preferences with given resources and retaining the utility of a transaction autonomously defined by the market participants themselves.

Surely, it would therefore be contrary to the premises of the concept if civil law prefigured the substance of transactions, for example, by setting upper and lower limits for prices or quantities, and the law was not faced with the potential of market failure, howsoever such market failure may have materialised. In contrast, the statutory principle of private autonomy and contractual freedom is, just like the absolute allocation of assets in private ownership, an indispensable prerequisite for the daily realisation of those millions of market movements serving to maximise the utility of individuals. The freedom to choose a counter party and to determine the content of contracts, along with the protection of private ownership and the rules for its conveyance, are the legal expressions of the economic mechanism of the concurrence and balancing of the aggregate supply and demand in the implementation of individual preferences.

However, property and contract law by no means merely trace the model will of a *homo oeconomicus*. Rather, property and contract law determine the prerequisites that must be present in order to render a transaction decision valid and binding. It prescribes that, from the time the contract has been concluded, none of the parties has the right to dissolve its obligation vis-à-vis the counter party by exercising its free will, and holds each party to its promises. In the face of the notion of comprehensive individual freedom of will, this is by no means self-evi-

---

[35] Thus, representative of many others, *Schäfer/Ott*, loc. cit., pp. 24 et seq. and *Samuelson/Nordhaus*, loc. cit., pp. 158 et seq.; *Roth*, loc. cit., pp. 18 et seq.

[36] *R. A. Posner*, loc. cit., p. 87.

[37] *BVerfG* BB 1990, p. 440; ditto BVerfGE 89, pp. 214 et seq.; *BVerfG* NJW 1994, p. 2749.

dent.[38] Furthermore, property and contract law prescribe that a validly created contractual obligation must be performed and provide institutions that enforce such performance. Moreover, property and contract law establish the result of the economic transaction in the form of a new ownership allocation, with binding force for and against everyone, and create enforceable defensive rights. As all of this is linked to force when encountering reluctance in performing the contract, the enforcement of contracts constitutes – as we have seen – one of the main reasons why proponents of extreme individualism are compelled to admit that an – albeit minimal - state and its laws are indispensable.

Even if the economic science of market forces and movements does not expressly thematise law, the existence of law is nevertheless assumed and in line with the market if only and because it enables market participants to reduce uncertainties while improving their level of information, as these are the prerequisites for the articulation and realisation of their preferences and utility maximisation.

5. Assumption of institutional economics with respect to law

The legislator, the courts and jurisprudence – particularly in the field of substantive and procedural civil and commercial law – have, in their respective lines of reasoning, always ascribed a central role to the economic framework and its conditions, requirements and consequences for the rules of law and legal acts. The statement made in a standard textbook inspired by the so-called 'economic analysis of civil law', namely that "the basic role of a legal system is to ensure certainty and ease of legal transactions, particularly in the exchange of goods and services,"[39] draws its arguments directly from welfare economics. However, this statement could equally well be based on the legislative motives of the bill of the Civil Code for the German Reich from 1888 (hereinafter referred to as the "Motives").

These Motives contain the rationale for a large number of differing legal institutions such as contracts, agency, legal person, damages, the meaning of ownership, the differentiation between ownership and possession, the necessity and the limits of bona fide purchases, the protection against nuisances and the limits imposed on the extent of this protection through the necessities of economic life and business relations as well as legal certainty as these concepts were, at the time, regarded as being indispensable for the dealings between persons and entities.[40]

The list of legal concepts whose rationale is based on the certainty of transactions could be continued almost ad infinitum. The selection made for the purposes of this analysis is based on the consideration that these are issues on which the current debate surrounding a fresh rationale for institutions and legal policy positions focuses. This also includes the current discussions about property rights and property economics that wrestle with the meaning of 'concentrated' and 'diluted' rights to act[41] or absolute and relative rights of disposition with regard

---

[38] Cf. *Knieper*, The Code, pp. 115 et seq.

[39] *H. B. Schäfer/C. Ott*, loc. cit., pp. 523 et seq.

[40] Motives, Vol. I, p. 223; these are only a small number of sample quotes that were selected somewhat randomly; see by way of example and without pretence to anything remotely approximating completeness, Vol. I, p. 78; Vol. II, p. 30; Vol. III, p. 344. With regard to the overall context, see *R. Knieper*, The Code.

[41] See *Schäfer/Ott*, loc. cit., pp. 529 et seq.; cf. the seminal work of *O. Steiger*, Property Economics versus New Institutional Economics, in: Journal of Economic Issues, 2006, pp. 183 et seq.

to the use (usus), yield (usus fructus), modification (abusus), transfer and exclusion of third parties[42] in connection with the efficient or inefficient allocation of resources. These are by no means new issues. So-called dogmatic jurists will have no trouble recognising the statutory differentiations according to ownership or possession and limited rights *in rem* as well as their scope and definitions, whose economic, cultural, historical and social context had been the subject of intense and heated debates long before the codification of commercial exchange and market relationships took place.

To jurists, it comes as no surprise that economists are attempting to compensate for, from a microeconomic perspective, the neoclassical pure modelling approach and its lack of contact with reality. This does not challenge the basic assumptions of self-interest and calculation as tools for gaining an insight into market mechanisms, but the mere model assumption of socially non-stratified, equally powerful/powerless, perfectly rational individuals who go about – perfectly informed – maximising their respective profits in a (market) world without transaction cost. Even within the field of economics, over the last few decades a new understanding appeared that such a constructed model world does not permit the making of predications about the real world. Despite divergence on specific issues,[43] New Institutional Economics has made it its mission to include empirical observations and reality into their models: the fact that market participants are not fully informed and act from a point of uncertainty, that the rights of disposition over the goods exchanged in the market are structured differently, that individuals are not only driven by a market-rational risk/reward calculation but act – under the conditions of a restrictive reality – either in a co-operative or opportunistic manner, either in compliance or non-compliance with the law, and that the procurement of information, the production process and transactions themselves cost real money and take real time, all of which are now being acknowledged. Formal and informal institutions, laws and regulations, trade practices, customs and their practical implementation emerge and develop in exchange with these realities and require an understanding.

Only when theory is supported by empirical observations, can the influence of the institutions on the economic development and the increase of welfare be assessed, evaluated and possibly changed. To model and determine individual preferences, the decision-making through interpersonal interaction under conditions of uncertainty and the expression of limited rationality, new economics no longer relies on a faceless *homo oeconomicus* but uses the mathematically checked results of game theory, which promises to contribute to a better understanding of real exchange transactions and market processes, particularly from the perspective of 'strategic games'.[44]

The aforementioned research by *Coase*, who stated as early as 1937 that there would be no incentive in forming hierarchies within corporations if all the market participants were fully informed and no transaction costs incurred[45] and that optimum efficiency of resource allocation would be achieved through negotiation without the need to allocate the rights to act,

---

[42] As listed by *E. Göbel*, loc. cit.pp. 66 et seq.

[43] From the large number of works dedicated to the evolution and differing approaches of institutional economics, I would like to cite *M. Erlei/ M. Leschke/D. Sauerland*, Neue Institutionenökonomik (New Institutional Economics), 1999; *R. Richter*, The New Institutional Economics: Its Start, its Meaning, its Prospects, in: European Business Organization Law Review, 6 (2005), pp. 161 et seq.; *E. Göbel*, loc. cit., part II in particular.

[44] See for example *M. D. Davis*, Game Theory: A Nontechnical Introduction, 4th ed. 2005; *C. Rieck*, Spieltheorie (Game theory), 8th ed. 2008.

[45] *R. Coase*, Nature, pp. 386 et seq.

property rights or any state-imposed law whatsoever, forms the methodological starting point of a critical expansion of the macroeconomic doctrine.[46]

However, in contrast to neoclassics, *Coase* readily emphasises that the model assumptions do not permit an analysis of the real market and its institutions. In fact, he noted that the assumption that there were no costs involved in carrying out market transactions "is, of course, a very unrealistic assumption".[47] Although it is done from time to time, these predications cannot be used to derive a theorem according to which it would be possible to transpose the model world into the real world, eliminate transaction costs and thereby attain allocation efficiency. Market transaction costs are diffuse, cannot be measured individually, but are nevertheless inevitable and must be factored in. They explain the real existence of enterprises and the complex arrangements associated with costs while at the same time aiming to minimise uncertainty and, consequently, costs.

A number of economic science research foci have evolved, more or less explicitly based on these considerations, that explore the reasons for uncertainty and how this uncertainty can be overcome (which is a cost incurring process) within the context of real market relationships, as well as the institutions geared towards reducing the very same costs. From a legal perspective, the various research foci differ according to whether they have a stronger emphasis on the law of property or on the law of obligations.

5a) Property economics

Proceeding from the concept of property, one approach objects to the diffuse notion of rights to act and insists that, as the basis of comprehensive powers to act, use, dispose of and collateralise, the existence of a certain, transparent, formalised title that can be determined without high information costs is the key to economic dynamics. This approach differentiates between ownership and possession, as the latter only constitutes physical control. The reasoning is that the momentum of economic development is due to the fact that the certainty of legal title permits the (temporary) surrender of use without risk as well as the use for collateralisation purposes, thereby enabling the existence of a credit market. Accordingly, property would reduce transaction costs, as its preferences are clearly articulated. According to this approach, the decisive point is that, if need be, ownership rights and contracts can be enforced before independent courts of law. Consequently, societies that have created institutions to flesh out and formalise both legal title and loan collateral, and to render both legal title and security enforceable against anyone, are successful in organising efficient production and allocation relationships that safeguard prosperity.[48]

One important aspect resulting from the formalisation of title is its transferability and its mortgageability. In the conflict between preservation of the status quo and marketability, the emphasis is shifting toward marketability: *North* believes that it was vital for the historical development of modern trade that the common law principles of absolute property protection were overcome and the *bona fide* purchaser could acquire property from a non-owner when the

---

[46] *R. Coase*, The Problem of Social Cost, in: H. D. Assmann/C. Kirchner/E. Schanze, Ökonomische Analyse des Rechts (Economic analysis of law), 1993, pp. 129 et seq. ("Social Cost).

[47] *Coase*, Social Cost, p. 148.

[48] Cf. the work of *O. Steiger*, Property Economics versus New Institutional Economics, in: Journal of Economic Issues, 2006, pp. 183 et seq.; also see *K. Boudreaux/P. D. Aligica*, Paths to Property, 2007, pp. 30 et seq.; perhaps also *H. de Soto*, The Mystery of Capital, 2000.

purchase contracts were confirmed by affixing a seal, i.e. in the form of a public deed.[49] The deed and – one could add – the register should create certainty, trust and predictability by assuming that all the facts entered into the deed and/or the register are deemed correct and proven.

However, the adoption of formalised property titles and its legal rationale inevitably bears a social price that should not be ignored.[50] In fact, individualised ownership can destroy social structures and solidarities, which may be based on diffuse group rights and obligations shaped by informal understandings and traditions and by title to participate in, to use and to preserve societal assets. Where absolute ownership is individualised, which is inevitable in market economies, it has to be accompanied by a social policy that compensates for the breaking up of the traditional structures of social protection in order to avoid social disasters.

5b) Transaction costs economics

Another approach puts the emphasis on the initiation, negotiation, conclusion, performance and enforcement of contracts. Along with objective uncertainties, whose resolution incurs costs, and in addition to the commitment of time and skill in the communication, negotiation and formulation of contracts, it is manifestation of opportunistic behaviour in particular that leads to transaction costs. This type of behaviour relates to the "incomplete or distorted disclosure of information especially to calculated efforts to mislead, distort, disguise, obfuscate or otherwise confuse".[51] Institutions serve to prevent opportunism, to establish dependable behavioural expectations, to arrange for 'credible commitments' and to prevail on the contracting parties to adhere to their agreements, even when these no longer correspond to their preferences and desires. The cost-effective and swift assertion and, if necessary, enforcement of the right to act as well as contractual rights are regarded as being fundamental to lasting and sustainable market conditions and a dynamic economy based on the division of labour.

Trust is the key term. Its presence can increase interaction efficiency, while significantly reducing the costs across all phases of the contractual relationship. However, trust must be established, it is risky and it can neither be assumed nor readily recommended.[52] Both formal and non-formal institutions can reduce the prerequisites and effects of asymmetrical information and establish trust. One possible alternative is creating hierarchical relationships, replacing trust with obedience. This structure may be organised in the form of a company, but in principle applies just as much to families or clans that demand absolute loyalty and are able to enforce such loyalty if need be. However, the scope for the organisation of economic relations via personal loyalties is very limited within developed monetary economies and has little use in a globalised world. To organise "impersonal exchange", a third-party impartial enforcer with coercive power and a "corpus of rules" applied by an effective jurisdiction are indispensable.[53] As the debate is dominated by US authors, systematic codification as a basis of normative trust hardly plays a role.[54] There can, however, be no doubt that the – compared to Europe

---

[49] *North*, loc. cit., p. 129.

[50] Noted by *Steiger* in particular, loc. cit., p. 195.

[51] *Williamson*, loc. cit., p. 47.

[52] *Williamson*, loc. cit., pp. 47, 64 et seq.; *North*, loc. cit., pp. 27 et seq., pp. 125 et seq.; *id.*: Institutions and Credible Commitment, in: Journal of Institutional and Theoretical Economics 149/1(1993), pp. 11 et seq.; *Schäfer/Ott*, loc. cit., pp. 499 et seq.; *Göbel*, loc. cit., pp. 6 et seq., pp. 118 et seq.

[53] *North*, loc. cit., pp. 35.

[54] *North*, loc. cit., pp. 125 et seq. is an exception. He describes the development of a codified mercantile law as a considerable advance on the common law in terms of developing dynamic markets based on the division of labour.

– oft-lamented high costs of negotiation and conclusion of contracts in the US are essentially caused by the lack of codified civil law. The existence of a law of obligations sets the millions of contracts free for the exchange of goods against money from detailed negotiations. Similarly, economic theories are silent on the notion of standardised trust, even though this concept also permits a depersonalised normative answer to opportunism.[55] Trust is substituted by codified law.

5c) Examples

The two previously described approaches to understanding institutions emphasise two different levels of certainty: the certainty of the legal title for property economics and the certainty in the evolution of preferences for Transaction Cost Economics. Both levels complement each other. I will try to demonstrate their efficiency by using two socially and economically important problem areas of law, i.e. real estate transactions and familiy law.

5c1) Real Estate Transactions

In his work on "Institutions, Institutional Change and Economic Performance", for which he was awarded the Nobel Prize in economics, the economist *Douglass North* described the relationship between rights and obligations in an exchange transaction, with given transaction costs, by reference to

> "(…) the transfer of a residential property in the modern United States. This transfer involves a bundle of rights over a physical asset in exchange for a sum of money. (…) Institutions determine how costly it is to make the exchange. The costs consist of the resources necessary to measure both the legal and physical attributes being exchanged, the costs of policing and enforcing the agreement, and an uncertainty discount reflecting the degree of imperfection in the measurement and enforcement of the terms of the exchange. The size of the uncertainty discount will be influenced by such specific-to-the-contract factors as asymmetric information about the condition of the house (known to the seller) and the financial condition of the buyer (known to the buyer), by such communitywide factors as the effectiveness of crime prevention, and by such nationwide factors as the stability of the price level.
>
> In the seller's utility are the price, terms, and security of the contractual obligation, that is, the likelihood that the buyer will live up to the contract ex post. The value of the residence to the buyer is a function not only of price and credit terms but also of the attributes that are transferred with the sale. Some, such as the legal rights that are transferred and the dimensions of the property and house, are easily measured, and some, such as the general features of the property, are readily observed on inspection. But others, such as the maintenance and upkeep costs and the characteristics of neighbors, may be far more difficult to ascertain. Equally, the security of property against default, expropriation, *uncertain title*, and theft will vary according to the difficulty of ascertaining their likelihood and, therefore, their importance.
>
> Now in the traditional neoclassical paradigm, with perfect information (i. e., zero transaction costs), the value of the asset that is transferred assumes not only perfect information but perfectly secure property rights as well. In that case, because both buyer and seller have been able to ascertain costlessly the value of all the attributes (both physical

[55] Cf. the work of *C.-W. Canaris*, Die Vertrauenshaftung im deutschen Privatrecht (Contractual liability in German private law), 1971.

and property rights) and there is no uncertainty or insecurity of property rights, the standard supply and demand models of housing with zero transaction costs would define the value of the asset. (...)

The transaction costs of the transfer are partly market costs – such as legal fees, realtor fees, title insurance, and credit rating searches – and partly the costs of time each party must devote to gathering information, to searching, and so forth. Obtaining information about crime rates, police protection, and security systems entails search costs to the buyer. (...)

(...) State laws defining the conveyance characteristics of real property, zoning laws restricting which rights can be transferred, common and statute law undergirding, defining, or restricting a host of voluntary organizations – all of these influence transaction costs. Realtors, *title insurance*, credit bureaus, and savings and loan associations that affect the mortgage market all will be influenced. The efficiency of these organizations is a function of the structure of property rights and enforcement and of the capital market. (...)

My description has emphasized institutions that lower transaction costs, but some – such as rules that restrict entry, require useless inspections, raise information costs, or make property rights less secure – in fact raise transaction costs. (...) Because this market is imperfect, institutions everywhere are a mixed bag composed of those that lower costs and those that rise them. (...)

(...) It is worth emphasizing that the uncertainties described above with respect to the security of rights are a critical distinction between the relatively efficient markets of high income countries today and economies in the past as well as those in the Third World today."[56]

I have chosen to include this extensive quote because it conveys a number of pivotal insights. First of all, it underscores the incompleteness of neoclassical hypotheses and their incapability of explaining both efficiency and deficiencies of the real housing market, which is characterised by a wide variety of information, procurement and transformation costs alongside a network of institutions. Legal policy proposals based on deductive logical model assumptions that abstract from reality are destined to fail.

It also illustrates that the complexity of the transaction, and the fact that the purchase of a residential property is, for the purchaser, oftentimes a one-off, existential and probably the most important acquisition of his adult life, generate a high degree of uncertainty and a great need for information. In the words of *North*, this is an 'imperfect market'.

It costs time and money to reliably procure all this information, with the exact extent of the expenditure depending on the institutions, which differ from country to country: The less the required information is publicly accessible via an information medium whose contents are irrebuttably presumed to be accurate, the higher the costs are. In a country such as Germany, where land survey office (Kataster) and land registry (Grundbuch) guarantee accurate information on the physical characteristics and the legal circumstances of a property, the prospective buyer does not have to expend time investigating these facts. Where the register entry guarantees public credence in the seller's title and the *bona fide* purchaser acquires indefeasible title, uncertain titles do not exist.

This is quite different in the US, where the absence of registers requires prospective purchasers to investigate the 'chain of title', which may result in high costs, and where the lack in security is, in part, compensated for by title insurance which, in turn, also attracts costs,

---

[56] *North*, loc. cit., pp. 61-63.

albeit without establishing the same degree of certainty and transparency as professionally maintained registers subject to the principle of public disclosure.

Where such public registers exist, the private cost burden is reduced, as these registers are established and maintained via public means. As the establishing state has a general interest in the security of private real estate transactions, but no specific interest in any individual transaction per se, the information contained in these registers is more reliable than any information provided by persons who have a vested interest in the transaction.

Where information contained in a public register is guaranteed to be correct and both parties to a legal transaction are advised and cautioned by an unbiased and competent civil law notary, trust can safely be placed and opportunistic behaviour is discouraged. One could argue, in line with game theory, that – against the backdrop of transparent information – co-operative behaviour is rewarded whereas any departure from co-operation, in the form of breaches of contract and other opportunistic conduct, is associated with high risks.[57] It therefore comes as no surprise that real estate disputes before the German courts account for a mere fraction of all litigation in the area of the law of obligations. The enforcement of rights through the courts ('after-the-fact' administration of justice) results in costs being reduced via a system of public registers and the public notarial authentication as preventive administration of justice.

The prospective buyer's information requirements remain independent of the institutional environment, with such information being pursued "until the marginal costs of the search for information reach the marginal utility of the additional information".[58] The prospective buyer will use agents, brokers and experts, who need to be remunerated but who nevertheless, serve to reduce transaction costs.[59] *North* highlighted this factor by mentioning institutions that serve to increase or decrease transaction costs, with legal advice counting among the cost-decreasing institutions. He considers "the inability of societies to develop effective, low-cost enforcement of contracts (…) the most important source of both historical stagnation and contemporary underdevelopment in the Third World".[60] He goes on to explain that "the use (...) of notarial records for evidence in disputes permitted evidence to become the basis for ascertaining facts in disputes", which – according to *North* – has greatly improved the enforceability of contracts,[61] also by avoiding litigation when the facts are clear.

It has become clear that neoclassics is not interested in the reality of contracts but rather proceeds on the assumption of isolated exchange agreements that are concluded and performed by faceless buyers and sellers, who have comprehensive knowledge and act with complete rationality and self-interest. Institutional economics has rejected this unrealistic model and has instead turned contracts into a research issue, with the focus being on 'relational', i.e. long-term, contractual relationships, because of their potentially high and heterogeneous transactions costs. As a result of their long-lasting effect, the objective uncertainty of the future and the vulnerability to subjective, opportunistic and non-compliant behaviour, these contracts are, more than others, exposed to the problem of information costs. *Oliver Williamson* in particular has examined governance strategies for such contracts, which are necessarily incomplete, and analysed methods for reducing transaction costs, which encompass careful planning, development of trust, adjustments and the reliance on trade practices up to vertical integration.[62] (It is

---

57 *C. Rieck*, loc. cit., pp. 127 et seq. in particular.

58 *Fleischer*, loc. cit., p. 131.

59 *W. Weigel*, Rechtsökonomik (Legal economics), 2003, p. 47.

60 *North*, loc. cit., p. 54; see also pp. 59, 62, 67, 134 et seq.

61 *North*, loc. cit., p. 127.

62 *O. Williamson*, loc. cit., pp. 68 et seq.

not surprising however that codified law, such as a Civil Code or, in international commercial relations, the UN Sales Convention[63] as state-provided instruments for lowering transaction costs, does not figure in the writings of the US author.[64])

The analysis does not extend to contracts whose subject matter is a one-off self-contained transaction, but which are nevertheless of great significance to one if not both parties, such as the purchase of a residential property, which is usually a once-in-a-lifetime occurrence. Game theory, in the service of economics, expounds – and we have no reason to doubt this – that the utility of goods, in the light of the assumptions of methodical individualism, is not inherent in the objects themselves but can only be identified according to subjective preferences and that the utility theory should therefore proceed from these preferences. It also demonstrates that decisions on the development of preferences are made in differing fashions, despite the situations and circumstances being identical, if these situations are described in different ways.[65] Consequently, the guiding, not to say manipulating, description of a situation or an asset is a central element in explaining the market mechanism, as it is able to create – or at least shape – preferences.

Applying these insights to an existentially important decision such as a real estate purchase, we should remember that we are arguing within the parameters of the microeconomic logic of methodical individualism and the resulting legitimacy of subjective preferences, as these have made it their mission to improve the living conditions of people in their daily environment (*Samuelson/Nordhaus*). These assumptions suggest that negotiation conditions be created in which the individual is informed *ex ante*, in a competent and unbiased manner, about the consequences of the impending transaction of material significance for the individual.

With a view to attaining an increase in efficiency and a cost reduction in real markets, Transaction Cost Economics has moved the "world of contract"[66] into the centre of the economic science debate. Even though the focus is on the long-term incomplete contract, the statements nonetheless claim universal validity. A widely noted publication reads:

> "*James Buchanan* has argued that 'economics comes closer to being a 'science of contract' than a 'science of choice' [on which account] the maximizer must be replaced by the arbitrator, the outsider who tries to work out compromises among conflicting claims'.[67] The governance approach adopts the science of contract orientation but joins the arbitrator with an institutional design specialist. The object is not merely to resolve conflict in progress but also to recognize potential conflict in advance and devise governance structures that forestall or attenuate it."[68]

It is evident that the costs for the institutional designer are intended to lower the other contract costs, particularly the costs of '*ex post*' court decisions, and it is equally obvious that, in Germany, this is subsumed under the concept of preventive administration of justice and that the institutional designer corresponds to the civil law notary.

---

[63] United Nations Convention on Contracts for the International Sale of Goods of 1980 – Federal Law Gazette (BGBl.) 1989 II p. 588.

[64] It is astonishing, however, when even continental European authors overlook these central institutions in their papers on US problems – e. g. the Austrian *Weigel* (loc. cit., pp. 44 et seq.) disregarding the General Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, "ABGB"); different: *Schäfer/Ott*, loc. cit., p. 426.

[65] *M. D. Davis*, loc. cit., pp. 73 and 13; see also *Rieck*, loc. cit., pp. 166 et seq.

[66] *Williamson*, loc. cit., p. 30.

[67] This is a quote from *Buchanan*'s paper "A contractarian paradigm for applying economic theory", in: American Economic Review 65 (1975), pp. 225 et seq., p. 229.

[68] *Williamson*, loc. cit., p. 29.

It follows that the consequences of a manipulated preference decision must be taken into consideration in the form of both individual and societal costs, as emphatically demonstrated by the sub-prime crisis. Similarly, the assessment of any fees incurred through an unbiased 'description' and advice must take into account the trade-off factor of lowering these consequential costs. These costs result from the frustration of the expectations of individuals, whose decisions were influenced by incompetent advice and/or advice tainted by the subjective interests of an intermediary.

Murray[69] and *Shiller*[70] stated that such subjective interests on the part of intermediaries are reinforced, and counteract the buyer's interests, if structurally-embedded alliances between brokers, financial institutions and insurers, all of which pursue their own personal profit agendas, exist. These are typical problems arising from the relationships between principal and agent, in which both pursue their own diverging utility preferences and which therefore lead to uncertainty, resulting in governance costs.[71] Quite rightly, they had countered this scenario with the involvement of a competent public officer in the form of a civil law notary as an inexpensive alternative that provides security, is impartial and is, in the sense of game theory, obliged to provide an objective description that ensures the prospective buyer arrives at an informed preference decision.

Moreover, reality, with brutal bluntness, has revealed the inadequacies of the US system, which caused massive losses in rights and assets, destroyed – with bitter consequences – the illusion and ideology of the market economy free of state intervention and, once again, brought the insight to the fore – known since *Adam Smith* – that the 'invisible hand' of the market needs the 'visible hand' of formal state institutions.[72] The real estate fiasco did not befall the deregulated markets unexpectedly, i.e. those markets that do not keep a public register subject to the principle of public disclosure and maintain this register with great professional competence, that is to say: markets that do not require transparency and where no notarial advice and authentication takes place *before* the transaction.

At great financial expense, the state must save the system from collapse, as only the state can act directly in the best interest of society and is not embroiled in the legitimate[73] pursuit of any particular personal or private interest. This does not mean, however, that the German state has remained unaffected, as the consequences of the exposure of German banks to foreign deregulated markets reflected back into the German market, even though the institutions that apply to the German real estate market had reliably prevented a local crisis.

The required extent of state intervention documents just how high the consequential and frustration costs of misguided preference decisions are, both at the level of the individual and of society, which could have been prevented – or at least reduced – via the cost of *ex ante* advice,

---

[69] *P.L. Murray,* Real Estate Conveyancing in 5 European Union Member States: A Comparative Study, 2007

[70] *R.J. Shiller, Robert J.*, The Subprime Solution – How Today's Financial Crisis Happened, and What to Do about It, 2008

[71] Cf. overview in *Göbel*, loc. cit., pp. 98 et seq.

[72] To this extent, the contradiction pointed out by *R. Richter*, loc. cit., p. 165 does not exist; it is, however, quite another question whether or not the formal state-created institutions can still be tied to a national state. To explore this question, though, would exceed the scope of this analysis. I therefore refer the reader to *R. Knieper*, Nationale Souveränität – Versuch über Ende und Anfang einer Weltordnung (National sovereignty – an essay on the end and the beginning of a world order), 1991.

[73] I am emphasising this to show that it would be mistaken to pin the blame for the crisis on the greed of individuals. This crisis was, in fact, caused by inadequate institutions.

authentication and registration in state-provided institutions. The fact that the legitimacy of state intervention is today taken for granted across nations following different ideologies also brings home the message that the establishment and maintenance of institutions to ensure an orderly and secure real estate market is a public function and an expression of sovereign activities.

5c2) Family Law

Institutions are "any form of constraint that human beings devise to shape human interaction", they can be formal, state-prescribed or informal, embodied in customs and traditions; their main purpose "is to reduce the uncertainty of human interaction by creating a stable (but not necessarily efficient) order and to lower costs".[74]

Societal change is inevitable, and this brings with it new uncertainties. Institutions can only fulfil their function if they also change, defining and enforcing new liberties and restrictions in the process. This applies to institutions that were established through the formal process of law as well as to institutions that came into being through informal conventions. The latter have the distinct disadvantage of moving within longer time frames, are handed down within the society and form "part of the heritage commonly referred to as culture".[75] They can only provide an adequate framework (that forgoes open force) to the calm flow of societal interaction, but are unable to keep abreast of rapid disruptions and do not guarantee order.

These considerations can be transposed, by way of example, to the development of marital, family and partnership relationships and interactions, which are characterised by the rapid dissolution of traditional gender roles, increasing individual autonomy in the shaping of the relationships between partners and an entirely new emphasis on the emotionality of these relationships. As yet unchallenged conventions regarding the protection of the material existence of family members, the dominance of the husband, heterosexuality, mutual maintenance obligations and rights of inheritance are disintegrating. Children are accorded an increasing level of autonomy, with the enduring social necessity of loving parenting still in place, as there is no alternative that can fulfil the same function. While this process is accepted without regret, it does lead to the decline of the unquestionable security that lies in every tradition and which must be institutionally compensated for.

The complexity and mixture of emotionality and financial interests, priorities at the level of the individual or the partnership, short-term and long-term selfishness as well as cross-generational solidarities contain a high potential of insecurities, asymmetrical information and power imbalances which forbids leaving their order to unregulated interactions. This would not increase freedom but rather encourage opportunistic and exploitative behaviour.[76]

Institutions that restrict interaction are indispensable in establishing new security, reconciling the increase in autonomy with the level of certainty required for the long-term status and financial relationships, enforcing fairness in partnerships and ensuring compliance with public interests that are, to a certain extent, also formulated as binding constitutional directives. As the old conventions and routines of "embedded set of institutions"[77] of patriarchy are no longer acceptable and as a new culture will only develop over time, social change can only be reflected in the change of the formal institutions of the law.

---

[74] Representative of others *North*, loc. cit., pp. 3, 4, 7, 36; *Göbel*, loc. cit., p. 1 et seq.

[75] *North*, loc. cit., p. 37.

[76] Cf. *G. Heinsohn/R. Knieper*, Theorie des Familienrechts. Geschlechtsrollenaufhebung, Kindesvernachlässigung, Geburtenrückgang (Family law theory. Dissolution of gender roles, child neglect, declining birth rates), 2nd ed. 1976.

[77] *North*, loc. cit., p. 22.

Prof.Dr. *Michèle Schmiegelow**

INTERDISCIPLINARY APPROACHES TO COMPARING THE QUALITY OF COMMON LAW AND CIVIL LAW

I. The "comparative quality" of common law and civil law as an issue of policy

For half a century after the end of the Second World War, understanding of the necessity of law as a framework for liberal democracy and free markets anywhere in the world was widespread in the Western system of values (M. Schmiegelow, 1997). After the end of the cold war, Western assistance to legal reforms in the former East block countries was thus a natural political commitment both in Europe and America. Since the end of the 1990's however, a debate on the right choice between common law or civil law patterns appears to deprive such commitment of some of its *a priori* legitimacy.

To the surprise of aid agencies and legal communities of major civil law donor countries, the yearly "Doing Business" Reports of the World Bank (DB) began to imply in 2000, if not openly state, the growing challenges to civil law systems, and have continued to do so ever since (World Bank-IFC, 2008). This sudden shift of opinion reflected the growing influence of a group of political scientists and economists commonly referred to as LLSV (by the initials of the family names La Porta, Lopez-de-Silanes, Shleifer and Vishny) by the World Bank sector in charge of preparing the DB. Based on an unconventional combination of sociology of religion, legal history, political theory, economics and econometrics, this group argued that common law countries were better governed and offered superior business environments than civil law countries of French or German „legal origin" (LLSV, 1999; LLS, 2007).

LLSV's boldest assumption is twofold: for reasons of protestant sociology, common law favors the trust of uninformed capital owners in experts acting as agents in the best interest of their principals. In contrast, civil law – in its broad sense, has been an expression of the will of a ruler since Roman times and, moreover, of catholic distrust in strangers. Hence capital flows more amply to the corporate sector and financial markets in common law countries, leading to higher per capita income than in civil law countries (LLSV 1999).

This basic assumption inspired LLSV's „legal origins theory" (LOT). To quantify the quality of legal origins, LOT needed to apply econometric methods. To deliver significant results, econometric methods require a simplification of the object to be measured, which other disciplines tend to abhor. Borrowing the concept of „legal systems" or „Rechtskreise" from the theory of comparative law (Zweigert and Kötz, 1996), while simplifying it beyond recognition, LOT divided the world in five „legal origins": English, French, German, Scandinavian and „socialist". It attributed each of initially 152 countries to one of the five „legal origins". Its world map is attached in annex 1 for easier reference. It assigned roughly half of the world, including most of Latin America, the greater part of Africa, South East Asia, the Islamic world

* Original text is in English.

and the former Soviet Union to the French legal origin. The group of countries of English legal origin is only half as large as the French one and concentrated in North America, Africa, South Asia and Australia/New Zealand. The German legal origin is again half as large as the English one and appears in central Europe and East Asia. Six Scandinavian countries make up the Scandinavian legal origin. Only three countries (North Korea, Myanmar and Cuba) remain of "socialist" legal origin in the LOT's world map.

Of all possible legal institutions, LOT chose those it considered crucial to English and American economic history as universal indicators of state administration quality, such as shareholders' rights, substantial and property rights protection, creditor protection, contract enforcement. Using diverse sources for different periods of time, LOT collected an impressive range of data regarding these indicators for each of the 152 countries. In order to compare the economic consequences of the five legal origins, it integrated these data by regression to the ultimate power of two. It tested the results by controlling them against the logarithm of per capita GDP data for the past two or three decades, taking care to eliminate biases of geographical latitude (favoring countries of temperate zones) and ethno-linguistic fractionalization (detrimental to economic performance). Taking the UK and the US as countries of „English legal origin" as a standard, LOT finds the greatest negative average deviation in the countries it considers to be of „French legal origin". While conceding that the countries it considers of German legal origin have achieved an even higher average per capita GDP than those of English legal origin from 1960 to 2000 (Mahoney, 2000; LLS, 2007), it does not recognize this evidence as a refutation, but maintains LLSV's „political theory" (LLSV, 1999), i.e. the abovementioned basic assumptions about civil law.

Institutional competition between common law and civil law is legitimate and desirable as long as it is open and undistorted. Given the global institutional influence of the World Bank, its adoption of the LLSV approach elevates it from the status of an unconventional academic argument to that of a fundamental political challenge to civil law donor countries as well as to their efforts to assist the transforming and developing countries. The transition or developing countries initiating or continuing reforms of their legal systems will hesitate to follow advice inspired by civil law, since most of them depend either on financial support from the World Bank or on private investors attentive to World Bank opinion. They will be all the more hesitant as the DB's are used as references in country analyses by major rating agencies and, hence, have a powerful impact on their international creditworthiness. Without a thorough examination of the methodology of LLSV and the DB, institutional competition between common law and civil law appears distorted.

Reactions from civil law countries have remained subdued, up to now. The French Ministry of Justice did initiate a program on *„attractivité économique du droit"*, which dealt with the issue of poor scores that France was given in the rankings of the World Bank's "Doing Business" reports and country analyses by rating agencies. It questioned the possibility of quantifying the quality of business environment as in the DB, but did not deal with the issue of transplants or assistance to developing and transforming countries. The Max Planck Institut für internationales und ausländisches Privatrecht in Hamburg opened one of its journals as a forum for an article on German and Japanese transformation assistance containing a first short critique of LLSV's political theory, religious sociology and econometrics (H. Schmiegelow, 2006).

Significantly, more comprehensive efforts in testing the LLSV approach were undertaken in the common law countries. In a series of working papers, researchers at the Center for Business Research at the University of Cambridge argued that LLSV econometrics contained biases masking dysfunctional conditions in US and UK corporate governance while amplifying negative aspects of the business environment in the Civil Law countries. At the Brookings Institution, Kenneth Dam identified further weaknesses of LLSV, such as their mistaken treatment of

nearly all Latin American countries as of "French legal origin", insufficient attention to contract law, as well as econometric anomalies. Moreover, he raised the intriguing question of whether China's extraordinary growth since embracing market economy had cast doubts on the nexus between law and development as assumed by institutional economics as well as LLSV.

Our project „Institutional Competition between Common Law and Civil Law in Developing and Transforming Countries" at the University of Louvain appears to be the first on the European continent to attempt an interdisciplinary approach to comparing Common Law and Civil Law with a more solid methodology than LLSV's and DB's. Its first international workshop was held on March 10, 2009 at Louvain-la-Neuve[1].

Finally, in a remarkable evaluation published in June 2008, the World Bank's Independent Evaluation Group (IEG) recognized a number of methodological problems of the World Bank-IFC „Doing Business" reports (World Bank-IEG, 2008). More particularly, it questioned their exclusive focus on the cost of regulations for individual firms without considering their intended social benefits or development goals. The evaluation noted that the data provision base of persons (70% representatives of globally active private law firms, where only one or two persons were interviewed for every indicator in each of the 178 countries) was far too small to warrant impartial results. A problem was also identified in the lack of transparency of the manner in which the World Bank-IFC „Doing Business" staff translated the collected data into country rankings, and manner in which the changes in rankings occurred over time. However, while recommending different procedures for the selection of, and improved methodologies for research on new indicators before their global publication by the World Bank, the IEG did not address the problem of the harm that may be caused by continued publication of the 10 indicators used with deficient methodology by the „Doing Business" reports. On the contrary, it commended World Bank-IFC for its assertive marketing of the „Doing Business" reports. The problem of distortion of institutional competition between Common Law and Civil Law was therefore not solved by the World Bank-IEG's otherwise useful evaluation.

In an implicit departure from LOT, World Bank-IEG (2008) conceded however, that a hypothetical civil law country combining the highest scores of the highest-scoring civil law country on each of the 10 indicators would reach third place in the overall ranking. In her presentation at our workshop on March 10, 2009, Victoria Elliot, the principal author of World Bank-IEG, 2008, took particular issue with the Employing Workers Indicator (EWI) of the DB, identifying inconsistencies between the EWI's focus on the cost of employing workers and its claim to observe ILO standards (Elliott, 2009). In a remarkable reversal, the World Bank Group published a note on April 27, 2009, stating that „the EWI does not represent World Bank policy and should not be used as a basis for policy advice or in any country program documents that outline or evaluate the development strategy or assistance program for a recipient country". The note expressed the commitments to remove the EWI from the World Bank Group's Country Policy and Institutional Assessment (CPIA) record, review EWI, develop a new Worker Protection Indicator (WPI), ask a new advisory group to offer broader ideas on labor-market issues to promote regulations designed to build robust jobs with adequate worker protection (World Bank IFC, 2009).

These developments show that the World Bank Group, while maintaining the DB reports as one of its „flagship publications" (World Bank IFC, 2009), is receptive to methodological criticism. It is therefore worthwhile extending such criticism beyond the EWI, reviewing all other nine indicators used in the reports accordingly in light of the findings of World Bank IEG, developing new indicators that would help direct legal reforms, and replacing the distorting method of simply averaging indicators for country rankings by a method of weighting

[1] http://www.uclouvain.be/269923.html

indicators according to their relevance for economic and legal policies. Basic assumptions of LLSV's political theory, religious sociology, economic model and econometric approach, which transcend the methods of the DB, must be thoroughly examined by LLSV using all cognitive resources of each discipline that was so boldly touched upon, or stopped being taking into consideration immediately.

II. Problems of LOT in political science, sociology, economics, law and history

The academic communities of the countries concerned should offer the material for transparent institutional competition between common law and civil law. As LLSV and the DB take an interdisciplinary approach, so must any debate aiming at criticizing their conclusions or any political idea that is opposed to their recommendations. As is the case for all discussions on economic development, the debate needs the involvement of political scientists, economists and sociologists as well as legal scholars.

If „legal origins" are supposed to influence development, particular attention must be paid to political theory, international relations theory, institutional economics, the theory of economic development, econometrics, comparative law, sociology of law, legal history and, more particularly, the history of failed and/or successful legal transplants. This is suggested by different methodological problems of the LLSV and World Bank approaches on which critical analyses published so far have focused upon, namely:

- econometric anomalies, such as a choice of indicators guided by LLSV political theory only, mismatch between the times of taking the samples and periods of application for the legal regimes that are compared, and the treatment of „legal origins" of 152 countries as a constant, in spite of very different degrees of integration of legal standards in economic life (H. Schmiegelow, 2006, World Bank IEG, 2008)
- the major inconsistency, recognized by LLSV (1999) and LLS (2007), between average long-term economic performance of countries of „German legal origin" (statistically benefiting from LOT's inclusion of Japan, South Korea, Taiwan, China into the „German" group) since the 1960's as compared to Common Law countries and the „political theory" (LLSV, 1999), maintained nonetheless by its authors, saying that the quality of government of Common Law countries is superior
- cognitive deficits in legal history, especially the history of Roman Law, such as its prevailing concern for protection of property (Robaye, 1997) of Common Law, such as its owing to the Roman Law (Hayek, 1973), such as the economic liberalism of the French, German and Japanese codes (H. Schmiegelow, 2006)
- a sociology of religion based on Robert Putnam's thesis that Protestants have more trust in strangers than Catholics, but as obviously refutable as Max Weber's Protestant explanation of capitalism by the histories of the Mediaeval bankers such as the Medici, Fuggers and Welsers as well as contemporary Japanese and Chinese capitalism (M. Schmiegelow and H. Schmiegelow, 1989). While trust of investors in the management of corporations may influence their decision to buy shares of such corporations and hence play a functional role in economic performance (Roe, 2006), the theory of bubbles and financial crises shows how dysfunctional such trust may become, if it is based on irrational expectations, or, as in the sub-prime crisis, expectations considered rational by flawed models of financial engineering (H. Schmiegelow and M. Schmiegelow, 2009; Reinhart and Rogoff, 2008, 2009)

– insufficient attention to the institutional economics of contract law, especially codified default rules, which reduce transaction costs and balance the synallagmatic interest of producers and consumers, owners and tenants, creditors and debtors (H. Schmiegelow, 2006)
– weaknesses in comparative law, such as the categorization of Latin American legal systems as being of „French legal origin" (Dam, 2006)
– failure to consider international relations theory which would require differentiating between colonial transplants of law that happened in most developing countries of the former British and French empires, and voluntary participation in the European codification movement of the 19th century such as Japan's (Berkowitz, Pistor and Richard, 2003; H. Schmiegelow, 2006)

III. A functional approach to „Law and Economics"

To refocus the debate for the benefit of legal reforms in transforming and developing countries, it seems necessary to regain the original focus of institutional economics, i.e. the transaction cost reducing role of reliable contracts and regulatory frameworks for free markets balancing the interests of producers and consumers, owners and tenants, creditors and debtors, employers and employees, shareholders, stakeholders and management of corporations. Common law and civil law traditions – whatever their differences in style and jurisprudence – share a commitment to the rule of law as a universal good. Both have been adapted in countless ways to the cultures and economic conditions of individual societies including those of their countries of origin. The demand for law in today's transforming and developing countries implies the expectation of such adaptability. Provided they are responsive to that expectation, both common law and civil law traditions can serve as reservoirs of functional solutions for legal reforms in transforming and developing countries.

1. Functional analysis in law, sociology and economics

While experts in comparative law have used functional analysis as a method of functional analysis for a long time (Dannemann, 2006; Michaels, 2006), few of them would be inclined to use econometric regressions of a conspicuously limited selection of indicators as a measure of the functional quality of common law or civil law seriously. Yet, there is growing awareness that the challenge of LLSV needs to be met in the arena which they have chosen, i.e. a very basic sociological functionalism, quantified by indicators easily measured by econometric regressions and controlled by the logarithm of per capita GDP, or other variables of countries compared.

In order to connect with LLSV's interdisciplinary attempt with its broad sociological references, my husband has proposed using Talcott Parsons' categories of sociological functionalism as a rough orientation (H. Schmiegelow, 2006). Previously, we found these categories most helpful in analyzing Japan's outstanding economic development from the 1960's to the 1980's (M. Schmiegelow and H. Schmiegelow, 1989). To be sure, Parsons' sociological functionalism is no substitute for rigorous political theory, economic analysis or jurisprudence. Parsons' self-confessed eclecticism is evident in his combining general equilibrium theory based on Pareto and Marshall utility with Max Weber's sociological explanation of culture, economy and society (Parsons, 1968). But just that combination may help respond to LLSV. Naturally, in the 1960's and 1970's, it became fashionable to regard Parsons' sociology as an

outmoded conceptual collection. But for the present debate on the relationship between law and economics, they have a *prima facie* relevance. Parsons' categories constitute an elementary matrix of necessary components for any viable society and can serve as early warning against all too reductionist assumptions. Parsons proposes that any social system or action has four functional requirements, namely, goal attainment, adaptation, pattern maintenance and integration. In modern societies, these requirements are fulfilled by the political system ("polity"), economy, culture and law (Parsons and Smelser, 1956). In figures 1 these functions are represented by a simple matrix of four squares.

Figure 1: Four Functional Requirements of a Social System or Social Action

1. **Goal Attainment**	**2.** **Adaptation**
3. **Pattern Maintenance**	**4.** **Integration**

The four requirements of social action are dependent on each other. Each is both an independent and a dependent variable. This calls for caution against all too confident assumptions about a hierarchy of importance among the four. This caution is particularly important if the four requirements are elevated to the level of social subsystems of a society (see Parsons and Smelser, 1956). Figure 2 immediately makes plain how dogmatically or ideologically sensitive this elevation is.

Figure 2: Four Functional Requirements of a Society (Nation State)

1. **Polity (government)**	**2.** **Economy**
3. **Culture**	**4.** **Law**

The most widespread assumptions come into mind immediately: Anglo-Saxon nation-states emphasize 2 and 4 (free markets, strong rule of law), whereas continental European nation-states emphasize 1 and 4 (big government, strong regulations). LLSV appear to share these assumptions while adding an intriguing emphasis on 3 as a factor explaining differences of 2 and 4, namely: Anglo-Saxon Culture supports a strong economy based on a strong rule of law. Dissociative continental cultures correlate with big government, regulated markets and weak economies. It is easy to "color" the Parsonian squares accordingly, as in figures 3 and 4

Figure 3: Frequent Assumptions about Anglo-Saxon Economies and Societies

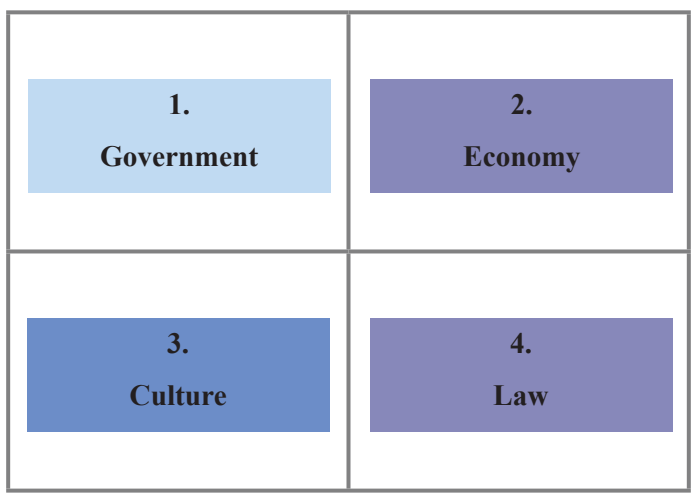
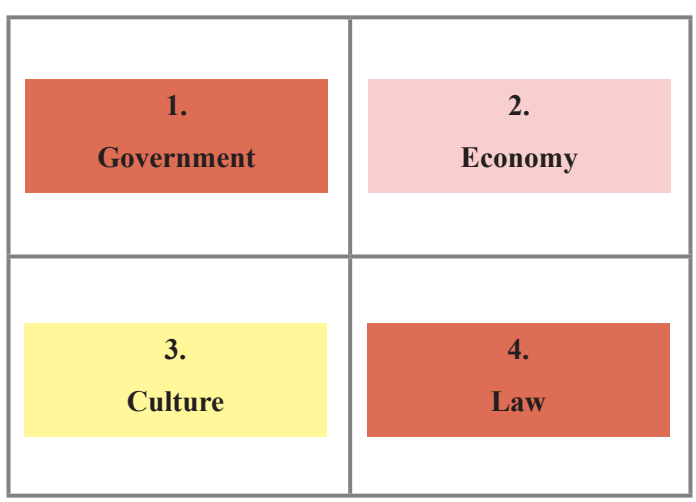


Figure 4: Frequent Assumptions about Continental European Economies and Societies



Of course, the evidence reviewed so far casts doubt on bold assumptions on this level of generalization. Ideological dissension on the supposed cleavage between Anglo-Saxon and Continental European patterns is "programmed" as it were.

But the four functional requirements of Parsons' sociological functionalism can just as easily be broken down to more focused levels of legal systems and economies, as in figures 5 and 6. On these levels, agreement should be much easier to reach. Few will contest the unquestioned goal of any legal system, i.e. justice, as in Figure 5. Most legal scholars, except the remaining representatives of positivism, will concede that in the interest of justice, the law at times needs to adapt to economic and social developments. Most economists and the more pragmatic lawyers will also agree that the law should serve to reduce transaction costs in the economy. Students of Professor Knieper will hold that cultural context is a functional requirement for the law. And who would doubt that these three requirements should be integrated into a fourth, namely a high standard of law abidance or enforcement?

Figure 5: Functional Requirements of Legal Systems

1. **Justice for all** **(the unquestioned goal)**	**2.** **Adaptation to economic and social developments, reduction of transaction costs**
3. **Responsiveness to cultural context**	**4.** **High standard of law enforcement and law abidance**

Figure 6 illustrates the division of labor taking place in economics between different schools of thought in economics. The theory of economic policy focuses on the attainment of specific goals, such as keeping inflation in check, encouraging investment or engaging in reforms of the legal environment of markets. General equilibrium theories analyze how markets adapt autonomously to impulses such as price changes. Behavioral economics explains economic patterns beyond rational expectations, such as Max Weber's "Protestant" explanation of capitalism and, indeed, LLSV. Finally, Germany's post war "ordo-liberalism" and new institutional economics stress the importance of reliable legal frameworks helping markets to remain competitive and function at the lowest possible transaction costs. Occasionally, dogmatic dissension flares up between these schools of thought. The protagonists of such dissension should consider how Japan's strategic pragmatism cut across contending doctrines and nurtured Japan's outstanding economic development from the 1950's to the 1980's.

Figure 6 : Functional division of labor between economic theories

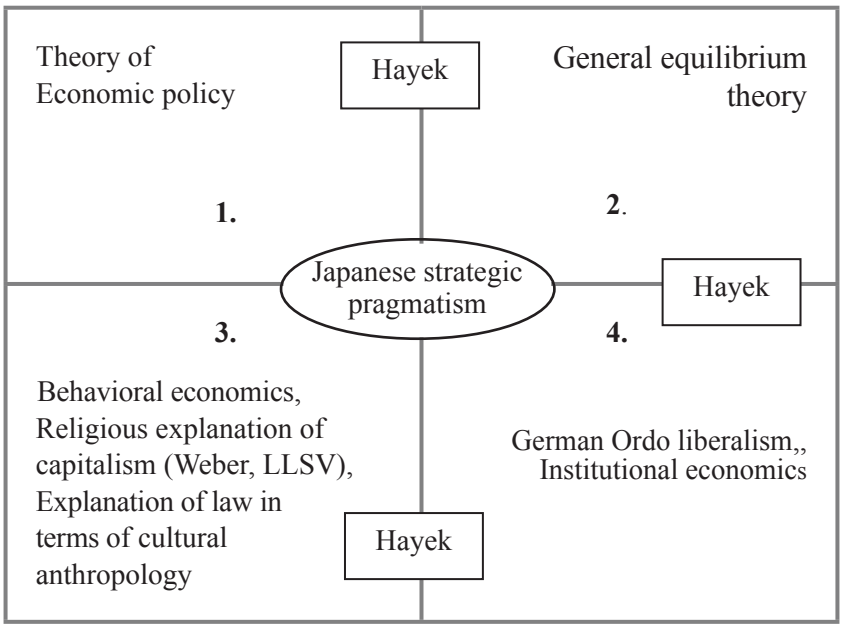


Figure 6 illustrates that, in spite of the many methodological problems of LLSV, they cannot simply be discarded as a manifestation of the "neo-liberal" onslaught on Continental European legal and economic traditions. Their basis in behavioral economics (Square 3 in Figure 6) is more solid than appears beneath the dazzling light of exaggerated assumptions and the methodological problems of the econometrics of LOT. But the most powerful refutations of LOT are offered by methodologically solid institutional economics (Square 4 in Figure 6).

2. How legal origins theory ignored contract theory

LOT builds on Andrei Shleifer's and Robert Vishny's influential refutation of the efficient market paradigm in finance. Their research in behavioral finance led them to the conclusion that markets do not automatically eliminate price distortions thanks to an assumed presence of countless arbitrageurs. They found that only a limited number of professional insiders with access to ample and patient capital are able to prevail against masses of inefficient "noise traders" by contrarian strategies over extended periods of time (Shleifer and Vishny, 1997). Hence, LOT focuses quite naturally on rules governing the provision of capital to financial markets. The question is whether it can assume as boldly as it does that common law is economically superior to civil law. LOT argues, as we have seen, that for reasons of Protestant sociology, common law favors the trust of uninformed capital owners in experts acting as agents in the best interest of their principals. The religious sociology involved in this argument is as debatable as LOT's assertion that civil law has been an expression of the will of the ruler since Roman times and of Catholic distrust of strangers. It is sufficient to refer to the cas-

es of the civil law of the Protestant Netherlands or the common law of the Catholic Ireland. And yet, there is unmistakable merit in LOT's major effort to attempt an econometric measure of the importance of law in economics.

Previously, Austrian economics and new institutional economics had come from similar doubts about general equilibrium theory to the similar conclusion that law has a crucial role to play in economic development. Some contributors to LOT cite Friedrich von Hayek, the eminent representative of the Austrian school of economics, as a reference for their assumption on the economic superiority of common law over civil law (Mahoney, 2000; LLS, 2007). That reference, however, is not borne out by a closer reading of Hayek's writings. For, in his seminal *Law, Legislation and Liberty* (1973), Hayek explicitly rejected the authoritarian interpretation of the Roman law. He emphasized that the Roman law has deeply influenced all Western laws including English common law and that the Justinian code (on which both the French and the German code draw to different degrees) was a digest of Roman jurisprudence since Seneca's and Cicero's times in a legal process very similar to the later common law. While Hayek had a basic preference for the gradual process of judge-made law, he did warn that common law precedents, if set and continuously followed by positivist judges or judges belonging to a particular interest group, may end up constructing a "one-way street" unresponsive to change in the economy or society. He emphasized that such one-way streets needed to be corrected by legislation.

While Hayek's arguments were designed to lift law and economics to the level of the critical rationalism science philosophy, as demonstrated by his Nobel Prize speech (Hayek, 1974; Heath, 2009), new institutional economics developed a more parsimonious approach to the function of law in economics. Ronald Coase and Douglass North received the Nobel Prize in 1991 and 1993 respectively for their research on how legally binding contracts (Coase, 1937,1988) and, more generally, legal frameworks for markets preventing corruption, reducing information asymmetries, providing infrastructures for contract enforcement and dispute settlement, etc. (North, 1990) can reduce economic transaction costs. Institutional economics has made no basic distinction between common law and civil law or between judge-made law and legislation.

Whereas LOT has its strengths in the area of financial markets, it is much less focused on the bedrock of economic transactions, i.e. contracts. Although it does consider strong rules of contract enforcement as an important indicator of comparative quality of legal origins, it does not seem to be interested in how the law can facilitate the conclusion of contracts. Rather conspicuously, LOT appears to bypass contract theory.

In classical contract theory, a complete contract fully specifies the rights and duties of the parties to the contract for all possible future situations in real life. This notion indeed reflects the classical common law requirement of full consent of the contracting parties on every right and obligation that may become an object of litigation. However, since Oliver Williamson recognized that it is either impossible or inefficient in terms of transaction costs to write complete contingent contracts, micro-economists and legal scholars have sought solutions both for case-by-case contracts and relationship-specific contracts.

While micro-economists have analyzed the transaction cost and incentive effects of the problem, American legal scholars have focused on how default rules provided by the law fill the gaps of incomplete contracts. Civil and commercial codes of civil law countries provide default rules for most of the economically important types of contracts (sales, rent, employment, services, construction, insurance, loans, etc). In common law countries they are an exception, the most important being codifying statutes for the sale of goods and services (the UK Sales of Goods Act and the US Uniform Commercial Codes). Common law judges nor-

mally recognize only the clear text of the contract. Moreover, they demand proof of complete consent on any right or obligation claimed by any party in subsequent litigation. If the text of contract is unclear or incomplete in the sense of contract theory, rights and obligations of the parties will be correspondingly incomplete. The contract may even be void for lack of clarity. Only rarely have common law judges attempted to save an incomplete contract from uncertainty by looking for rules «implied in the law», which might serve as «implied terms» of the contract (Farnsworth, 2008).

We challenge the position that this significant difference of contract laws between the two legal families may qualify LOT's assumption that the common law is economically superior to civil law in the broad sense. Even if we concede that common law provides a superior environment to financial markets by favoring a more ample flow of capital to professional insiders, civil law may score by offering a safe and easy framework for the conclusion of contracts in the real economy. The provision of default rules for all economically important types of contracts by civil codes as a public good offers two crucial economic advantages. The first is that codified default rules are publicly accessible to everyone, thus preventing the information asymmetries regularly resulting in common law countries from one contracting party writing a multi-page contract striving for "completeness" with the other party resigned to accept it. The second advantage of codified default rules is that, as a public good, they spare contracting parties the transaction cost of attempting to write complete contracts even for routine commercial activities. This may have been a necessary, if certainly not a sufficient (H. Schmiegelow, 2006), condition for civil law countries of German legal origin to outperforming, by LOT's own admission (Mahoney, 2000; LLS, 2007), common law countries between 1960 and 2000.

3. Areas of research in the project "Institutional Competition between Common Law and Civil Law in Developing and Transforming Countries" at the University of Louvain

The German and the Japanese civil codes offer particularly interesting material for comparative functional analysis as they have stood the test of time in more severe conditions than most transforming countries today. They provided an immediately available institutional framework for the economic revival of the two countries more completely destroyed in the Second World War than any other country in any war before (H. Schmiegelow and M. Schmiegelow, 1989; H. Schmiegelow, 2006). *Prima facie*, they appear better suited to help "jump start" economic development in transforming and developing countries than a strategy of waiting for the slow process of judge-made law emulating the history of common law. The default rules are offered by these codes to all citizens who could not afford the legal advice necessary to draw up specific provisions from voluminous compendia of precedents needing to be referred to in order to make contracts safe, at great cost, for disputes before common law courts.

Inversely, under the impact of the consumer protection movement in the US, the private autonomy of contracting parties in the civil codes of France and Germany was significantly reduced by EU legislation requiring member-state to revise their civil codes so as to condition the validity of sales contracts on complex procedures increasing the transaction costs of both producers and consumers (Boucart, 2005, Riesenhuber, 2007).

High degrees of creditor protection and of contract enforcement in Germany and Japan are already attested by LLSV themselves, one of the inconsistencies calling into question the broad brush of their conclusions. Creditor protection in German and Japanese corporate law

even turned out to be too much of a public good. It ended up by being criticized as an impediment to the setting up of new businesses and was, or is being, lowered in both countries (Baum, 2009).

Property rights and debt collection are some of the major concerns of both LLSV and DB. The "Registering Property Index" (RPI) is among the seven out of 10 indicators of DB where the top ranking countries are those with the *prima facie* fewest requirements and lowest registration costs. But comparative econometric analysis of two major property conveyance and acquisition systems has revealed that apparently simple recording systems such as the American, English and French ones, where it is sufficient to deposit the agreement to acquire a real estate property at the County recording office ultimately results is a much costlier and much less safe property conveyance procedure than is the case with a public registry such as in Australia, Denmark, Germany, or Spain, when the ownership of the seller is questionable. For, while recording offices must accept all signed documents irrespective of their legality and their conflict with previously established rights, public registration of a new right requires previous annulment of all older contradicting rights.

In most civil law countries with a public registry system, the public notary authenticating the property sale or mortgage is bound by law to examine the legality of contract and confirm absence of contradicting rights before conveying it to the registry. In the American recording system, title examiners are obligated to examine all deeds dealing with the concerned plot of land in the past and to certify legality of the document in question. This is lucrative for title examiners, but the risk of legal uncertainty remains with their clients. In the subprime crisis, millions of mortgages packaged in asset-backed securities required title search as sub-prime borrowers became unable to service their debt. Hernando de Soto, the Peruvian scholar dealing with the deficiencies of the substantive law in the developing countries, has compared the US recording system to dysfunctional conditions in Latin America (De Soto, 2009). It proved to be a major structural impediment to rapid crisis recovery. Evidently, the RPI needs to refocus on the comparative advantage of public recording systems for any country like the US determined to rely on financial innovation for economic growth. Only a public recording system makes securitization of mortgages and trade in such securities possible, as any lender, any investor and any holder of mortgages and similar property assets can check the identity and contents of the asset involved in the public registry at any time. It is interesting to note that China's new property law has opted for a public registry system (Rehm and Julius, 2009).

Shareholder protection against corporate insiders was initially another of the major areas where LLSV assumed common law countries to be superior to civil law countries. Prompted by studies detailing French and German shareholder rights as functionally equivalent to common law anti-director rights (Cools, 2005, Braendle, 2005), LLSV replaced the anti-director rights standard by indicators such as securities laws governing the new issues regarding the rights and corporate laws preventing insider trading.

Both the US and the UK recognized the need of reforming their corporate take-over rules in the 1960's. Since very different interest groups reflecting the different economic structures of the two countries (industrial in the US, financial in the UK) supported the reform, the results are very different, enabling shareholders in the US to delay and prevent a takeover, while the UK reform makes any such attempt virtually impossible. In various combinations, France, Germany and Japan have adopted elements of one or the other, or both. There is no longer any common law/civil law divide (Baum, 2009). Moreover control by the logarithm of per capita GDP does not confirm superior quality of either the US or the UK solutions as compared to the corporate law regimes of civil law countries as a group. As already mentioned,

LLSV themselves admit that Germany's and Japan's average economic performance exceeded that of the US and UK since the 1960's, i.e. following the corporate law reforms in the US and UK.

Germany's and Japan's superior average long-term economic performance must be all the more intriguing from the LLSV point of view, since the financial sector of these two countries has been marked by indirect financing of corporate investment through banks rather than by direct financing from the capital market (Schmiegelow and Schmiegelow, 1989). Indirect finance has been regarded as backward by generations of economists and it is not surprising that LLSV take the capital market model prevalent in the US and the UK as an axiomatic standard. More recent analysis of financial intermediation takes a more balanced view however, finding virtue in the banks' ability to reduce information asymmetries between providers and receivers of capital better than capital markets, to absorb an interim risk for household savings and to monitor management performance in "relationship banking" with small and medium enterprises. "Old-style" financial intermediation by commercial banks may have been more functional after all than the "innovative" securitization driven by US investment banks.

Whatever the judgment of history on these differences of financial systems may be in the end however, they can no longer be linked to "legal origin". For France has made great steps in the process of disintermediation recommended by IMF and World Bank as a global standard. Securitization, both on the asset and the liability side of French non-financial sectors, indicates that France has been changing from a bank-based to a market-based financial system ever since the early 1980's.

The worst regression score for France and Germany in the 2008 World Bank-IFC "Doing Business" report are reflected in the "Employing Workers Indicator" (ranks 144th and 137th respectively of 178 countries). Their statistical impact on non-weighted average of 10 indicators of the report largely accounts for the modest 20th position for Germany and 31st for France, whereas Common Law countries offering freedom of hiring and firing are ranked among the first four. As mentioned already, the evaluation of World Bank-IFC "Doing Business" by World Bank-IEG (2008) singles this indicator out as the most important common negative factor in the ranking of European civil law countries, even if Scandinavian countries were categorized as civil law countries. But labor regulations are not part of the civil code in either country. They result from particular social legislation reflecting policies of distributive justice and/or Keynesian notions of automatic demand stabilizers in mature economies. Except for remnants of life-time employment and seniority wages, Japan's labor market is much less rigid, even though Japan is categorized as a civil law country. This suggests that the labor market may be a telling category for LLSV political theory and for current World Bank economic analysis, but it is not applied consistently in case of institutional competition between common law and civil law.

Evidently, the number of indicators for comparing the quality of "legal origins" needs to be increased. Moreover, the particular value of each indicator is lost, if all indicators are simply averaged in the country rankings of the World Bank reports. They need to be weighted to provide meaningful answers to every single policy question that the transforming and developing countries must ask in search of functional solutions in their legal reforms.

The level and distribution of the cost of litigation as well as of fees for legal advice are not only important for measuring the ease of access to law as an important condition of the rule of law. They also constitute an important part of transaction costs in terms of institutional economics. This is an important issue for research in institutional competition between different "legal origins" of advice to transforming and developing countries. In view of salient differences between the UK and the US, as well as between Latin countries, Germany and

Japan, concerning the rules governing court costs and lawyer's fees, here again, the simple dichotomy between common law and civil law will not be helpful.

The institutional competition between common law and civil law could lead to more focused political strategies in the transforming and developing countries if comparison of their functional qualities would lead to a realization of what they have in common, in addition to what makes them different (Zweigert & Kötz, 1998; Dannemann, 2006). Indeed the most important feature in the relation between civil law and common law is the expanding role of legislated law in common law countries and the growing importance of judge-made law in civil law countries. In modern societies such as the US, the UK, France, Germany and Japan (to name only some, i.e. the most important donor countries to the transition and developing countries), there is intense interaction between legislative and judicial powers. Court rulings fill gaps of legislation or even correct dysfunctional legislation in civil law countries. Inversely, statutes in common law countries prescribe judges' obligations in more detail than civil law codes which provide judges with ample opportunity to become "sources of law" thanks to numerous "general clauses" (Danneman, 2006; H. Schmiegelow, 2006; H. Schmiegelow, 2009). Research on these functional interactions between two of the three components of Montesquieu's division of powers, as well as advice based on such research is of crucial importance for the transition and developing countries in the process of reforming their legal system.

IV. Analyzing the failed and successful "transplants" of legal systems

As Berkowitz, Pistor and Richard (2003) have rightly argued, "legal origin" alone is not a sufficient indicator of the quality of a government. As a rule, the colonial method of transplanting a legal system was by no means a guarantee of successful economic development. In the 19th century, the entire common law was codified to speed its diffusion in the British Empire, more particularly in India. And yet, India's present Prime Minister Manmohan Singh, one of the few professional economists among the heads of government of the world, presented a severe reckoning of India's past development failures in his address at the occasion of the 50th anniversary of India's independence in 2007. In 2006, the World Bank ranked India, the biggest common law country, 173rd out of 178 countries for contract enforcement, casting serious doubt on the consistency of broad brush assumptions on the superiority of common law in comparison with civil law.

The paradigm of success in the history of legal transplants, if "transplant" is the right word at all, is Japan's selectively using, after much internal debate, of elements of the French and the German civil law for its own civil and commercial codes in the 1890's. In fact, the legislative process leading to the adoption of these codes is highly instructive for today's legal reforms in developing and transforming countries. It involved the initial drafting of entire civil and commercial codes by the French legal scholar Emile Gustave Boissonade and the rejection of those drafts by a group of Japanese scholars favoring English jurisprudence. It included an 8-year period of reflection used for discussions among Japanese scholars and lawmakers. It took a new direction with the return of numerous Japanese lawyers from legal studies in Germany, where they had followed the intense debate about various drafts of the German civil code, which was to enter into force only in 1900. It ended by the adoption of Japan's own civil and commercial codes in 1897 and 1899 reflecting preferences of Japan's legal commu-

nity choosing among various functional options in each section of the codes (H. Schmiegelow, 2006). In today's development policy discourse, the autonomous quality of that process would be called "ownership", i.e. Japan acted as project owner of its own reform.

China has evidently been following a similar pattern in its dialogue with Western partners on the rule of law since the early 1990's. In designing such laws as those on patent protection, contracts and, most recently, even real estate transactions, it keeps a high degree of "ownership" in taking the initiative of organizing and directing the institutional competition between common law and civil law countries. The discussions are protracted and detailed. LLSV political theory or civil law legal dogmatism does not seem to carry much weight in Chinese legislative discussions. Functional analysis is appreciated. Decisions are taken with strategic pragmatism (H. Schmiegelow and M. Schmiegelow, 1989), ready for adjustment in subsequent phases of market development and legal reform. Today, the degree of enforcement of China's new laws is still uncertain (Dam, 2006). But, then, there is a chance for continued institutional competition between functional solutions of common law or civil law origin. As the Chinese economy and its political system evolve, demand for law grows. Japan's history of legalization and modernization will be instructive in this respect (Hirowatari, 2000). *Mutatis mutandis*, similar situation is present in Vietnam, Laos and Cambodia.

In countries of Eastern Europe, Russia, the Caucasian Region, and Central Asia an initial surge of enthusiasm for legal transformation assistance on the part of advisors from common law countries, especially the US, gave way to lament about delays and failures of legal reforms as well as their undermining by corruption (Black, Kraakman and Tarassova, 2000). Berkowitz, Pistor and Richard (2003) concluded that the idea of legal transplants should be abandoned as such.

The failure of most colonial transplants' cases and of the American affluent supply of "templates" for legal transformation in Russia and Eastern Europe in the 1990's suggests that a new method must be found for using common law or civil law as sources of advice to legal reforms anywhere in the world. The evidence suggests that the "transplant" method should be replaced by what we would call the "discourse method" in which donor countries would engage in international legal cooperation with the developing and transforming countries while the latter maintain ownership of their legal reforms.

The developing countries deserve no less commitment than the transforming countries. This may mean that colonial transplants now become the object of reform. US advice is at work in legal reforms in the Latin American countries of the Spanish Civil Law tradition. So are some of Germany's political foundations. Japan has assisted Cambodia in drafting a new civil code replacing the colonial transplant from France. Even in such cases, open institutional competition between common law and civil law sources of advice may produce functional results.

The analysis of legal reforms in the developing and transforming countries will have to extend to economic benefit, social concerns and cultural context. China's own recent effort in supplementing its dynamic economic development by a full-fledged system of social security based on the European model is an example that demonstrates this need (Zheng, 2008). Mongolia's debate on whether or not to allow land law to undermine the traditional nomadic mode of land use by division in plots and liberalization of land sale is another (Kurumisawa, 2010).

While the functional qualities of common law and civil law may be recognized as an issue between Western donor countries themselves, the economic, social and cultural dimensions of legal reforms in the developing and transforming countries require essential analytical contribution of scholars and policy-makers of the reforming countries concerned.

V. Comparing functional qualities of legal institutions by improved methodology

To measure transaction costs and compare macro-economic performance of Common Law countries and civil law countries, econometric and macro-economic analysis must be applied to the 200 year periods in case of the French *Code Civil* and the 100 year periods in case of the German BGB and the Japanese civil code. In the cases of more recent reforms, such as US and UK revisions of corporate law in the 1960's, as well as German and Japanese reforms, which have adopted different elements of US or UK patterns, the time periods will have to be adjusted accordingly.

The comparative statics of LLSV and DB econometric methodology needs to be replaced by dynamic panel analysis in order to capture the impact of legal institutions on economic performance through the variations of business cycles. Available data on the economic performance of DB's 178 countries need to be controlled for biases such as resource affluence, migration, particular land use régimes, financial intermediation as opposed to equity finance etc. (Boucekkine, Ngendakuryo, H. Schmiegelow, M. Schmiegelow, in preparation).

Periodically recurring financial crises arising from insufficiently supervised capital and real estate markets in the US and UK need to be analyzed as thoroughly as the rigidities in the labor markets of the civil law countries from the point of view of institutional economics without masking these patterns by non-weighted averages which do not explain economic performance. More particularly, the sub-prime crisis challenges the contract law, property law and enforcement law as well as accounting rules of both common law and civil law to compete institutionally for the most efficient and rapid crisis recovery.

The areas of institutional competition requiring particular attention in terms of transaction costs and functional roles for economic efficiency are:

- Contract law
- Property law
- Corporate laws
- Labor market regulations
- Financial regulation
- Civil Procedure, Administrative Procedure
- Laws governing legal professions
- Court costs, lawyers' fees and other legal transaction costs
- The role of rating agencies and debtor information
- Foreign trade and foreign capital control regimes

VI. Conclusion

Rebuttal of the boldest assumptions of "Legal Origins Theory" and the necessary criticism of its econometric methods should not lead us to consider the economic analysis of law as an externality to be evaded by legal scholars. On the contrary, institutional economics is a powerful recognition of the crucial role that legal institutions, functionally interacting with the cultural context, play in economic theory and economic development. Legal scholars, legal practitioners, and agencies of international legal cooperation should seize the potential offered by the interdisciplinary link between law and economics.

References

Baum, Harald (2009), "Different Interests Reflected in Reforms of Take-over Law in the US, UK, Japan and Germany", *Workshop Institutional Competition between Common Law and Civil Law* March 10, Université Catholique de Louvain, http://www.uclouvain.be/269923.html

Berkowitz, Daniel, Katharina Pistor and Jean François Richard (2003), "The Transplant Effect", *American Journal of Comparative Law*, Vol. 51, pp. 163-203

Black, Bernard, Reinier Kraakman and Anna Tarassova (2000),"Russian Privatization and Corporate Governance: What Went Wrong?", *Stanford Law Review* Vol. 52, p.1790

Boucart, Hélène (2005), *L 'agréation de la livraison dans la vente, Essai de théorie générale*, Université de Poitiers, Collection de la Faculté de droit et des sciences sociales

Boucekkine, Raouf, Fabien Ngendakuriyo, Henrik Schmiegelow and Michèle Schmiegelow (forthcoming), *Contract Rules in Codes and Statutes: Easing Business Across the Cleavages of Legal Origins*, CRIDES, IRES, CECRI Joint Working Paper Series, No 3 , Université Catholique de Louvain

Braendle, Udo C. (2005). «Shareholder Protection in the USA and Germany - On the Fallacy of LLSV» University of Manchester, May 2005. Available at SSRN: http://ssrn.com/abstract=728403

Coase, Ronald (1937) "The Nature of the Firm", *Economica* NS4 (1937), pp. 386-405

--- (1988), *The Firm, the Market and the Law*, University of Chicago Press

Cools, Sofie (2005) "The Real Difference between the United States and Continental Europe: Distribution of Powers", *Delaware Journal of Corporate Law*, 2005, pp. 697-766

Dam, Kenneth (2006), *The Law-Growth Nexus: the Rule of Law and Economic Development,* Washington: Brookings Institution.

Dannemann, Gerhard (2006), "Comparative Law: Study of Similarities or Differences", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford (Oxford University Press), pp.383-420

Elliott, Victoria (2009), "Taking the Measure of Doing Business Indicators: An Independent Evaluation", *Workshop Institutional Competition between Common Law and Civil Law* March 10, Université Catholique de Louvain, http://www.uclouvain.be/269923.html,

Farnsworth, E.Allan, " Comparative Contract Law ", in Mathias Reimann & Reinhard Zimmermann (eds.), *The O xford Handbook of Comparative Law*, Oxford University Press: Oxford, pp. 899-936

Hayek Friedrich von (1973), *Law, Legislation and Liberty*, Chicago: University of Chicago Press

--- (1974), *Pretense of Knowledge*, Nobel Prize Lecture, http://nobelprize.org/nobel_prizes/economics/laureates/1974/hayek-lecture.html;

Heath, Joseph (2009) "Hayek" in "Methodological Individualism", *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/methodological-individualism/#2

Hirowatari, Seigo (2000), "Post-war Japan and the law. Mapping discourses of Legalization and Modernization", *Social Science Japan Journal* (Oxford). 3, 2, p. 155-169

Kurumisawa, Yoshiki (2010), "Die Erfassung des Rechtskontexts am Beispiel des Bodesrechts" in Herbert Küpper und Wolfgang Brenn eds. , *Rechtstransfer und internationale rechtliche Zusammenarbeit,*

La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny (1999), "The Quality of Government", *Journal of Law, Economics and Organization*, Vol. 15, pp. 222-244

La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer (2007), "The Economic Consequences of Legal Origins", Working Paper 13608, National Bureau of Economic Research, Cambridge Mass, (www.nber.org/papers/w13608)

Mahoney, Paul (2000) *The Common Law and Economic Growth: Hayek Might be Right*, University of Virginia School of Law Working Papers Series, 00-8, January

Michaels, Ralf (2006), "The Functional Method of Comparative Law", in Mathias Reimann and Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, Oxford (Oxford University Press), pp.339-382

North Douglass (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge University Press

Parsons, Talcott (1968) *The Structure of Social Action*, New York: The Free Press (1937) vol 1, 11

--- and Neil Smelser (1956), *Economy and Society*, New York: The Free Press

Reinhart, Carmen and Kenneth Rogoff (2008), *This Time is Different: A Panoramic Overview of Eight Centuries of Financial Crises*, NBER Working Paper No 13882, March 2008

--- (2009), „What Other Financial Crises Tell Us : The lesson of history is grim: expect a prolonged slump", Wall Street Journal, February 3, 2009

Rehm, Gebhard and Hinrich Julius (2009), "The New Chinese Property Rights Law: An Evaluation from a Continental European Perspective", *Columbia Journal of Asian Law* Vol. 22, pp. 2 -22

Riesenhuber, Karl (2007) "Wandlungen oder Erosion der Privatautonomie?", in: K. Riesenhuber und Yukio Nishitani, (Eds.), *Wandlungen oder Erosion der Privatautonomie? - Deutsch-japanische Perspektiven*, Berlin (de Gruyter), S. 1-15

Robaye, René (1997), "Du 'dominium ex iure Quiritium' à la propriété du Code civil des Français", *Revue Internationale des Droits de l'Antiquité*, Vol. 44, pp. 311-332.

Roe, Marc (2006), *Legal Origins and Modern Stock Markets*, *Harvard Law and Economics Discussion Paper No. 563*

Schmiegelow, Michèle and Henrik Schmiegelow (1989), *Strategic Pragmatism: Japanese Lessons in the Use of Economic Theory*, New York: Praeger, pp 150-160

Schmiegelow, Michèle, ed. (1997) *Democracy in Asia,* New York: St. Martin's Press

Schmiegelow, Henrik (2006), "Why Legal Transformation Assistance from Germany and Japan to Former East Bloc Countries? ", *Zeitschrift für japanisches Recht*, Vol.11 No. 22, pp 5-38

--- (2009), "Institutional Competition between Common Law and Civil Law",

Keynote Presentation at the Joint Symposium Legal Technical Assistance to Developing Countries in Asia: Institutional Difference and Competition between Common Law and Civil Law of the Japan Federation of Bar Associations, The American Bar Association and the Bundesrechtsanwaltskammer on June 22, 2009, Tokyo

Schmiegelow Michèle (2008), "Common Law et droit civil aux prises dans la transformation des anciens pays de l'Est", *Mémoires de l 'Académie des Sciences, Arts et Lettres d 'Angers*

Shiller, Robert (2008) *The Subprime Solution: How Today's Financial Crisis Happened, and What to Do About It*, Princeton: Princeton University Press

Shleifer, Andrei, and Robert W. Vishny (1997), "The Limits of Arbitrage", *The Journal of Finance*, Vol. 52, No. 1. (Mar., 1997), pp. 35-55.

World Bank IFC (2008) *Doing Business*

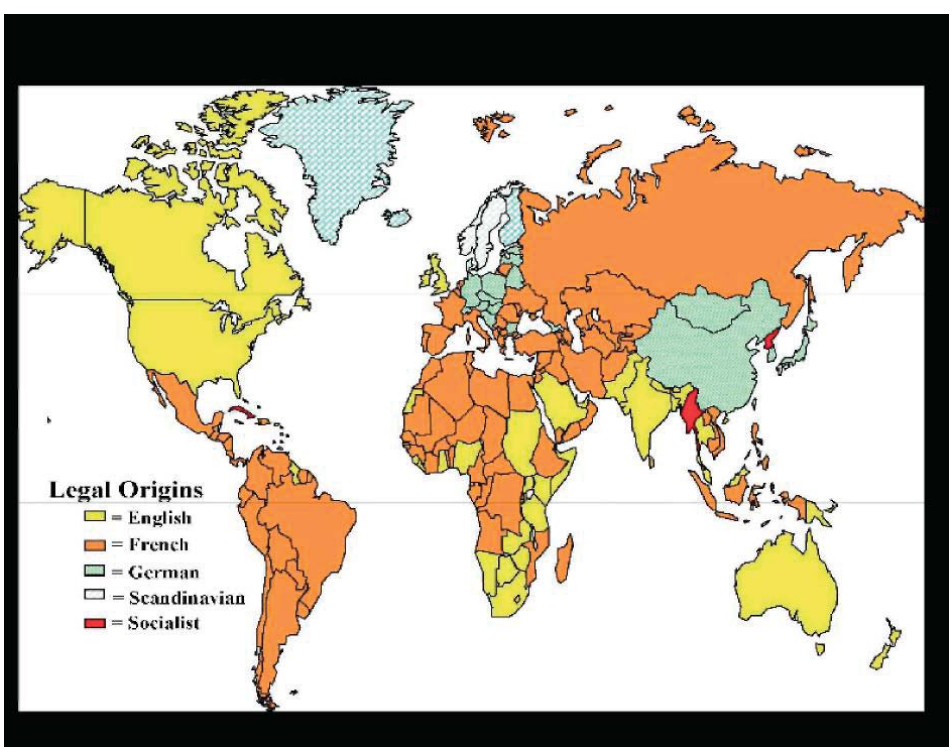
--- (2009) "Revisions to the EWI Indicator" http://www.doingbusiness.org/documents/ EWI_ revisions.pdf

World Bank IEG (2008), *Doing Business: An Independent Evaluation - Taking the Measure of World Bank-IFC Doing Business Indicators*

Zhen Bingwen (2008) , "Social Security Fund Governance and Legislation: What China Can Learn from the European Union", Paper presented at the Third High Level Round Table of the EU-China Reform Cooperation Project, Sept. 23-25,2008, Beijing

Zweigert Konrad, and Hein Kötz (1998), *An Introduction to Comparative Law* (translated by Tony Weir), 3d edition, Clarendon House

Annex 1: World Map of Legal Origins according to LLSV (2007)



I
META-PRAVNI UTICAJI NA PRAVNE SISTEME

Prof. Dr. *Slobodan Perović**
Osnivač Universitas iuris naturalis Copaonici,
Predsednik Saveza udruženja pravnika
Srbije i Republike Srpske

IZVANPRAVNI ČINIOCI I PRAVNI POREDAK UNIVERZALNE VREDNOSTI I KULTURNI IDENTITET

Uvodna reč

Društvene determinante koje bitno utiču na koncept prava i njegovu primenu u praktičnom životu različite su po svom dejstvu i identitetu, ne samo sa stanovišta prostora, već i sa stanovišta vremena u kome egzistiraju. One su podložne promenama, shodno različitim procesima evolucije, čak i u istom društvenom i pravnom sistemu. Tako, može se reći, da ove determinante, i pored svoje relativne postojanosti, u određenim vremenskim periodima, doživljavaju izvesne modifikacije, pa i "renesanse" legitimiteta, ali isto tako, u nekim periodima, one izražavaju duboke promene, što je naročito slučaj sa periodom revolucionarnih preobražaja određenog društva. U svakom slučaju te determinante prava (npr. ekonomska konstitucija, moralna zasnovanost, demokratska, politička i opšta intelektualna kultura, tradicija ustaljenih pravila ponašanja, socijalna kohezija, poštovanje proklamovanih ljudskih prava) mogu doći u stanje krize ili stagnacije, ili, naprotiv mogu postići visok stepen usklađenosti u smislu konstitucije pravne države.

Dakle, određeno vreme, može doneti korenite promene u društvenoj osnovi pravnog sistema, i to u smislu njegove oslabljene moći, kako u procesu stvaranja tako i u postupku njegove primene, što može dovesti i do krize pravnog sistema ili do pravne države kao vladavine načela legitimiteta i legaliteta, a sve u okviru potrebne društvene tolerancije.

Pre izlaganja pojma krize pravnog sistema kao i pojma pravne države, zadržimo se na analizi značajnih društvenih činilaca koji utiču na jednu ili drugu društvenu i pravnu pojavu.

Značajni izvanpravni činioci

Pravna ili antipravna država (kriza pravednog prava) nalazi svoju odluku u svim determinantama koje čine opštu kulturu jedne zajednice. Ovde, nije ni moguće ni potrebno nabrajati sve determinante koje čine jedan organizovani socijabilitet, ali za potrebe ovoga rada, izdvajamo sledeće činioce opšte kulture od kojih zavisi sudbina jednog pravnog poretka u smislu ustrojstva pravednog ili nepravednog prava, a to su:

---

* Originalni tekst je na lokalnom jeziku.

Odluka je u rukama svih činilaca koji čine opštu kulturu jedne zajednice. Ponovimo, to su:

- stanje svesti i savesti u pogledu pravde i pravičnosti kao konkretizovane pravde;
- tolerancija kao sposobnost i znak duhovnog punoletstva i visokog stepena razuma, kao ustanova demokratske kulture zasnovane na sveopštoj harmoniji u razlikama po rođenju ili bilo kom legitimnom ubeđenju (međukulturna tolerancija, politička, klasna, rasna i verska tolerancija, nacionalna, jezička, materijalna, svojinska i ugovorna, tolerancija u svim oblicima poštovanja dostojanstva čoveka i njegovih neprikosnovenih prava);
- opšte stanje razvoja nauke kao saznajno-iskustvene discipline, religije kao nadiskustvenog učenja o najvišem biću i filozofije kao racionalnog sistema umnosti pogleda na svet i pitanja odnosa između mišljenja i bića, duha i materije;
- stanje moralne zasnovanosti, etičke kulture, tradicije i ustaljenih pravila ponašanja;
- ekonomska konstitucija u smislu izbora ekonomskog modela administrativne ili tržišne ekonomije i tržišnog poretka sa svim pojavnim oblicima takvog ustrojstva, a posebno svojine kao centralne ustanove društvenog i pravnog poretka;
- stanje političke zrelosti i prosvećenosti u smislu poštovanja i razvoja demokratskih institucija u sistemu vladavine prava i pravne države, a posebno principa trodelne podele vlasti i nezavisnosti suda i sudijske funkcije;
- pravna, ekonomska i socijalna sigurnost na osnovu koje se formira pravna i moralna svest i poverenje u zajedničke norme ponašanja;
- stanje opšte obrazovanosti, umetnosti i intelektualne kulture uopšte, a posebno u vidu kreacije intelektualnih tvorevina u oblasti autorskog i pronalazačkog prava;
- socijalna kohezija u smislu sistemske i socijalne integracije;
- zaštita životne sredine i stanje ekološke etike, tačnije, ekološke filozofije;
- zaštita zdravlja kao uslova života i kao prirodnog prava svakog čoveka na onu vrstu zaštitu koja odgovara njegovim potrebama;
- radne navike i radna etika u smislu poštovanja radnopravne i socijalne pravde;
- stanje porodice i porodične strukture kao osnovne ćelije društva;
- kultura mira kao osnovna odrednica jedne zajednice koja se suprotstavlja različitim agresijama koje ugrožavaju život na našoj planeti, kao što su: preteća opasnost od nuklearnog i drugog oružja za masovno uništavanje ljudi, genocid, organizovani terorizam;
- stanje javnog mnjenja posebno na području medijske, naučne i stručne opservacije;
- stupanj tehničko-tehnološke obrazovanosti;
- stupanj ostvarenih prirodnih prava i principa jednakog postupanja sa jednakim stvarima.

Kao što se vidi, ako skup pomenutih determinanti čini kulturni identitet jedne zajednice od koga zavisi ostvarenje ili podnošljivo neostvarenje ili nepodnošljivo neostvarenje proklamovanih ljudskih prava – onda proizilazi zaključak da u svetskim okvirima ovo vitalno pitanje međunarodne zajednice ne može biti rešeno u bliskoj budućnosti i taj proces se prostire na neodređeno vreme.

Na tom putu, samo organizovana umnost čovečanstva može otvoriti vrata humanoj budućnosti, a to znači potpunom ostvarenju ljudskih prava proklamovanih i kodifikovanih u čitavom mozaiku međunarodnih konvencija, povelja, deklaracija i drugim dokumentima, kao izrazu zajedničke savesti i pravde kao stožerne vrline.

Pravo i dostojanstvo čoveka

Sva ljudska bića rađaju se slobodna i jednaka u dostojanstvu i pravima. Razlike u pogledu rase, boje, pola, jezika, veroispovesti, političkog ili drugog mišljenja, nacionalnog ili društvenog porekla, imovine ili drugih srodnih okolnosti – sastavni su delovi pozitivnog prava. Prirodno pravo sazdano je na jedinstvu svih ovih razlika.[1]

Na intenciji zajedničkih svojstava dostojanstva čoveka, prirodno pravo je u prošlosti, naročito danas (ljudska prava), izgrađivano kao univerzalno i nedeljivo pravo utemeljeno na priznanju urođenog dostojanstva i jednakih i neotuđivih prava svih članova ljudske porodice.[2]

Prava dostojanstva čoveka, kao apriorna i po prirodi data svim ljudima na isti način bez obzira na njihove razlike po rođenju ili bilo kakvom legitimnom ubeđenju, danas postaju, ne samo univerzalna za sve ljude sveta, nego ta prava uživaju poseban imunitet u tom smislu što se ona ne mogu uskratiti bilo kakvom zakonodavnom intervencijom, sudskim odlukama ili upravnim merama u okviru pojedine države, bez obzira na različite oblike državnog uređenja. Jer, prihvatanjem odgovarajućih međunarodnih dokumenata (implementacija, ratifikacija), odnosno uvođenjem opšteprihvaćenih pravila međunarodnog prava u svoj pravni sistem, takva država se jednim delom odriče npr. svog sudskog suvereniteta u korist šire međunarodne sudske zaštite, konkretno u korist Evropskog suda za ljudska prava.

U kontekstu rečenog, zaštita imunitetskih ljudskih prava sa područja dostojanstva ličnosti, mora imati, ne samo višestepenu sudsku zaštitu u formalnom smislu, već i u smislu delotvorne (uspešne) i efektivne (a ne samo efikasne) materijalnopravne i procesnopravne zaštite s obzirom na još jednu garanciju takve delotvornosti u okviru šire međunarodne sudske zaštite.

Otuda, delotvornost pravnih sredstava u kontekstu domaćeg prava, ne sme biti postavljena ni praktično rešavana sistemom zatvorenih, već naprotiv, sistemom otvorenih vrata uvek i svagda kada su u pitanju ona ljudska prava koja uživaju poseban imunitet, kao što je pravo na život i dostojanstvo čoveka, pravo na slobodu, sa čitavim nizom derivata takvih prava.

Drugim rečima, ceo sistem zaštite imunitetskih ljudskih prava ne sme biti postavljen na način da može biti žrtva uskog tumačenja slova zakona, već on mora u svakom konkretnom

---

[1] U tom smislu v. Univerzalnu deklaraciju o pravima čoveka usvojenu i proklamovanu rezolucijom Generalne skupštine Ujedinjenih nacija od 10. decembra 1948. Ius naturale est quod apud homines eandem habet potentiam (Sec. Ulpianus – D. 1, 1, 1, 3) Prirodno pravo je ono koje kod svih ljudi ima istu snagu. U tom smislu Jovan St. Popović, Prirodno pravo, izdanje Službenog lista, Beograd 1995, str. 49, gde se kaže da prirodno pravo nije delimično ni proizvoljno, nego je opšte i nepromenljivo, srazmerno je shvatanju svakog naroda i svakog čoveka kao moralno-umnog stvorenja, a pozitivnom zakonu služi kao obrazac; Od novije literature v. naročito: Yves Madiot, Considérations sur les droits et les devoirs de l'homme, Bruxelles, 1998, str. 23–107; Frédéric Worms, Droits de l'homme et philosophie, Paris 1993, str. 67 i dalje; Jean-Luc Matheu, La défense internationale des droits de l'homme, Paris 1998, str. 19 i dalje; Robert Derathé, G. W. F. Hegel – Principes de la philosophie du droit ou droit naturel et science de l'état en abrégé, Paris 1998, str. 45 i dalje; Simone Goyard-Fabre, La philosophie du droit de Kant, Paris 1996, str. 237 i dalje.

[2] Univerzalna deklaracija o pravima čoveka iz 1948. O univerzalizaciji ljudskih prava, v. Yves Madiot, Considérations sur les droits et les devoirs de l'homme, Bruxelles 1998, naročito str. 23–107; Jean-Luc Mathieu: Le défence internationale des droits de l'homme, Paris 1993, naročito str. 19–57; Artur Kaufman, Pravo i razumevanje prava, Beograd–Valjevo 1998, str. 269, i sl., gde se, između ostalog, kaže: "Ljudska prava jesu ona osnovna zaliha etike i prava koja se može univrzalizovati i koja takođe ima stvarno univerzalno važenje. Ljudska prava su dragoceno nasleđe koje nam je poklonilo 19. stoleće... U novije vreme je vrlo mnogo pisano o univerzalizaciji ljudskih prava; o tome je Ludger Kinhart objavio opsežnu knjigu; nedavno su se Valdemar Šrekenberger i Erhard Deninger vrlo decidirano izjasnili za pretenziju ljudskih prava na univerzalnost. Svakako se može sumnjati da ljudska prava pokazuju visok stepen opštosti; to su dokazale uporedno-pravne studije" (navedeno delo, str. 270).

slučaju odgovoriti smislu i kulturi razuma, kako konkretnog zakonskog teksta, tako i njegovom genusnom izvoru proklamovanih i opšteusvojenih pravila međunarodnog prava i to u smislu svih atributa demokratske kulture, oslobođen svih oblika opresije ili bilo kakvih metapravnih pritisaka ili uticaja.

Pored filozofskog opusa, prirodna prava čoveka, a posebno dostojanstvo čoveka kao "apsolutna svrha" (Kant), doživela su fazu skoro potpune kodifikacije u drugoj polovini XX veka, u čitavom mozaiku dokumenata Ujedinjenih nacija čije proklamacije i proširenja predstavljaju nepregledni proces, a ostvarenja i praktična primena ovih prava hroničnu teškoću koju savremeni svet još nije u stanju da potpuno otkloni.

Reč je, pre svega, o onim pravima koja su predviđena Univerzalnom deklaracijom o pravima čoveka iz 1948. godine,[3] Međunarodnim paktom o građanskim i političkim pravima iz 1966. godine, Međunarodnim paktom o ekonomskim, socijalnim i kulturnim pravima iz 1966. godine; tu je i druga faktografija i hronologija međunarodnih dokumenata o ljudskim pravima koja je ubrzo usledila i koja do danas traje. U tom smislu treba posebno istaći Povelju o osnovnim pravima Evropske unije (2000).

U stvari, sve ove deklaracije i međunarodne konvencije predstavljaju kodifikaciju prava čoveka ili njegovih prirodnih prava koja su se u prošlosti nalazila u poveljama ili deklaracijama različitih naroda u različitim vremenima, a koja su istovremeno bila predmet pažnje značajnih filozofa i pravnika našeg ili ranijih vekova, i to, pre svega, u okviru učenja filozofije pravde i prirodnog prava.

Otuda, može se zaključiti da su ove konvencije, a pre svih i iznad svih, Univerzalna deklaracija o pravima čoveka, obuhvatne kodifikacije u kojima je utisnuta vekovna evolucija prirodnog prava čoveka. Ona je utvrdila i proširila čovekova prirodna prava i doprinela težnji da se u ovoj oblasti pronađu zajedničke tačke razuma jednog nadnacionalnog prava. Polazeći, dakle, od racionalne koncepcije prirodnog prava, Deklaracija, pored klasičnih političkih i građanskih prava, sadrži još i čitav niz ekonomskih i socijalnih prava, koja će kasnije biti predmet regulisanja posebnih konvencija.

Prema Povelji o osnovnim pravima Evropske unije, ljudska prava su grupisana prema sledećim ustanovama: dostojanstvo, slobode, jednakost, solidarnost, pravo građanstva, pravda.

Kada je reč o dostojanstvu, Povelja predviđa da je dostojanstvo čoveka nepovredivo, i da se ono mora poštovati i braniti. U sledstvu ove osnovne odredbe, rečeno je, da svako lice ima prao na život i da niko ne može biti osuđen na kaznu smrti niti ona može biti izvršena. Zatim je regulisano pitanje prava na integritet ličnosti, gde je predviđeno, da svako lice ima pravo na fizički i duhovni integritet. U okviru medicine i biologije mora se posebno poštovati: a) slobodan pristanak određenog lica, u skladu sa zakonom predviđenim uslovima; b) zabrana praktične primene eugenetskih dostignuća, posebno onih koja imaju za cilj selekciju ljudi; c) zabrana korišćenja ljudskog tela i njegovih delova u cilju ostvarivanja prihoda; d) zabrana kloniranja ljudi u reproduktivne svrhe. Posle ovoga Povelja izriče zabranu torture, mučenja, nehumanog i degradirajućeg ponašanja odnosno, tretmana. I najzad, tu dolazi i zabrana ropstva i prinudnog rada u smislu: da niko ne može biti držan u ropskom ili zavisnom položaju; da niko ne može biti prisiljavan na prinudni ili obavezni rad; zabranjena je trgovina ljudima.

Kao što se vidi, pitanje dostojanstva čoveka ovde je regulisano na način koji se visokim stepenom nalazi u kontinuitetu već pomenutih odredbi Univerzalne deklaracije o pravima čoveka iz 1948. godine, kao i brojnih međunarodnih dokumenata kojima je ova Deklaracija

---

[3] Usvojena i proklamovana rezolucijom Generalne skupštine Ujedinjenih nacija 217 A (III) od 10. XII 1948, poznata na engleskom jeziku pod imenom Universal Declaration of Human Rights i francuskom Déclaration universelle des Droits de l'Homme.

poslužila kao izvor kulture razuma i vrline pravde u procesu stvaranja zajedničkih područja ljudskosti.

Ovakve i slične odredbe nalaze se i u ustavnim rešenjima mnogih država. One su tu došle, ili putem implementacije i internacionalizacije ovih univerzalnih vrednosti ili su imale već izgrađeni osnov u tradiciji svog nacionalnog zakonodavstva. Tako, npr. Osnovni zakon (Ustav) Savezne Republike Nemačke u svojoj uvodnoj odredbi (član 1) predviđa da je dostojanstvo čoveka neprikosnoveno i da je obaveza svake državne vlasti da poštuje i štiti dostojanstvo čoveka i njegova nepovrediva i neotuđiva prava koja čine osnov za svaku ljudsku zajednicu, za mir i za pravednost u svetu. U tom smislu, ova prava vezuju za zakonodavnu, izvršnu i sudsku vlast kao neposredno važeće pravo.

Razume se, da se ovde ne može zaobići pitanje praktičnog ostvarenja ili neostvarenja proklamovanih prava vezanih za dostojanstvo čoveka i integritet njegove ličnosti. Polazeći od činjenice da su ovde mnoga proklamovana prava ostala bez konkretne pravne sankcije (lex imperfecta), kao i činjenice nedovoljnog ostvarenja ovih prava, ili još i više, njihovog drastičnog kršenja na različitim stranama univerzuma prava, pa čak i od onih koji su zvanično pozvani da ih štite i ostvaruju i koji vladavinu prava zamenjuju vladavinom volje ili samovolje nekog "vlasnika vremena" – može se konstatovati da disproporcija između proklamovanih i neostvarenih ljudskih prava, posebno na području dostojanstva čoveka, predstavlja danas najslabiju tačku u celom sistemu ljudskih prava. Ovo tim pre što danas postoje brojne prepreke u ostvarenju proklamovanih i kodifikovanih prava na život i slobodu među kojima se po svom katastrofalnom ishodu izdvajaju nekoliko antagonista prava na život u savremenom svetu: nuklearno hemijsko oružje, genocid, terorizam, moguća ekološka katastrofa, pojava novih bolesti, ogromne svojinske razlike.

Kultura mira

Pravo na život i dostojanstvo čoveka može se ostvariti samo u miru, a ne u ratu i nasilju kao antipodu umnosti. Otuda, mir je jedna od osnovnih univerzalnih vrednosti, ne samo sa stanovišta ostvarenja dostojanstva čoveka i integriteta njegove ličnosti, već i sa stanovišta opstanka sveta kao celine.[4] Različite agresije koje ugrožavaju život na našoj planeti, a posebno preteća opasnost od nuklearnog i drugog oružja za masovno uništavanje ljudi može se prevazići i izbeći samo putem uspostavljanja regionalnog i međunarodnog mira i bezbednosti, gde je, pored mnoštva drugih činilaca, međukulturna tolerancija neophodni uslov svake harmonije u razlikama i konstitucije sveopšteg mira.

Drugim rečima, kultura mira sa određenim stepenom ujednačavanja univerzalnih vrednosti putem multikulturne tolerancije (ekonomske, političke, klasne i rasne, religijske, jezičke, nacionalne, svojinske i ugovorne, i svake druge koja spaja razlike po rođenju ili bilo kom dostojnom ubeđenju) – jedini je put koji vodi ostvarenju proklamovanih prirodnih prava čoveka i univerzalnih vrednosti njegove društvenosti.

---

[4] Tajnu prirode Gete će ovekovečiti rečima: Prirodom smo okruženi i obgrljeni, bez moći da iz nje izađemo, i bez moći da u nju dublje uđemo. Nezamoljena i neupozorena, ona nas uzima u kružni tok svoga plesa i bavi se nama sve dok se ne zamorimo i ispadnemo iz njenog naručja. Ona večno stvara nove oblike; što postoji još nikada nije bilo, a što je bilo, ponovo neće doći. Sve je novo, a ipak, uvek staro. Živimo usred nje, a tuđi smo joj. Ona neprekidno govori sa nama, a ne odaje nam svoju tajnu. Neprestano delujemo na nju, a ipak nemamo moći nad njom (citirano prema Kaufmanu, Pravo i razumevanje prava, Osnovni problemi hermeneutičke filozofije prava, Beograd-Valjevo, 1998, str. 234).

Suprotno, nekultura rata, sile i nasilja, kako nam prošlost vekova govori, odnela je milionske žrtve, a savremeni pakao razdora i nesloge može nas odvesti u sudar civilizacija[5], u rat glavnih kulturnih grupacija sveta, koji, s obzirom na savremena sredstva za masovno uništavanje ljudi, preti opštom kataklizmom opstanka.

I zato konstatujmo: samo je svet umnosti u stanju da nas izvede na put kulture mira. I to na način ostvarenja prirodnih prava čoveka, ne samo u filozofskom, već, pre svega, u pravnonormativnom opusu proklamovanih i kodifikovanih međunarodnih dokumenata Ujedinjenih nacija.

Njihova izuzetna brojnost, prožeta zajedničkim tačkama ljudskosti na različitim područjima, građanskih, političkih, ekonomskih, socijalnih i kulturnih prava, zasnovana je na ciljevima i načelima Ujedinjenih nacija, koja proizilaze iz organizovanog htenja i napora održanja međunarodnog mira i bezbednosti. U tu svrhu prema Povelji UN, neophodno je preduzimati efikasne kolektivne mere kako bi se sprečile i otklonile pretnje miru i suzbili akti agresije i druge povrede mira kao i rešavati međunarodne sporove ili situacije preduzimanjem mirnih sredstava, u skladu sa načelima pravde i međunarodnog prava.

Samosvesna sloboda

Dostojanstvo čoveka i kultura mira pretpostavlja i samosvesnu slobodu čoveka u uslovima svakog organizovanog socijabiliteta. Život čoveka se odvija u zajednici, i svaki čovek, po prirodnom zakonu, ima pravo da živi u zajednici. To je posledica njegovog socijalnog nagona koji proizilazi iz njegovog biološkog svojstva.[6] Samim tim što živi u zajednici, čovekova sloboda je ograničena slobodom drugih; drugim rečima, ograničena je koegzistencijom sloboda. Slobodu, dakle, treba shvatiti kao mogućnost da se čini sve ono što ne škodi drugome, a to znači da su granice vršenja prirodnih prava određene granicama tih istih prava koja poseduju drugi ljudi.

Prema tome, sfera prava jeste sfera slobode, ali one slobode koja je u međuzavisnom odnosu sa slobodom drugih. Sloboda je, dakle, samosvesna, racionalna i disciplinovana. Pravda se ovde postiže proporcijom sloboda. Upravo takva sloboda je cilj svakog pravnog ustrojstva.[7]

---

[5] Semjuel Hangtington, Sukob civilizacija i preoblikovanje svetskog poretka, CID Podgorica i Romanov – Banja Luka 2000; Frensis Fukujama, Sudar kultura, Zavod za udžbenike i nastavna sredstva, Beograd 1997; isti autor: Naša posthumana budućnost, CID Podgorica 2003. Fridrih Hajek, Pravo, zakonodavstvo i sloboda, Službeni list SRJ, Beograd i CID Podgorica 2002.

[6] Hugo Grocijus se smatra prvim ocem naučno-koherentne škole prirodnog prava u 17. veku, i to one, za koju danas možemo reći da pripada biološko racionalnom pravcu prirodnog prava. U svom delu De jure belli ac pacis (Pravo rata i mira, publikovano i više izdanja), ovaj autor, polazeći od antičkih izvora prirodnog prava i shvatanja da je nagon društvenosti poznat i u životinjskom svetu, neraskidivo je taj nagon vezao za čovečiji um, i na taj način dobio jednu biološko-racionalnu teoriju koja opšti socijalni nagon koncentriše samo na zajednicu ljudi, a ne i na životinjski svet. Tu misao Grocijus će izraziti rečima da čovekova potreba za druženjem ne znači život u "jednoj banalnoj zajednici", već u "mirnom socijalnom stanju koje je organizovano prema dužnostima čovečijeg razuma" (Opširnije, v., T. Živanović, Sistem sintetičke pravne filozofije, Beograd, 1959, str. 537). Proizilazi da biološko svojstvo čovečije prirode koje se ogleda u nagonu društvenosti, prema ovoj teoriji, nije dovoljno za objašnjenje prirodnog prava (i životinje poseduju nagon druženja), već se nagon društvenosti uveličava ljudskim umom i razumom, tako da samo umom kvalifikovani socijalni nagon dobija snagu izvora prirodnog prava. Prirodno pravo postaje prirodna biološka nužnost, i kao takvo, ono je univerzalno i pravedno po sebi (Opširnije, Henri Rommen, Le droit naturel, Histoire-Doctrine, Paris, 1945, str. 93 i dalje).

[7] Opširnije, Hegel, Pravni i politički spisi, Beograd, 1981, str. 209, 216.

Ta uzajamnost sloboda izražava se u literaturi kao princip po kome svako lice treba da ima jednako pravo na najobuhvatniji potpun sistem jednakih osnovnih sloboda, koji je u skladu sa sličnim sistemom slobode za sve. Sloboda može biti ograničena samo radi slobode: manje obuhvatna sloboda mora da ojača potpuni sistem slobode u kojoj imaju udela svi, odnosno, manja od jednake slobode mora biti prihvatljiva onim građanima koji imaju manju slobodu[8] i dalje: sloboda je nejednaka kada jedna klasa osoba ima više slobode od druge ili kada je sloboda uža nego što treba da bude. Sve slobode jednakih građanskih prava moraju biti iste za svakog člana društva.[9]

Polazeći od ovako definisane slobode kao večite ljudske težnje, polazeći, dakle, od samosvesne slobode kao racionalne simetrije sloboda utvrđujemo sledeće pravilo: nema slobode pod nasiljem i nema slobode bez odgovornosti.

To su dve stožerne tačke koje određuju polje slobode u njegovom racionalnom značenju. Nasilje, kao tuđa prinudna samovolja[10] antipod je slobodi; bezgranična sloboda antipod je društvenoj grupi. Nasilje, kao način ophođenja ili kao sistem vladavine, pretvara slobodu drugog u poslušnost njegove čulnosti; naprotiv, apsolutna sloboda pretvara ga u robinzona. Između nasilja i indeterminizma, slobodu, dakle, treba videti kao potpunu egzaltaciju ličnosti, ali koja sobom nosi i odgovornost prema drugim titularima slobode. Shvaćena u racionalnom smislu, sloboda je, dakle, nerazdvojna od odgovornosti.[11]

Centralni opseg sloboda regulisan je međunarodnim konvencijama i drugim opštim aktima, kao i nacionalnim zakonodavstvom, što sve čini sveobuhvatni traktat sloboda savremenog čoveka.

Polazeći od racionalne koncepcije prirodnog prava kao temelja univerzalnih i regionalnih deklaracija o slobodi, sloboda se proklamuje za sva lica bez ikakve razlike u pogledu njihovih različitih svojstava po rođenju, nacionalnom poreklu ili bilo kom opredeljenju i ubeđenju.

Različiti vidovi proklamovanih sloboda danas čine čitav pravnički svet kojim se iskazuje duboka vera u one osnovne slobode koje bi trebalo da budu temelj pravde i mira u svetu i koje se najbolje ostvaruju demokratskom kulturom i zajedničkim poštovanjem prirodnih prava čoveka.

Pravo na slobodu proglašeno je, najpre, od strane Univerzalne deklaracije o pravima čoveka, i to rečima da svako ima pravo na život, slobodu i bezbednost ličnosti.

Titulari prava na slobodu su dakle sva lica bez ikakve razlike u pogledu rase, boje, pola, jezika, veroispovesti, političkog ili drugog mišljenja, nacionalnog ili društvenog porekla, imovine, rođenja ili drugih okolnosti.

Njima se priznaje sloboda kretanja, privatnosti, misli, savesti i veroispovesti; sloboda mišljenja i izražavanja i udruživanja; sloboda zasnivanja porodice; sloboda glasanja na povremenim i slobodnim izborima; sloboda obrazovanja; sloboda neometanog uživanja imovine.

---

[8] Džon Rols, Teorija pravde, prevod. M. Ivović, izdanje Službeni list SRJ i CID Podgorica, 1998, str. 234.

[9] Džon Rols, navedeno delo, str. 194.

[10] Jovan Sterija Popović, Prirodno pravo, Beograd, 1995, str. 67.

[11] U tom smislu, Friedrich Hayek, La constitution de la liberté, izdanje Litec, Paris, 1994, str. 69 i sl. Na ovom mestu, ovaj autor kaže da sloboda ne znači samo da pojedinac nema prepreku za svoj izbor. Sloboda isto tako znači da on mora snositi posledice za svoje postupke, i da za to primi prekor ili pohvalu. Sloboda i odgovornost ne mogu biti odeljene jedna od druge. Jedno slobodno društvo zahteva (verovatno više od bilo čega) da njegovi članovi u svojim aktivnostima budu vođeni, ne samo osećanjem za odgovornost, nego i osećanjem za javno mnjenje, kako za uspeh tako i za neuspeh njihovih inicijativa i napora.

Sva ova i druga prava slobode ličnosti, predviđena su i dalje regulisana čitavim nizom dokumenata, kako na opštem planu, tako i regionalnim dokumentima o ljudskim pravima među kojima je za nas značajna Evropska konvencija o ljudskim pravima, sa protokolima, kao i mnogi dokumenti konferencija o bezbednosti i saradnji u Evropi.

Kada je reč o vladavini zakona, ovi dokumenti naročito podvlače pravdu na kojoj svi zakoni treba da budu zasnovani, a posebno je predviđen čitav spektar sloboda, među kojima, naročito, sloboda kretanja, mišljenja i udruživanja kao i slobodu mirnog uživanja u svojoj imovini, bilo samostalno, bilo u zajednici sa drugim.[12]

Povelja o osnovnim pravima Evropske unije koja čini sastavni deo predloga evropskog Ustava, predviđa različite vrste sloboda i to: 1) pravo na slobodu i bezbednost, gde je predviđeno da svako lice ima pravo na slobodu i bezbednost; 2) poštovanje privatnog i porodičnog života; 3) zaštita podataka lične prirode – sa ovim podacima se mora pošteno postupati i oni se mogu koristiti samo za utvrđene svrhe i uz saglasnost dotičnog lica ili u skladu sa drugim zakonski legitimnim osnovnom – svako lice ima pravo pristupa sakupljenim podacima koji se na njega odnose, kao i na njihovu ispravku; 4) pravo na brak i pravo na osnivanje porodice u skladu sa nacionalnim zakonodavstvom kojim se reguliše ova materija; 5) sloboda mišljenja, savesti i veroispovesti, što uključuje i slobodu promene vere ili uverenja, kao i slobodu izražavanja verskih osećanja ili ubeđenja, pojedinačno ili kolektivno, javno ili privatno, putem veroispovesti, nastave, običaja i vršenja obreda. Pravo na prigovor savesti je priznato u skladu sa nacionalnim zakonima kojima se reguliše ova materija; 6) sloboda izražavanja i informisanja, što podrazumeva i slobodu mišljenja, slobodu primanja i prenošenja informacija ili ideja bez intervencije organa vlasti i bez graničnih ograničenja. Poštuje se sloboda medija i njihov pluralizam; 7) sloboda okupljanja i udruživanja, što podrazumeva slobodu mirnog okupljanja i formiranja udruženja, na svim nivoima, naročito u oblasti politike, sindikata i civilnog društva. Političke partije na nivou Unije doprinose izražavanju političke volje građanstva Unije; 8) sloboda umetnosti i nauke – akademske slobode se poštuju; 9) pravo na obrazovanje, što podrazumeva i kontinuirano stručno osposobljavanje – ovim pravom je obuhvaćeno obavezno besplatno obrazovanje. Ovo pravo podrazumeva i slobodno osnivanje obrazovnih ustanova, uz poštovanje demokratskih načela, kao i pravo roditelja da svojoj deci osiguraju obrazovanje i obuku u skladu sa njihovim religioznim, intelektualnim i pedagoškim uverenjem, sve to u skladu sa nacionalnim zakonodavstvom kojim se reguliše ova oblast; 10) profesionalne slobode i pravo na rad znači da svako lice ima pravo da radi i da se bavi svojom profesijom koju je slobodno izabralo ili prihvatilo. Svaki građanin Unije ima pravo da traži posao, da radi, da otvara firme ili da pruža usluge u svim državama članicama. Državljani trećih zemalja koji imaju odobrenje za rad na teritoriji država članica imaju pravo na uslove rada koji su istovetni sa onima koji imaju i građani Unije; 11) sloboda preduzetništva se priznaje u skladu s pravom Unije i nacionalnim zakonodavstvom i praksom; 12) pravo vlasništva, što podrazumeva da svako lice ima pravo da bude vlasnik sredstava koja je legalno steklo, da ih koristi, da sa njima raspolaže i da ih drugima predaje. Niko ne može biti lišen svog vlasništva, osim kada se radi o potrebi njegovog javnog korišćenja, u slučajevima i pod uslovima koji su zakonom predviđeni i uz pravičnu naknadu za svoj gubitak. Upotreba sredstava može se regulisati zakonom u meri koja je neophodna za očuvanje opšteg interesa. Intelektualna svojina je zaštićena; 13) pravo azila se garantuje u skladu sa odredbama Ženevske konvencije o statusu izbeglica od 28. juna 1951. i Protokolom od 31. januara 1967. i u skladu sa Ustavom; 14) zaštita u slučajevima udaljavanja, proterivanja i ekstradicije, što podrazumeva da su zabranjena kolektivna proterivanja. Niko ne može biti udaljen, proteran

[12] U tom smislu, isti Dokument (op. cit., čl. 9).

ili ekstradiran prema državi u kojoj postoji ozbiljan rizik od osude na smrtnu kaznu, torturu ili druge nehumane ili degradirajuće kazne ili postupke.

Sve ove slobode kao univerzalne i pravedne, okuplja prirodno pravo u svoj kodeks sloboda, ali uvek pod aksiomom slobode kao racionalne pojave, samosvesno shvaćene od strane svih titulara koji pripadaju određenoj pravno organizovanoj zajednici. Drugim rečima, polje bilo koje slobode jednog titulara, ograničeno isto takvim poljem drugog titulara.

Otuda i konstatacija da osnovne slobode ne samo da ograničavaju jedna drugu, već i same sebe[13] I dalje: zahtev da osnovne slobode treba da budu iste za sve podrazumeva mogućnost da ostvarimo veću slobodu za sebe samo ako je ista veća sloboda data i drugima.[14]

U stvari, sloboda mora imati svoju sadržinu i svrhu, jer "ona nije samo negacija nužnosti i determinizma, ona nije carstvo proizvoljnosti i slučaja, za razliku od carstva zakonitosti i nužnosti. Sloboda je pozitivna i sadržajna. Želeći slobodu radi slobode, slobodu bez svrhe i sadržaja, znači želeti prazninu, okretati se nebiću".[15]

Racionalna koncepcija prirodnog prava, uzima, dakle, slobodu kao koegzistenciju sloboda različitih titulara, udaljena od svakog nasilja, ali i povezana sa odgovornošću titulara slobode, čime sloboda u uslovima društvenosti, dobija svoju svrhu i sadržinu, a time i epitet stvaralačke moći.

Pokušaj definisanja slobode

Sloboda je bila i ostala predmet različitih koncepcija kako u filozofskom značenju počev od antičke i srednjovekovne filozofije (Platon, Aristotel) pa preko evropske filozofske misli, naročito od 17. i 18. veka, pa sve do danas (Tomas Hobs, Džon Lok, Žan Žak Ruso, Kant, Hegel, Mil, Šopenhauer) a takođe i u filozofsko-pravnom značenju (Monteskje, Kelzen, Taranovski, Rols, Hajek, Sorokin, Berlin, Dal, Held, Dvorkin, Živanović).

Brojne vrste sloboda i brojne definicije koje se prostiru, ne samo na području prava i pravne nauke, već i na širokom polju filozofije, psihologije, aksiologije, ekonomije, morala, kulture i opšte civilizacije – govore o horizontu i čitavom mozaiku sloboda u kome se čovek lakše snalazi nego što svojim doprinosom taj portret slobode može da obogati.

Stojeći pred ovim teškoćama i sa osećanjem naučne odgovornosti, Autor ovih redova iznosi ovde jednu Skicu teorije slobode, koja započinje sa definicijom slobode, pa preko njenih brojnih atributa, sve do pitanja stepena ostvarenja proklamovanih sloboda.

Sa ovom impresijom, evo pokušaja da se čestice slobode obuhvate jednom sintezom:

Sloboda je prirodno pravo čoveka da svojim voljnim radnjama vrši izbor sadržine i način svoje delatnosti u različitim područjima individualnog i zajedničkog života, ali tako da, držeći se pravednog zakona i tolerancije kao izraza kulture razuma, ne vređa istu i jednaku slobodu drugih.

---

[13] John Rawls, Politički liberalizam, izdanje "Filip Višnjić", Beograd 1998, str. 385.

[14] John Rawls, navedeno delo, str. 385. Kao primer za ovu konstataciju, ovaj autor navodi sledeće: iako možda želimo da u slobodu (političkog) govora uključimo i neometan pristup javnim mestima i slobodnu upotrebu društvenih resursa da bismo izrazila naša politička mišljenja, ovo proširenje naše slobode kada se primeni na sve, postaje neizvodljivo i izaziva podele u društvu, tako da bi, u stvari, u velikoj meri smanjilo efektivan obim slobode govora – navedeno delo, ibidem.

[15] Nikola Berdjajev, Smisao stvaralaštva – pokušaj opravdanja čoveka, Logos, Beograd 1996, str. 120 i sl. Na istom mestu, ovaj autor će dalje reći: Sloboda, koja je shvaćena isključivo formalno, bez svrhe i sadržaja, je ništa, praznina, nebiće. Sloboda prvobitnog greha je i bila takva, negativna formalna sloboda, sloboda radi slobode, tj. sloboda "od", a ne sloboda "za". Sloboda u prvobitnom grehu nije bila sloboda za stvaranje, stvaralačka sloboda – navedeno delo, str. 121.

Iz ove definicije proizilaze sledeći atributi slobode: 1. sloboda je prirodno pravo čoveka; 2. sloboda je izraz dostojanstva čoveka; 3. sloboda je samosvesno ograničena pravednim zakonima, odgovornošću i sveopštom tolerancijom; 4. sloboda je opšti pojam koji podrazumeva pojedine vrste sloboda; 5. sloboda je element demokratske kulture i pravne države; 6. sloboda je na neprestanom putu ostvarenja i neostvarenja.[16]

Nauka kao istinoljubiva težnja

Nauka, kao saznajno iskustvena disciplina i kao "slika istine"[17] sveopšte prirodne i socijalne pravde, predstavlja univerzalnu vrednost čovečanstva. Svako ima pravo da učestvuje u naučnom napretku i u dobrobiti koja otuda proističe.[18] U mozaiku različitih naučnih grana i pravaca postoje i zajedničke tačke vezivanja. Ta sazvežđa imenuju se rečima – objektivnost i javnost znanja i novih saznanja koja su pod stalnom optikom nauke kao organizovane i istinoljubive sumnje.

U uslovima visoko proklamovane i ostvarene slobode naučnog stvaralaštva koje omogućava eliminisanje svake vrste oktroisane dogme koja, ipso facto zloćudno zatvara polje istine, isto kao što smrt zatvara fizički deo čovekove ličnosti. I otuda, kao što je pravdi i pojedinačnoj pravičnosti, nasilje najgori protivnik, tako je i nauci svaka dogma i dogmatska netolerancija njen antagonist, a posebno ona koja se zasniva na diskriminaciji ljudi po rođenju ili bilo kom dostojnom ubeđenju.

A ta dogma, bez obzira na vremenske i prostorne meridijane, uvek dolazi kada čulnost nadjača umnost, kada u svetu paklene nesloge fizičko nasilje nadvlada argument naučne misli, kada notorni prirodni i socijalni fakt izgubi bitku u ratu "duše sa tijelom". Bar mi, kao ćelija ove civilizacije, to dobro znamo i osećamo svu tegobu te realnosti.

Vreme koje svoju naučnu misao zatvori u "molitvenik" bilo koje vrste, u lavirint različitih diskriminacija (u pogledu rase, boje, pola, jezika, veroispovesti, političkog ili drugog mišljenja, nacionalnog ili društvenog porekla, imovine, rođenja, pripadnosti ili drugih okolnosti koji proizilaze iz istoga genusa ljudskosti), nije vreme nauke, već dogmatske netolerancije koja za sobom ostavlja pusto ostrvo dostojanstva života. To je vreme svesnih ili nesvesnih krivokletnika, vreme u kome čak i koncentrisane asocijacije znanja postaju žrtve zabluda koje sobom odnose individualna i opšta dobra, koja odnose naše prirodno pravo na život i naše prirodno pravo na samosvesnu slobodu.

I po tome – danas, možda više nego ranije, našem sveukupnom biću potrebno je više naučnih znanja i saznanja o nama i nama bližnjim, jer smo svi deo i delo prirode, jednaki u dolasku i jednaki u odlasku.

Polazeći od ove datosti, u nauci ne sme vladati ničija vlast niti bilo čiji nalog političkih, finansijskih i državnih zvaničnika, već samo nalog savesti i naučno proverenog znanja, snaga boljeg argumenta u hipotezi tolerancije kao izraza duhovne slobode i odgovornosti u demokratskom obrazovanju volje, bez obzira na brojnost ili malobrojnost naučno obrazloženih pozicija.

---

[16] Zbog nedostatka prostora Autor u ovom radu neće detaljno izlagati pojedine atribute i vrste sloboda (egzistencijalne slobode, statusne slobode, slobode stvaralaštva, političke slobode, imovinske i tržišne slobode, slobode rada, ostvarenje i neostvarenje slobode i sl.) već upućuje na svoj tekst „Vremenske dimenzije pozitivnog i prirodnog prava", Beograd, 2009, str. 417-474.

[17] Scientia est quam veritatis imago.

[18] Čl. 27 Univerzalne deklaracije o pravima čoveka.

Većina ili manjina, nauku ne treba da impresionira. Razume se, većina ili manjina, veoma je važna činjenica sa stanovišta organizacije i funkcionisanja neke celine, ali sa stanovišta naučne istine one nisu presudne veličine. Znamo kako je prošla manjina pre više vekova koja je izrekla istinu da se zemlja okreće, ili, kako je Sokrat prošao pred sudom atinske demokratije.

U nauci, dakle, niko nema pravo da sebe stavlja iznad drugog, i da pluralizam života pretvara u monizam dogme i svoje autoritarnosti. Jer, takav zatvoreni sistem nikada neće stići do "učenog neznanja" kao krajnje tačke relativnosti našeg bitisanja i ograničene mogućnosti naše umne i fizičke prirode.

Religija kao svojstvo različitih civilizacija

Religija kao sistem umnih nadiskustvenih i iracionalnih predstava o ljudskom bitisanju (duša – telo), rasprostranjena na sve civilizacije sveta[19], svojim diverzitetom i uticaju koji vrši na konstituciju i izgled pojedinih ustanova i kategorija prava i pravnog poretka, predstavlja jednu od univerzalnih vrednosti čovečanstva.[20]

Prema jednom autoritativnom mišljenju, religija je glavna određujuća karakteristika civilizacija i u tom smislu velike religije su osnove na kojima počivaju velike civilizacije.[21] Iako u komparativnoj književnosti ne postoji podudarnost u pogledu vrste i broja važnijih civilizacija, ipak se neke civilizacije redovno naglašavaju, kao što su: kineska civilizacija sa konfučijanskom komponentom; japanska civilizacija koja se često u literaturi zajedno sa kineskom naziva dalekoistočnom civilizacijom; islamska civilizacija sa brojnim posebnim kulturama – arapska, turska, persijska i malajska; zapadna civilizacija u kompoziciji Evrope i Severne Amerike, dok civilizacija Latinske Amerike ima značajna odstupanja u odnosu na izvornu zapadnu civilizaciju; afrička civilizacija koja je naučno sporna s obzirom na veliki diverzitet i brojnu pripadnost islamskoj civilizaciji[22]

Sve ove klasifikacije govore samo o religijskoj i kulturnoj raznolikosti sveta gde *fundamentum divisionis* čini grupisana svest oko osnovnih pitanja nadiskustvene sfere ljudske umnosti. Otuda, sve klasifikacije u ovom domenu ne mogu biti potpune, tim pre, što gotovo

---

[19] S. Perović, Kulturni identitet i prirodno pravo, Pravni život, br. 9/2004.

[20] Vid. Mirča Elijade, Vodič kroz svetske religije, Narodna knjiga, Beograd 1996.

[21] Opširnije vid.: Semjuel Hantington, Sukob civilizacija i preoblikovanje svetskog poretka, CID Podgorica i Romanov Banja Luka, 2000, str. 51 i tamo citiranu literaturu na str. 363 pod tač. 19.

[22] S. Hantington, navedeno delo, str. 48–51. Ipak, ovaj autor navodi i druge klasifikacije civilizacija i važnijih kultura. Tako po njemu, naučnici se uopšteno slažu u svojoj identifikaciji važnijih civilizacija u istoriji i onih koje postoje u modernom svetu. Ipak, oni se često razlikuju u pogledu ukupnog broja civilizacija koje su postojale u istoriji. Kigli potvrđuje šesnaest jasnih istorijskih slučajeva i, vrlo verovatno, osam dodatnih. Tojnbi je prvo govorio o dvadeset dve, a onda dvadeset tri; Špengler je opisao osam važnijih kultura. Meknil pominje devet civilizacija u celoj istoriji; Bagbi takođe vidi devet civilizacija ili jedanaest, ako se Japan i pravoslavlje razlikuju od Kine i Zapada. Brodel identifikuje devet, a Rostovanji sedam važnijih savremenih civilizacija. Ove razlike delom zavise od toga da li su kulturne grupe, kao što su civilizacija, od kojih je jedna bila rezultat druge. Uprkos ovim razlikama, identitet važnijih civilizacija nije sporan. "Razumna saglasnost", kao što je Melko zaključio, postoji bar između dvanaest važnijih civilizacija, od kojih sedam više ne postoje (mesopotamska, egipatska, kritska, klasična, vizantijska, srednjeamerička, andska) i pet koje postoje (kineska, japanska, indijska, islamska i zapadna). Neki naučnici dodaju pravoslavnu rusku civilizaciju kao posebnu civilizaciju odvojenu od svoje roditeljske vizantijske i zapadne hrišćanske civilizacije. Za našu svrhu korisno je ovim šest civilizacijama u savremenom svetu dodati latinskoameričku i, moguće, afričku civilizaciju.

svaka religija i civilizacija ima svoje varijacije i različite oblike, često i suprotstavljene, iako pripadaju istom izvoru. Tako, prema jednom stanovištu (Encyclopaedia Britannica) mogu se označiti 33 religije (tačnije skupovi religija), kao posebni autonomni sistemi, ali, ipak, "sve religije su mape ljudskog uma"[23]

Filozofija prirodnog prava, počev od svog detinjstva u antičkoj Evropi, pa preko srednjovekovne hrišćanske doktrine sve do Huga Grocijusa (17. vek), imala je svoj teološki oblik i u vanevropskim zemljama, na primer, prirodno pravo Španske škole pretočeno na Zapadnu Indiju.[24]

Tako prema navedenom autoru, tradicija Prirodnog prava preuzeta u Americi pod uticajem Španije, očigledno je bila katoličkog karaktera: tracicija tzv. Španske škole, u suštini tomistička, opšte raširena i savršeno primenjivana u Španiji XVI veka, koja priznaje Boga kao donosioca večnog zakona, a vidi u prirodnom zakonu učešće čoveka, prihvatajući stvarnost prirodnog prava božanskog porekla iznad pozitivnog. Taj pravni pojam dobro se prilagođavao katoličkom smislu osvajanja. Jedna od osnovnih odlika ekspanzije hispanstva po svetu, bio je u stvari religiozni karakter. Španci su uglavnom išli u Zapadnu Indiju sa osnovnom namerom da donesu hrišćanstvo.[25]

Kada je reč o uticaju religije na koncepciju prirodnog prava u evropskoj pravnoj civilizaciji starog i srednjeg veka, taj uticaj se kroz istoriju proteže sa različitim interpretacijama.[26] Ali, bez obzira na tu različitost, zajedničko i suštinsko obeležje ovog shvatanja je u božjoj volji koja se uzima za osnov svekolikog prava. Po njemu, ne samo prirodno, već i pozitivno pravo se interpretira kao božanska zapovest – impositio numinis.[27]

Već iz ovoga se može primetiti, da je ovo shvatanje, kao religijsko, vezano za onu religiju u čijem okviru se javlja.[28] Iz toga dalje proizilazi da je teološko shvatanje prirodnog pra-

---

[23] Mirča Elijade, navedeno delo, str. 19. U ovom delu navode se 33 religije, i to: afričke, australijske, budizam, hananska religija, keltska religija, centralnoamerička religija, hrišćanska religija, konfucijanizam, dualistička religija, egipćanska religija, germanska religija, grčka religija, helenistička religija, hinduizam, hetitska religija, indoevropska religija, islam, đainizam, judaizam, mesopotamijska religija, religije misterija, severnoameričke religije, religije Okeanije, preistorijske religije, rimska religija, šamanizam, šinto, slovenske i baltičke religije, južnoameričke religije, taoizam, tračka religija, tibetanska religija, zoroastrizam.

[24] Opširnije, vid.: José M. Castán Vázquez, Las bases Iusnaturalistas del Derecho privado Hispanoamericano, objavljeno u Actas de las II jornades Hispánicas de Derecho Naturak, Cordoba 2001.

[25] Opširnije, vid.: José M. Gastán Vázquez, navedeno delo, str. 329 i sl. i tamo citiranu literaturu na str. 330, pod tač. 2–4.

[26] H. Rommen, Le droit naturel, Histoire-Doctrine, Paris 1945, naročito str. 54–93; Jacques Ellul, Le Fondement théologique du Droit, Cahiers théologiques de l'actualité protestante, 15–16, Neuchâtel–Paris 1946, naročito str. 45–53; Jean-Marc Trigeaud, Le droit naturel, fondement des droits de l'homme, u knjizi Droits de Dieu et droits de l'homme, Actes du IX Colloque national des Juristes catholiques, Paris, dés 11–12 novembre 1988, str. 21 i sl.

[27] Opširnije v. Henri Ahrens, Cours de droit naturel ou de philosophie du droit, complété, dans les principales matiÉres, par des aperçus historiques et politiques, 6 édition, Tom I, Leipzig 1868, str. 61 i sl.

[28] "Da bi prirodno pravo moglo da se prihvati kao takvo, potrebno mu je više nego neko božansko poreklo. Njemu je faktički potrebno da se nametne ne samo jednom narodu, kao Mojsijev zakon, koji vezuje samo potomke Avramove na temelju saveza, već svim ljudima, nezavisno od istorijskih slučajnosti. Da bi božanska volja bila početak jednog prirodnog prava, potrebno je da to bude jedan jedini Bog, koji nameće svoje zapovesti univerzalnoj državi umnih bića, i da zakoni koje on propisuje budu poznati svačijem poštenom umu. Ono što zakoni propisuju i brane mora da proizilazi iz prirode stvari, onakvih kakve je Bog stvorio. Pored prirodnih zakona, koji regulišu tok pojava, postojali bi racionalni propisi koji naređuju da se postupa saglasno s prirodom stvari; ti propisi su pravični i obavezni". (Haim Perelman, Pravo, moral i filozofija (prevod D. Guteša i V. Mihajlović), izd. Nolit, Beograd 1983, str. 12).

va postojalo i u periodu mnogoboštva, kao i u periodu hrišćanstva, naročito srednjevekovnog.[29]

U hrišćanskoj civilizaciji srednjega veka, prirodno pravo je shvatano kao božansko pravo, ali su interpretacije išle uglavnom u dva pravca. Po jednom starijem shvatanju, božansko pravo se ogleda u volji Božjoj, i kao takvo, ono je savršeno i nepogrešivo. Svoj autoritet zasniva na Božjoj zapovesti.[30] Prema drugom stanovištu, pod uticajem ideja racionalizma, u okviru iste hrišćanske filozofije, prirodno pravo se shvata kao objektivno savršeno, kao rezultat uma, ili božansko umno pravo.[31] Na prvi pogled može izgledati da nema razlike između ovih shvatanja, ali se ta razlika ipak uočava, jer "pravedno je ono, što božanstvo mora narediti po svojoj sadržini istine, a ne ono, što božanstvo naređuje po svojoj volji".[32] U odnosu na "čisto teološko shvatanje", ovde je dakle, izvor prava, ne prosta volja, već um najvišeg bića.[33] Otuda, ovo shvatanje naziva se još i teološko-racionalističkom teorijom.[34] Za svog predstavnika ova teorija ima Tomu Akvinskog,[35] velikog filozofa sholastičkog učenja, koji je naroči-

---

[29] Prema Perelmanu (ibidem) "dovoljno je da hrišćanska misao, onakva kako je izražena u Gracijanovom dekretu (oko 1140), identifikuje prirodno pravo koje je opisao Ciceron sa propisima Starog i Novog zaveta (prirodno pravo je sadržano u Zakonu i u Jevanđelju), pa da se razvije sholastička teorija prirodnog prava. Gracijanov dekret tvrdi da prirodni zakon ima apsolutnu prevagu nad običajima i ustavima. Sve što je običaj priznao ili je zapisano, ako protivreči prirodnom zakonu, mora se smatrati ništavnim i nepostojećim. Tu prirodno pravo ne služi samo, kao rimskom pretoru, da proširi ili dopuni neki pozitivan zakon, već da o njemu sudi i, ako je potrebno, da ga osudi. U perspektivi sv. Tome prirodno pravo nije ništa drugo do učestvovanje racionalnih stvorenja u večitom zakonu koji Bog nameće univerzumu".

[30] Videti, H. Ahrens, navedeno delo, str. 61 i dalje; T. Živanović (navedeno delo, str. 554) ovako opisuje to shvatanje: "Prema prvobitnoj srednjevekovnoj hrišćansko-teološkoj (teističkoj, teozofskoj) doktrini, pravo (kao i moral, čijim delom se je ono smatralo) ima za osnov božju volju. Božanska volja je preko Otkrovenja utvrdila ab aeterno principe pravednog (i moralnog), kojima pravo treba da odgovara. Pozitivno pravo kao celina (njegova egzistencija) može se prema tome da pravda samo kao zapovest božanska (impositio numinis). Zastupnici teokratskog shvatanja prava (zajedničkog svim religijama), koje, kao što se vidi, meša pravo s religijom, iako su to dva zasebna socijalna poretka, proširili su ga i na samu državu, predstavljajući je kao božansku ustanovu, koju, kao i pravo, smatraju nužnim zlom grešnog sveta".

[31] Opširnije videti, Henri Rommen, Le droit nautrel, Histoire-Doctrine, Paris 1945, str. 54 i dalje; Jacques Ellul, navedeno delo, str. 45 i dalje; T. Živanović (navedeno delo, str. 555) – kao podloga božanskom umnom pravu "koje se pojavilo u drugoj fazi sholastičke filozofije, poslužila je misao izražena u Platonovom dijalogu Eutifron (nasuprot Eutifronu koji izražava tradicionalnu grčku doktrinu, Sokrat dokazuje, da je sveto ne zato što su ga bogovi hteli, već su ga bogovi hteli zato što je sveto – dakle, svetost prethodi zapovesti). Shodno njoj, postavio se kao lex aeterna princip, da pravedno (i dobro) prethodi samoj božjoj volji i sastoji se u saglasnosti sa svetošću ili mudrošću božanskom (conventia cum sanctitate divina antecedenter ad voluntatem divinam) da je, prema tome, pravedno ono, što božanstvo mora narediti po svojoj istini. Tako je nastala jedna mešovita teološko-racionalistička teorija prema kojoj celokupno pravo predstavlja božansko-racionalni realitet. Ono je, kako se uzima, nužno i univerzalno, prema tome, večno i nepromenljivo. Docnije je Leibnitz ovo gledište formulisao drugačije u svojoj teoriji esencijaliteta. Po njemu, izvor prava je suština (esencija) božja, te je pravedno i moralno to po sebi, i bog ne bi mogao, po samom zakonu svoje esencije, drugačije hteti, kao što ne bi mogao učiniti, da tri ugla trougla nisu ravni dvama pravim".

[32] T. Živanović, navedeno delo, str. 556.

[33] Jacques Ellul, ibidem; Henri Rommen, ibidem; Jean-Marc Trigeaud, ibidem; Th. Jouffroy, Cours de droit naturel, t. I, 4 éd., Paris 1866, str. 113 i dalje.

[34] Ovo shvatanje se nalazi već u Gracijanovom dekretu (Gratiani decretum) oko 1150 godine, koji je, kao prvi deo Corpus juris canonici, uzdizao i obožavao prirodno pravo, što će se nastaviti u delima Tome Akvinskog u 13. veku.

[35] Thomas Aquinas (1225–1274). O životu i delu Tome Akvinskog, videti, Tomo Vereš (izabrao i priredio), Toma Akvinski, izabrano djelo, Globus, Zagreb 1981, str. 1–27.

to svojim delom "Suma teologija"[36] utvrdio da je zakon delo razuma[37] i definisao odnos između prirodnog i božanskog prava.[38]

Prema osnovnom svojstvu ovoga učenja, prirodno pravo ima za izvor božanski um, a to pravo čovek saznaje preko svog prirodnog uma.[39]

U tom smislu, ovaj autor određuje i svrhu zakona, rekavši da je zakon pravilo i mera postupaka (regula et mensura) ljudskog delovanja koje navodi čoveka da nešto radi odnosno da nešto ne uradi.[40] Ali, sve to određuje razum, a ne volja. To dalje znači, da jedan zakon ne sme biti protivan razumu i svaka volja zakonodavca ukoliko nije u saglasnosti sa razumom i ne može biti zakon.

---

[36] Summa theologiae, objavljena u knjizi T. Vereša, navedeno delo, str. 153 i dalje; videti i Toma Akvinski, Država (prevod s latinskog izvornika i beleške T. Vereš i M. Jeličić), Globus, Zagreb 1990, v. naročito, deo o zakonu (str. 129–209) i deo o pravu (str. 209–327).

[37] Prema T. Akvinskom, zakon je delo razuma jer obavezuje na delanje. Zadatak razuma je da upućuje stvari prema svrsi, koja je pak, po Filozofu, glavni izvor svega što čovek radi. Budući da je zakon pravilo i mera, on se na dva načina pojavljuje. Pre svega, tako da zadaje pravila i merila ljudskom delovanju. To je svojstveno razumu, pa je u tom smislu zakon prisutan isključivo u njemu. Na drugi način zakon je prisutan u onome što je podvrgnuto nekom pravilu i merilu. U tom smislu zakon prožima sve stvari koje teže za nečim na temelju neke zakonitosti. Na taj način zakonom se može nazvati bilo koja težnja što proizilazi iz zakonomernosti. Doduše ne u bitnom značenju te reči, nego u smislu ustanovljene srodnosti – participative. Sposobnost razuma da utiče na zbivanja u životu dolazi od volje: čim se, naime, neko opredeli za neki cilj, razum određuje (imperat) kojim se to sredstvima postiže. No, da bi nalozi volje primili vrednost zakona, moraju biti odmereni nečijim razumom (aliqua ratione regulata). Eto, na taj način treba shvatiti tvrdnju prema kojoj volja poglavara ima vrednost zakona. Inače bi volja poglavara bila bezakonje, a ne zakon.

[38] Kod ovog pitanja primećuje se da je T. Akvinski prihvatio Aristotelovu teoriju pravde. Tako, kod pitanja da li je umesno deliti pravo na prirodno i pozitivno, Akvinski odgovara da je pravedno neko delo koje je svojevrsnom jednakošću srazmerno drugome. Međutim, nešto može biti srazmerno nekom čoveku na dva načina. Na prvi način po svojoj sopstvenoj prirodi, recimo kad neko toliko daje da isto toliko primi. To se naziva prirodnim pravom. Na drugi način se nešto izjednačuje ili dovodi u srazmeru s drugim ugovorom ili zajedničkim dogovorom, pa se neko smatra zadovoljnim ako toliko i toliko primi. I to se može dogoditi na dva načina: prvo, privatnim ugovorom koji među sobom zaključe privatna lica; drugo, javnim ugovorom, kad ceo narod pristane da se nešto drži gotovo jednakim i srazmernim prema drugome, ili odredbom vladara koji je dužan da se brine za narod i da ga predstavlja. A to se naziva pozitivnim pravom.

[39] Prema tom shvatanju, "prirodno pravo je posredstvom čovečijeg uma od Boga otkriveno pravo. I ono je prema tome jedan deo božanskog prava u širem smislu, te s njegovim osnovnim delom ne može doći u sukob. Ono se pojavljuje, dakle, kao posredno božansko pravo, tj. kao božansko prirodno pravo. Jedan deo božanskog prava u širem smislu je ujedno pozitivno (ili konvencionalno) pravo, tj. ukoliko je neposredno i posredno božansko pravo primljeno u ljudskom, pozitivnom pravu. To je treći deo božanskog prava u širem smislu, božansko pozitivno pravo" (T. Živanović, navedeno delo, str. 557).

[40] Jedno od važnih mesta u filozofiji T. Akvinskog je i ono gde on raspravlja pitanje da li je pravo naroda (ius gentium) isto što i prirodno pravo ili drugim rečima da li je prirodno pravo jedinstveno za sve narode ili se razlikuje s obzirom na različitost prostora odnosno nacije. Može se reći da je ovaj autor ozbiljno označio nadnacionalni karakter prirodnog prava i shvatio ga kao univerzalno pravo. Po njemu, "pravedno je ono pravo odnosno prirodno pravo koje je po svojoj prirodi primereno drugome ili izjednačeno s drugim. Ako se uopšteno posmatra, onda to ne odgovara samo čoveku, nego i ostalim bićima. Zbog toga je pravo koje se naziva prirodnim na određeni način zajedničko i nama i životinjama. No, od prirodnog prava, u tom smislu, odstupa pravo naroda, jer je ono zajedničko svim životinjama, a ovo samo ljudima. Naime, posmatrati nešto u odnosu na ono što iz toga sledi svojstveno je razumu (proprium rationis). A budući da je to odredio prirodni razum, prirodno je za čoveka. Zato pravnik Gaj i kaže: što je prirodni razum ustanovio među svim ljudima, toga se pridržavaju svi narodi, a naziva se pravom naroda" (T. Akvinski, Država (prevod s latinskog izvornika i beleške T. Vereš i M. Jeličić), Globus, Zagreb 1990, str. 239.

Pri tome, svrhu zakona T. Akvinski uvek vidi u nekom zajedničkom dobru,[41] pa se, prema tome, zakon, kao pravilo razuma, uvek donosi u cilju ostvarenja zajedničkog (opšteg) dobra od strane onoga ko se stara za određenu zajednicu i to tako da zakon mora biti proglašen da bi bio obavezujući.[42]

Tomistička doktrina srednjevekovne sholastike nije do kraja ostala netaknuta. Ona je krajem 18. i početkom 19. veka bila u izvesnoj meri potisnuta, kao posledica prodora opštih ideja protiv racionalizma. Hrišćanska filozofija toga doba (Francuska i Nemačka) vraća se staroj doktrini božanskog prava[43] prema kojoj, prirodno pravo ne može biti umno, već božansko voljno.

Subjektivno prirodno pravo predstavlja skup pravnih ovlašćenja koja nekome pripadaju neposredno na osnovu objektivnog prirodnog prava i na osnovu odnosa koji su dati samom prirodom – npr. pravo čoveka na život, nepovredivost, pravo na slobodu, pribavljanje svojine.[44]

I pored ovih oscilacija u teološkim učenjima srednjevekovnog prirodnog prava, shvatanje Tome Akvinskog ostaje kao najznačajnije i ono će kasnije naći svoju "reinkarnaciju" u drugim metateološkim doktrinama, posebno u radovima Huga Grocijusa i njegovih sledbenika.

Demokratska jednakost i međukulturna tolerancija

Demokratska jednakost i međukulturna tolerancija predstavljaju univerzalne vrednosti u svetu više kulture prava kao izraza opštekulturnog identiteta određene zajednice. Međutim, kada je reč o ostvarenju prirodnog prava, kao univerzalno pravednog prava[45], onda nije dovoljno pretpostaviti demokratiju kao prost "zakon većine" koji može ugroziti pravo manjine ili se čak pretvoriti u svoju suprotnost: diktaturu većine nad manjinom.

Sa gledišta prirodnog prava, takva demokratija ne bi bila u stanju da svakome obezbedi poštovanje ljudskih prava koja moraju u suštini biti ista za sve ljude, jer su svi, kao deo i delo

---

[41] Tako, "u prirodi je zakona usmerenost prema zajedničkom dobru koja dolazi do izražaja i u primeni na pojedinačne ciljeve. Sigurno je da se ljudske radnje odnose na pojedinačne stvari, ali se mogu usmeriti prema zajedničkom dobru. Doduše, ne u tom smislu kao da bi spadale u istorodna ili istovrsna dobra, već u tom smislu da imaju isti krajnji uzrok, tj. ukoliko je zajedničko dobro zajednički cilj. Kao što teorijski razum dolazi do nepokolebljive sigurnosti tako da sve svodi na osnovna načela koja se više ne mogu obrazložiti (prima principia indemonstrabilia), tako praktični razum dolazi do nepokolebljivosti kad je usmeren prema konačnoj svrsi koja se sastoji u zajedničkom dobru. Vrednost zakona ima, dakle, ono što je obeleženo takvim sadržajem" (T. Akvinski, Suma teologija, deo koji nosi naslov "O biti zakona", u knjizi Toma Akvinski – Izabrano djelo, (izabrao i priredio Tomo Vereš), Globus, Zagreb 1981, str. 225.

[42] U pogledu neophodnosti da jedan zakon bude objavljen, ovaj autor kaže da bi zakon bio obavezan, što je njegova bit, valja ga primeniti na ljude koji su mu podložni. A upravo ta primena obavlja se proglašenjem koje ljudima obznanjuje zakon. Iz toga sledi da zakon mora biti proglašen da bi bio pravomoćan. Na osnovu svega rečenog, zakon se može definisati ovako: zakon nije ništa drugo nego odredba (ordinatio) razuma u vidu zajedničkog dobra, koju proglašava lice zaduženo da se brine za zajednicu (T. Akvinski, navedeno delo, str. 227).

[43] H. Rommen, navedeno delo, str. 54 i dalje; T. Živanović, navedeno delo, str. 558; J. Ellul, navedeno delo, str. 45.

[44] To definicija koju je dao Cathrein, v. opširnije Gény, Science et Technique en droit privé positif. Nouvelle contribution ů la critique de la méthode juridique, 4 vol., Paris 1914–1924, str. 291 i dalje.

[45] Opširnije, Božidar Marković, O pravednom pravu, Novi Sad 1993, naročito str. 91–147; isti autor: Načela demokratije, biblioteka Politika i društvo, Beograd 1998, str. 5 i dalje; Arend Lajphart, Modeli demokratije, izdanje Službeni list SCG i CID Podgorica, 2003.

prirode isti u dolasku i odlasku i koji, već po tome, moraju uživati isto dostojanstvo života, bez obzira na različite oblike društvenog uređenja.

Takva demokratija (vulgarna) nije daleko odmakla od one druge (simulovane) u kojoj su demokratske proklamacije samo "papirne", a u stvari, supstituisane vladavinom nasilja, bilo manjine nad većinom (razne vrste autokratskih i sličnih diktatura), bilo većine nad manjinom (razne vrste "demokratske" vladavine).

Prema tome, vladavina racionalne koncepcije prirodnog prava pretpostavlja takav stepen demokratske kulture[46] u kojoj je, pored notornih atributa demokratije[47] tolerancija – njena prva i poslednja instanca.[48]

Očigledno, takva vrsta demokratije koju ovde nazivamo demokratskom kulturom, pretpostavlja najmanje tri svojstva: prvo, političku zrelost određene zajednice koja dolazi kao rezultat čitavog niza metapravnih determinanti (stepen filozofske prosvećenosti, moralna zasnovanost, ekonomska konstitucija, politička emancipacija, tradicija opštih pravila ponašanja, tehnička civilizacija) a koje su izraz odgovarajuće "istorijske nužnosti";[49] drugo, svest o odgovornosti, jer samosvesnu demokratsku slobodu nužno prati odgovornost (polje slobode jednog, granica je slobode drugog titulara slobode, opšte ili posebne, npr. svojinske), i treće, tolerantnost kao izraz visoko razvijene umnosti, zajedničke i individualne, dakle, "misliti sam, zamišljati sebe (u ophođenju sa ljudima) na mestu svakoga drugoga i uvek misliti saglasno sa samim sobom".[50]

Pravo na toleranciju kao element demokratske kulture, naučno je naročito obrazložio Artur Kaufman[51] koji je dao jednu sintezu ovog pitanja. Izložićemo neke delove te sinteze, da bi kasnije pokušali da izvučemo odgovarajuće zaključke o celom pitanju.

Tako, prema ovom autoru, u demokratiji važi zakon većine, i ta većina može sve, samo ne može dve stvari: ona ne može da ukloni sam princip većine i time demokratiju, i ona ne može da stavi van snage osnovna i ljudska prava. Ovo s toga, što ta prava važe pre države, država ih ne odobrava, ona samo treba da ih štiti. S druge strane, demokratija zahteva višepartijski sistem. Onaj ko jedino istinitim stanovištem smatra sopstveno stanovište, odnosno stanovište svoje grupe, svoje partije, taj ne može biti demokrata. Drugim rečima, ne može se biti demokrata bez jednog kvantuma relativizma. Sopstveno uverenje mora biti udruženo sa saznanjem, da pored sopstvenog uverenja, postoje i druga podjednako vredna uverenja. Zato se anti-relativista, onaj koji svoje mišljenje smatra apsolutnim, svakako najtačnije može okarakterisati ovim Monteskijevim rečima: "Bože, kako to da smo mi uvek u pravu a da drugi nikada nisu u pravu".[52] Zato će ovaj autor dalje nastaviti: niko nema nepodeljenu celu istinu. Jedan nikada nema pra-

---

[46] U tom smislu, v. Yves Madiot, Considćrations sur les droits et les devoirs de l'homme, Bruxelles, 1998, naročito str. 168 i dalje.

[47] Dejvid Held, Demokratija i globalni poredak, Beograd, 1997; Slobodan Jovanović, O državi, osnovi jedne pravne teorije, Beograd, 1990.

[48] Artur Kaufman, Refleksije o pravnoj državi, demokratiji, toleranciji, u knjizi Pravo i razumevanje prava, Beograd–Valjevo, 1998, str. 331–342.

[49] Hegel, navedeno delo, str. 209.

[50] Kaufman, navedeno delo, str. 142. Zapravo to su Kantove misli koje je Kaufman citirao u kontekstu svojih duboko argumentovanih razmatranja o pravu tolerancije kao neophodnom svojstvu demokratskog uređenja i pravne države, str. 332 i sl.

[51] Artur Kaufman, Refleksije o pravnoj državi, demokratiji, toleranciji, u knjizi Pravo i razumevanje prava, Beograd–Valjevo, 1998, naročito str. 331–342.

[52] Navedeno delo, str. 333.

vo, rekao je Niče, a sa dvojicom počinje istina.[53] Otkrivanje istine skoro se nikada ne dešava na usamljenom putu; ono iziskuje kooperativan napor. To je slično kao kod nekog orkestra. Onaj ko svaki glas izdvaja iz celine i sluša za sebe, taj nikada neće čuti simfoniju. Konvergencija većine pojedinačnih saznanja iste stvari jedan je od najvažnijih kriterijuma istine.[54]

Posle ovih uvodnih konstatacija izraženih često izvanrednim stilom figurama, ovaj autor će o toleranciji neposredno reći: podjednako vredne alternative vode ka najvažnijoj duhovnoj osnovi demokratije, ka toleranciji. Kod tolerancije je reč o odnosu između istine, slobode i jednakosti, naime, da li zabluda zbog slobode, ima isto pravo kao i istina. Međutim, ovaj autor će razlikovati praktičnu toleranciju od dogmatske netolerancije. Prva, praktična ili "građanska" tolerancija nije u stvari nikakva tolerancija, dok ova druga "dogmatska netolerancija" jeste priznanje netolerancije kao takve. Pri tome, po ovom autoru, tolerancija je nepodeljena, ali nije bezgranična. Samo se po sebi razume da se važeći zakoni moraju poštovati, da se kršenje prava, osobito zločin, ne može trpeti, da se nehumanost ne sme održavati. Većinom se kaže da se ni netolerancija ne može trpeti.[55] U toj opštosti, prema ovom autoru, to nije tačno. Postoje mnoge forme netolerancije koje ne škode opštem dobru. Ne može se trpeti netolerancija koja ugrožava opšte dobro, pogotovu slobodu.[56] Tako lice ili grupe koji propagiraju mržnju prema strancima i vrše nasilje prema onima koji su drukčiji, ne zaslužuju nikakvu trpeljivost.[57]

Za razliku od drugih atributa demokratske kulture, tolerancija kao njen sastavni deo, ima svoje specifičnosti. Pre svega, ona se ne donosi rođenjem,[58] već se stiče (tačnije, može se steći) tokom života zavisno od individualnih i opštih sklonosti društva koje pretenduje da postane demokratsko. To znači, da čovek ab initio nije tolerantan po prirodi, već je egoista sa nagonom samoodržanja i elementarne egzistencije. Međutim, on je, u odnosu na druga prirodna bića, snabdeven većim stepenom razuma i umnosti, tako da se na putu od "urođenog do učenog neznanja"[59] nalazi na različitoj hijerarhiji kulturnog saznanja. Kako "tolerancija iziskuje sposobnost komunikacije i time, pre svega, vrlinu da se drugi sasluša, da se drugome može prići, ona pretpostavlja visoku meru duhovne slobode i sposobnost da se za sebe obrazuje pouzdano mišljenje i potrebna joj je snaga da započinje uvek iznova i da dopusti da je pouče nove situacije i informacije. Nagrada za toleranciju je istinska sloboda i nezavisnost".[60] Tolerancija se, dakle, ne završava bezuslovno na netoleranciji, nego samo na netoleranciji koja ugrožava slobodu.[61]

---

[53] Navedeno delo, str. 334.

[54] Kaufman, ibidem.

[55] Kaufman, ibidem, str. 336.

[56] Kaufman, ibidem.

[57] Kaufman, ibidem.

[58] Kaufman, navedeno delo, str. 341.

[59] Blez Paskal, Misli, Beograd, izd. Kultura, 1961, str. 152, gde se, između ostalog kaže: Svet sudi dobro o stvarima, jer se nalazi u urođenom neznanju, koje je prvo sedište čovekovo. Nauke imaju dve krajnje tačke, koje se dodiruju. Prva je čisto urođeno neznanje, u kom se od rođenja nalaze svi ljudi. Druga je krajnost ona do koje dolaze velike duše koje, prešavši sve što ljudi mogu znati, uvide da ne znaju ništa, i dospevaju u ono isto neznanje iz koga su i pošle; ali to je učeno neznanje, koje sebe poznaje. Oni između tog dvoga, koji su izišli iz urođenog neznanja a nisu mogli dospeti do onog drugog, imaju izvesnu prevlaku one nadule učenosti, i prave se kao da su znalci. Ti unose zabunu u svet, i pogrešno o svemu sude.

[60] "Veliko je pitanje da li to svako može. Mnogim ljudima se, po svoj prilici, neće smeti prebaciti što, s obzirom na kompleksnost našeg modernog sveta, ne umeju sebi drukčije da pomognu nego da na to reaguju s ravnodušnošću ili sa netolerancijom. Teško da svako ima snage da se neprestano raspravlja sa promenljivim situacijama i mišljenjima. Takve ljude susresti s razumevanjem, čini mi se da je dužnost tolerancije" (Kaufman, navedeno delo, str. 342).

[61] Kaufman, navedeno delo, str. 342.

Prema tome, pitanje tolerancije je pitanje duhovne slobode, opšte kulture koja se dostiže vaspitanjem razuma da svako ima pravo na svoje mišljenje, bez obzira na brojnost ili malobrojnost.

Tolerancija i dogmatska netolerancija, dva su saputnika života čoveka kao društvenog bića. Ako je stepen razvoja individualnog i zajedničkog razuma zarobljen dogmom bilo koje vrste (rasa, boja, pol, jezik, veroispovest, političko i drugo mišljenje, nacionalno ili društveno poreklo, imovina, i druge slične okolnosti), onda je to antipod demokratskoj kulturi, bez obzira na zakon većine koji je karakterističan za demokratsko društvo.

Naprotiv, ako je taj razum dostigao takvu meru duhovne slobode u smislu racionalne koncepcije prirodnog prava, onda je to put ka demokratskoj kulturi kao najvišem stepenu konstitucije jedne zajednice.

Pitanje je, kako toleranciji dati "pravnu odjeću" uz očuvanje pravne sigurnosti; može li, s pozivom na toleranciju, manjina da odbije primenu zakonske obaveze *(dare, facere, non facere)* a da ostanemo u domenu pravednog prava; može li, najzad, sudija da odbije primenu nekog zakona zbog poštovanja tolerancije ili "oprostive zablude iz savesti.[62]

Odgovor na postavljeno pitanje, pored onoga što je do sada rečeno, čini suštinu moći prirodnog prava.

Za razliku od pozitivizma koji samo "riječi zakonske znade" bez shvatanja njegovog razuma i smisla,[63] racionalno prirodno pravo ovde pruža čitavu disperziju mogućnosti za ostvarenje pravednog prava, čuvajući neophodnost opštosti prava i pravne sigurnosti kao zajedničkog dobra, ali istovremeno (u hipotezi demokratske kulture i tolerancije kao jednog od atributa te kulture), štiteći i pojedinačnu ličnost kao ćeliju zajedničkog dobra.

Tako, pravo na toleranciju može biti uvedeno u svet pozitivnog prava na više načina.

Najopštiji je onaj po kome je prirodno pravo supstrat i uzor pozitivnom pravu, tako da se, ustanove i pravila pozitivnog prava inspirišu ili čak poklapaju sa kategorijama racionalnog prirodnog prava. Naime, ukoliko je pozitivno pravo, kako u svom nastanku tako i u svojoj primeni, u većoj meri inspirisano racionalnim prirodnim pravom, ono je bliže legitimitetu i legalitetu prava kao polugama vladavine prava (pravne države), pa je, samim tim, i pravo na toleranciju svedeno na manji prostor. Ovo s toga što je takvo pravo izraz saglasja svih ili ogromne većine, a nije izraz samovolje i nasilja jednih u odnosu na druge. Razume se, da i u toj hipotezi, pravo tolerancije mora naći mesto u pozitivnom pravu, i redovi koji slede biće posvećeni tom pitanju.

Velika mogućnost pozitivnog prava da u svet svojih pravnih normi šire uvede pravo na toleranciju, jesu permisivne norme, dakle, one koje dozvoljavaju alternativne dispozicije ponašanja. Propisivanjem ovih normi ostavlja se mogućnost svakom subjektu prava da svoje ponašanje uskladi sa jednom od zakonom predviđenih alternativa, čime se u velikoj meri (nekada i potpuno) ostvaruje i pravo na toleranciju, posebno manjine.

Ali, ovde mora biti postavljena jedna jasna i kategorična "demarkaciona linija" između onih društvenih odnosa koji se po prirodi same stvari mogu regulisati permisivnim normama i onih, kod kojih, radi zaštite opšteg dobra, to nije moguće činiti. Reč je o javnom poretku

---

[62] Kaufman, navedeno delo, str. 208. Na ovom mestu, ovaj autor je izložio Hegelovu ideju "objektivne savesti" po kojoj se hoće, da se u liku države uspostavi sinteza objektivne obaveze i subjektivne slobode, opštosti i posebnosti. Pri tome, neuralgičnu tačku predstavlja individualna savest. Nju Hegel priznaje prema slovu, ali da li je "savest jedne određene individue primerena toj ideji savesti, da li je ono što ona smatra ili prikazuje kao dobro, i stvarno dobro, to se može saznati samo iz sadržaja onoga što treba da bude dobro... (Kaufman, ibidem).

[63] Vidi čl. 993. Bogišićevog zakonika iz 1888.

koji se karakteriše imperativnim normama[64] i gde malo (ponekad nimalo) ima prostora za permisivne norme jer su u pitanju prinudni pravni propisi ili moralni imperativi.[65]

U tom smislu, još jednom ukazujemo na konstatacije Artura Kaufmana[66] koji će kazati da se krivično pravo, koliko je mogućno mora ograničiti na područje jednostavne, elementarne moralnosti koja izražava ono što je opšteljudsko: ti ne treba da ubiješ, povređuješ, kradeš, pljačkaš, obmanjuješ, činiš nasilje... Samo takve norme imaju zaista pravo da ih prihvati svačija savest.[67]

U suštini, reč je o minimumu opštosti onih prirodnih prava čoveka (ljudskih prava) koja su (ili koja bi trebalo da budu) zaštićena u svakoj prostorno-vremenskoj dimenziji i koja danas predstavljaju venac kodifikovanih prava u okviru odgovarajućih standarda međunarodne zajednice.

Razume se, permisivnih normi, u prošlosti i danas, ima na svakom koraku, naročito u oblasti privatnog prava, a posebno obligacionog i naslednog.

Međutim, pravna država koja počiva na demokratskoj kulturi, treba da obezbedi, tačnije, da uvek vodi računa da se ove norme što više koriste i to ne samo u domenu privatnog, već i javnog prava.

U stvari, uvek kada to ne zadire ili ne ugrožava određena javna dobra (opštu korisnost) i zaštićena osnovna ljudska prava, permisivne norme treba propisivati u većoj meri (odnosno u najvećoj mogućoj meri), ne samo zbog ostvarenja prava na toleranciju, već, pre svega, što se na taj način odvija proces preobražaja prava iz "carstva naredbi" u sferu slobode čoveka i svih njegovih asocijacija.

Samo takva zakonodavna politika, jurisprudencija i pravna nauka treba da predsedava svim našim htenjima, grupnim i pojedinačnim.

Najzad, kada je reč o pravu tolerancije i njegovom uvođenju u život pozitivnog prava, značajno je zadržati se na ulozi suda koju on ima u postupku primene prava na konkretne životne situacije.

---

[64] Simon: L'ordre public en droit privé, Rennes, 1941; Malaurie: L'ordre public et le contrat, Reims, 1953; Claps-Lienhart: L'ordre Public, Lyon, 1934; Vareilles-Sommiéres: Les lois d'Ordre Public et la dérogation aux lois, Revue de Lille, 1899, str. 674.

[65] O odnosu prava i morala postoji bogata literatura; vid. naročito: Ripert: La régle morale dans les obligations civiles, Paris, 1927; Lévy-Bruhl: La morale et la science des moeurs, Paris, 1937; Delos: Le probléme des rapports du droit et de la morale, Archives de philosophie du droit et de sociologie juridique, 1933, br. 1-2, str. 84-111; Cardahi: Droit et morale, t. I, II, III, Paris, 1950; Darbellay: La régle juridique. Son fondement moral et social, Paris, 1945: Salmans: Droit et morale, Bruges, 1924; Mestre: Morale et obligation civile, Revue trimestrielle de droit. civil, 1925, str. 51; Savatier: Des effets de la sanction du devoir moral, Poitiers, 1916; Saiget: Le contrat immoral, Paris, 1939; Dorat des Monts: La cause immorale, Paris, 1956; Aillet: Morale théorique et science des moeurs Archives de Philosophie du droit et de Sociologie, 1937, br. 3-4, str. 26; Bonnecase: La notion juridique de bonnes moeurs, Etudes de droit civil a la mémoire de Henri Capitant, Paris, str. 91; Grospiron: L'exécution des conventions immorales, Beuvais, 1938; Perić: O školama u pravu, Arhiv, 1921, br. 4, str. 241; Taranovski: Enciklopedija prava, Beograd, 1923; Marković: Poštenje i moral u pravu, Arhiv, 1922, str. 332; Živanović: Osnovni problemi etike, Beograd, 1935.

[66] A. Kaufman, nav. delo, str. 216.

[67] Razvijajući ovu misao, ovaj autor će nastaviti: Nasuprot tome, zahtevi visokog etosa, na primer zahteva da deca u slučaju nametnute trudnoće treba da dođu na svet (tako Katolička crkva), nisu podobni za uopštavanje na taj način da bi se s tim morala složiti svaka pravno svesna žena. To može da odluči samo pojedinačna žena na sopstvenu odgovornost. A ako se odluči za prekid trudnoće, pravo joj zbog toga ne može uputiti nikakav prigovor, Kaufman, ibidem.

Ta uloga je nešto jednostavnija kada zakon upućuje na primenu nekog metapravnog kriterijuma (npr. poslovni običaj, pravična naknada, savesnost i poštenje),[68] od one, kada zakon uopšte ne reguliše određen društveni odnos (pravna praznina), ili, što je još najteže, kada zakon reguliše jedan odnos, ali na nepodnošljivo nepravedan način. Kakva je uloga suda u takvim situacijama s obzirom na pet antičkih reči (ići sudiji znači ići pravdi) koje su preživele vekove i koje su i danas aktuelne.

U stvari, uloga sudije u postupku primene prava svodi se na pitanje pozitivizma ili univerzalizma prava. Još je antičko pravo razlikovalo ius i leges, pa se postavlja pitanje da li sudija primenjuje samo zakon koji je na pravnoj snazi u trenutku njegove primene i to u smislu njegovog slova, ili sudija izriče pravdu držeći se važećeg zakona, njegovog smisla i razuma, pa čak i drugih usvojenih pravila ponašanja koja dopunjuju zakonsku dogmatiku.[69]

Odgovor na ovo pitanje u suštini određuje granice uloge sudije u postupku primene zakona i prava uopšte.

Kada je sudija samo automatizovani primenjivač zakonske norme, pa čak i one, koja u toliko nepodnošljivoj meri protivreči pravdi da se silom fakta mora povući pred pravdom,[70] i kada se sudiji ne dozvoljava da putem interpretacije takvu zakonsku normu privede pravičnom rešenju, onda se uloga sudije u postupku primene prava svodi na neku vrstu svoje suprotnosti. Sudija tada postaje zavisan od normativne snage jedne dogme, suprotno opštem mišljenju i svom sudijskom uverenju.

Viša kultura zakonitosti ispoljena racionalnom koncepcijom prirodnog prava,[71] kao i čitava civilizacija prava i pravosuđa, opominje, ukazuje i uči nas, da ovde sudijskoj nezavi-

---

[68] To je, po terminologiji tripartitne teorije koju smo imali čast da izložimo i obrazložimo u knjizi Prirodno pravo i sud, Beograd, 1996, str. 23–47, tzv. korektivni odnos prirodnog prava prema pozitivnom pravu. Tih situacija ima naročito u Zakonu o obligacionim odnosima, pa upućujemo na gore pomenuto mesto, kako ovde ne bi nepotrebno opterećivali tekst.

[69] Božidar Marković, Ogled o odnosima između pojma pravde i razvitka pozitivnog privatnog prava, Beograd, 1995, naročito str. 9 i sl. Prema ovom autoru, čini se, da ima nečeg postojanog što je iznad zakona i pozitivnog prava. Postoje načela koja upravljaju i samim zakonima tako da pozitivno pravo nije neka proizvoljna tvorevina, poslednji pojam, nego je izraz izvesne prethodno postojeće stvarnosti. Nadalje, ovaj autor na ovom mestu navodi stanovište E. Dirkema (Durkheim, Revue internationale de l'enseignement, I, t. 15, str. 47), prema kome, videti u zakonodavnoj volji jedini izvor prava, to znači uzeti slovo za duh, spoljašnji izgled za stvarnost. Ovu ideju između ostalih, zastupa i Stammler (Die Lehre von dem richtigen Rechte, Berlin, 1902, str. 29 i sl.), prema kome, pozitivno pravo je samo drugorazredna stvar, tehnika, spoljašnja strana stvarnosti koju treba upoznati pre nego što se ona izrazi u propisima. Pozitivno pravo je uslov a ne cilj, sredstvo a ne svrha. Celo pozitivno pravo samo je težnja da postane pravedno pravo (navedeno prema B. Markoviću, op. cit., str. 11. Na istom mestu dati su i drugi bibliografski podaci autora koji zastupaju ovo stanovište).

[70] Opširnije, Gustav Radbruh, Filozofija prava, Beograd, 1980, naročito str. 288, gde se kaže: "Sukob između pravde i pravne sigurnosti mogao bi se rešiti na taj način da pozitivno pravo, koje obezbeđuje propis i moć, ima prednost i onda kad je sadržinski nepravedno i nesvrsishodno, osim u slučaju kad pozitivni zakon u toliko nepodnošljivoj meri protivreči pravdi, da zakon kao "neispravno pravo" mora odstupiti pred pravdom. Nemogućno je povući oštriju liniju između slučajeva zakonskog neprava i zakona koji važe uprkos neispravne sadržine, ali se najoštrija granica može povući tamo: kad se čak i ne teži za pravdom, kad se jednakost, koja čini jezgro pravde, prilikom donošenja propisa pozitivnog prava svesno osporava, onda zakon nije, recimo, samo "neispravno pravo", on šta više uopšte nema pravnu prirodu. Jer pravo se, pa ni pozitivno pravo, ne može drukčije definisati nego kao poredak i propisivanje, određeni po svome smislu da služe pravdi".

[71] Na objašnjenju izvora, smisla i domašaja prirodnog prava, zasnovana su različita učenja počev od antičkog (Aristotel), i teološkog (Akvinski), pa preko biološko-racionalnog (Grocijus), sve do racionalnog (Dekart) i sublimiranog racionalnog u vidu transcendentne filozofije (Kant). Opširnije, T. Živanović, Sistem sintetičke pravne filozofije, Beograd, 1959, str. 523 i dalje; (Hegel, Pravni i politički spisi, Nolit, Beograd, 1981, str. 210), jer i taj kodeks raspolaže dobrom količinom elementa čulnosti.

snosti treba otvoriti šire prostore, jer, pravo je fenomen dobrog i pravičnog,[72] a nije, niti može biti, samozvani fakt nasilne volje jednih u odnosu na druge.[73] Prema tome, sudija je u izricanju pravde nezavisan od bilo koje vlasti, osim vlasti legitimnog zakona i on donosi nepristrasne odluke u zakonom predviđenom postupku na osnovu procene činjenica i razumevanja zakona u smislu ostvarenja komutativne i distributivne pravde; sudija primenjuje i norme o ljudskim pravima koje proizilaze iz potvrđenih i objavljenih međunarodnih ugovora i opšteprihvaćenih međunarodnih standarda koji su sastavni delovi unutrašnjeg pravnog poretka svake prosvećene zajednice.

Pravda i aktivna pravičnost

Pravda predstavlja univerzalnu i apsolutnu vrednost prirodnog prava, koja je, u određenoj meri implementirana u konkretno pozitivno pravo. Kada se pozitivno pravo shvati i ostvari u kompoziciji pravde, kada opšta konstitucija jedne zajednice prihvati pravdu kao "stožernu vrlinu"[74], tada pravo te zajednice postaje legitimno u svom izvoru i legalno u svojoj primeni.[75]

Za Aristotela, pravedno se uvek nalazi u nekoj proporciji, a proporcija znači jednakost odnosa. Sa tog stanovišta, pravičnost može biti ili komutativna ili distributivna –*iustitia commutativa* i *iustitia distributiva*[76].

Kada se pravičnost postiže apsolutnom sredinom putem aritmetičke proporcije, kada se, dakle, od štetnika oduzima upravo onoliko koliko iznosi šteta i ta vrednost prenosi na oštećenog, onda je to komutativna pravda[77].

Međutim, kada se pravičnost postiže putem geometrijske proporcije koja uzima u obzir prirodu i osobenost ličnosti, kada se, dakle, članovima zajednice uvažava njihova vrednost, zasluga ili neka druga individualnost (veći stepen priznate individualnosti znači i veće pripadanje), onda je to distributivna pravda[78].

U stvari, ova podela proizilazi iz opšteg pojma pravde kao savršene (potpune) vrline u odnosu prema nekome. Kao takva, pravda je najveća od svih vrlina i ni "večernja ni jutarnja zvezda nije tako sjajna kao ona", kazaće Aristotel u petoj knjizi svoga dela Nikomaho-

---

[72] Ius est ars boni et aequi (Ulpianus – D. 1, 1, 1, pr.).

[73] To je ona nasilnička definicija prava koja celokupno pravo svodi na volju vladajuće klase. Po njoj, država svoj monopol za fizičko nasilje ostvaruje putem prava kao volje vladajuće klase. U tom smislu, npr. Radomir Lukić u svim izdanjima udžbenika Uvod u pravo. Razume se, da takav pristup pravu predstavlja političku kvalifikaciju koja služi trenutnim političkim potrebama. Kada se, dakle, pravo shvati kao nasilje jednih nad drugima, onda zakonici koji su građeni na takvom poimanju prava, jesu nelegitimni zakonici koji traju dok traje volja te vladajuće klase odnosno partije. Opširnije videti Zbornik radova u knjizi Pravna država, u izdanju Instituta za kriminološka i sociološka istraživanja, Beograd, 1991; Gordana Vukadinović, Izbor tekstova iz teorije prava, Priština, 1996, naročito str. 189–211.

[74] Aristotel, Nikomahova etika, Kultura, Beograd 1970, knj. V, str. 111 i sl. Prema Aristotelu, pravednost je potpuna vrlina jer ona podrazumeva poštovanje pravednih zakona i postupanje prema drugima kao sebi jednakima. Kao moralna odredba ona je vrlina koja u sebi sadrži sve druge vrline. Pravednost, dakle, nije nikako samo neki deo vrline, već ona predstavlja skup svih vrlina.

[75] S. Perović, Prirodno pravo kao integritet pravde, Pravni život br. 9/2003.

[76] Aristotel, Nikomahova etika (prevela sa starogrčkog R. Šalabalić), Beograd, 1970, knjiga V, str. 111. i sl.; ili, u prevodu T. Ladana, Zagreb, 1982, knjiga V, str. 87. i sl.

[77] Aristotel, navedeno delo, str. 120.

[78] Aristotel, navedeno delo, str. 117.

va etika[79], dodajući, pri tome, i stih-poslovicu "skupljene sve su u pravdi, ko živi, ljudske vrline"[80].

U redu ovih ideja, pravednost je potpuna vrlina, pre svega, zato što podrazumeva poštovanje zakona i postupanje prema drugima (bližnjima) kao sebi jednakim. Ona je, dakle, vrlina kao moralna odredba koja u sebi sadrži sve druge vrline. Drugim rečima, pravednost nije nikako samo neki deo vrline, već ona predstavlja korpus vrlina, kao što i njoj suprotna nepravda nije deo poroka nego "potpun porok"[81].

Ovako shvaćen opšti pojam pravde, Aristotel je "nasledio" od svog učitelja Platona, koji je pravednost ubrajao u četiri "stožerne vrline". Ipak, u Aristotelovom učenju opšte pravde, prepoznaje se i jedna sasvim praktična i životna dimenzija ovoga pojma, a to je, što se pravda kao potpuna vrlina ne shvata apstraktno, već uvek kao odnos prema drugom, kao vrlina koja predstavlja i dobro drugih (objektivno dobro), jer je neposredno upravljena na drugog[82].

Razvijajući ovako shvaćen opšti pojam pravde, Aristotel dolazi i do pojma posebne vrste pravde odnosno pravde u užem i posebnom smislu. Obe nose isto ime i pripadaju istom genusu. Kao deo opšte pravde, posebna pravda se odnosi na nešto što je konkretno, ali što istovremeno zadržava svojstva opšte pravde, kao deo prema celini. Ovu, posebnu pravdu, Aristotel vidi kao komutativnu i distributivnu.[83]

Sudijska nezavisnost kao izraz opšte kulture

Jedna od značajnih determinanti kulturnog identiteta jedne zajednice bez sumnje, predstavlja i sudijska nezavisnost u sistemu trodelne podele vlasti.

Posle ovih reči, nije teško imenovati još jednu istinu: sudijska nezavisnost i nepristrasnost je neminovna i notorna pretpostavka ustanove sudstva. Ona je nasušni hleb, voda za piće i vazduh za disanje svakog suda prava i pravde koji se nalazi pod svodom vladavine prava i pravne države.[84]

---

[79] Iz izgubljene Euridipove tragedije Melanippe (Aristotel, navedeno delo, str. 114).

[80] Stih iz Teognida, prisvojio ga i Fokilid, a kružio je i kao poslovica (Aristotel, ibidem).

[81] Prema Aristotelu, "potpuna vrlina je, pre svega, zato što u stvari predstavlja potpunu praktičnu primenu vrline, a potpuna je zato što onaj ko je poseduje može da je primeni i prema drugima, a ne samo prema sebi; jer mnogi ljudi mogu da pokažu neku svoju vrlinu i svojim ličnim držanjem u raznim prilikama koje se njega lično tiču, dok su sasvim nesposobni da to učine kad je u pitanju neko drugi". Zato se smatra tačnom ona Bijantova izreka "na vlasti se čovek poznaje" (Bijant iz Prijene kod Mileta, po mudrosti poznati jonski državnik, jedan od sedam mudraca. Slično kaže i Sofokle u Antigoni, str. 175). Opširnije, v. Aristotel, ibidem.

[82] U tom smislu "pravda je savršena vrlina, mada ne u apsolutnom značenju, nego u odnosu prema nekome... najgori je onaj čovek koji se i prema samome sebi i prema svojim prijateljima služi nevaljalstvom, ali za to nije najbolji onaj ko primenjuje vrlinu prema sebi nego onaj ko to čini prema drugome, jer to je teško" (Aristotel, ibidem).

[83] Zbog nedostatka prostora Autor ovde neće dalje izlagati pojam i posledice komutativne i distributivne pravde, već upućuje na svoj tekst *Prirodno pravo i univerzalne vrednosti,* Beograd, 2005, kao i tekst *Objektivna odgovornost za prouzrokovanu štetu,* pripremljen za Simpozijum o pravu Jugoistočne Evrope koji će biti održan oktobra 2010. god. u Cavtatu.

[84] G. Radbruh, Filozofija prava, izdanje Nolita, Beograd, 1980, str. 293. Na ovom mestu Radbruh upotrebljava ove reči kada hoće da podvuče demokratiju kao nužnu pretpostavku pravne države. On kaže, da treba da tražimo pravdu, ali da istovremeno vodimo računa o pravnoj sigurnosti, jer je i ona sama jedan deo pravde. I dalje, po rečima Radbruha, pravna država je jedino u stanju da zadovolji obe ideje – pravdu i pravnu sigurnost. Pri tome, "demokratija je svakako jedno dobro vredno hvale ... a najbolje u demokratiji je upravo to što je samo ona podobna da obezbedi pravnu državu" (ibidem).

I zato, pitanje nezavisnosti sudije nije samo pravno pitanje. To je pitanje opšte kulture jedne zajednice.[85] Kultura koja je određena prirodom i domašajem osnovnih principa na kojima je zasnovana ta zajednica, njenim filozofskim opredeljenjem, ekonomskom i političkom konstitucijom, tehničkom civilizacijom, moralnom emancipacijom, juristićkom opservacijom.

U tom širem krugu zbivanja prava i pravde na bilo kom stepenu prostorno vremenske datosti, princip nezavisnosti sudije[86] predstavlja demarkacionu liniju koja deli polje prava od pustinje neprava.

U uslovima nepravne države, gde je legitimitet i legalitet prava ispod dozvoljenog stepena društvene tolerancije, gde vladavinu prava zamenjuje vladavina samovoljnog fakta-vlasti, strasti ili interesa pojedinačnog ili grupnog, gde se eliminiše načelo podele vlasti i ceo život svodi na politički monizam i njegovu strogu hijerarhiju, tu se sudijska nezavisnost svodi na zavisnost od partijske, a ne zakonske, odluke. Takva zavisnost pretvara sudiju u derivat jednosmernog naloga (političkog, nacionalnog, rasnog ili klasnog) i sudija tada objektivno nije u stanju da primeni pravedno pravo.

U hipotezi, dakle, nepravne države, pravo doživljava brodolom, a s njim tone i princip nezavisnosti sudije. Ići takvom "pravu" i takvom sudiji, znači ići anti-pravdi.[87] Cela istorija prava je tu, da nam posvedoči ovu tvrdnju. I ne samo istorija, već i komparativna stvarnost.

Naprotiv, kada se demokratski princip organizuje po načelu ustavnosti i zakonitosti, tada se nezavisnost sudije obezbeđuje delovanjem pravne države. To znači, da nezavisnost sudije, kao neminovni atribut njegove funkcije, predstavlja organski deo pravne države.

Izrečene konstatacije donose nam zaključak: nezavisnost sudije moguće je ostvariti samo u hipotezi vladavine prava i pravne države. Razume se, država ne stiče svojstvo pravne države, niti sudija stiče nezavisnost, samo na taj način što će se te reči upisati u neki zakon ili ustav.[88] Ona to postaje kada rezultat (ishodište) prava ukazuje na činjenicu da je određeno pravo legitimno u svom nastanku i da je legalno u svojoj primeni.

U stvari, nezavisnost sudije u postupku primene prava svodi se na pitanje pozitivizma ili univerzalizma prava. Još je antičko pravo razlikovalo *ius* i *leges,* pa se postavlja pitanje da li sudija primenjuje samo zakon koji je na pravnoj snazi u trenutku njegove primene i to u

---

[85] Ivo Krbek, Garancije sudijske nezavisnosti (posebni otisak iz Spomenice kongresa pravnika), Beograd, 1935, str. 2 i sl., prema kome zemlju bez sudijske nezavisnosti teško možemo smatrati kulturnom zemljom.

[86] O nezavisnosti sudije videti naročito: Danilo Danić, O jemstvima sudijske nezavisnosti, Beograd, 1935; Ivo Krbek, Garancije sudijske nezavisnosti, Beograd, 1935; Đorđe Tasić, O jemstvima sudske nezavisnosti, Beograd, 1935; Krivic Rudolf, O jemstvu sodniške neodvisnosti, Beograd, 1935; Nikola Georgiev, Garanci za nezavisimosta na sudijata, Beograd, 1935; Živojin Perić, O sudskoj nezavisnosti, Beograd, 1899; Živojin Perić, O ulozi sudske vlasti po srpskom zakonodavstvu, Beograd, 1909; Adam Lazarević, Za problemot na sudskata nezavisnost, postojanost i nepodvižnost, Skopje, 1960; Zoran Pokrovac, Sudačka neovisnost, postulat vezanosti zakonom i slobodnopravni pokret, Zbornik Pravnog fakulteta u Zagrebu, br. 4, 1992, u ovom radu naročito: Hermann Kantorowicz, Der Kampf um die Rechtswissenschaft, Heidelberg, Winter, 1906.

[87] Opširnije, Giorgio Del Vecchio, Giustizia e diritto, Roma, 1934, str. 80 i sl. Prema ovom autoru, pravnik i naročito sudija, mora, koliko je mogućno, da gospodari celim sistemom i, gotovo, da ga oživi, da oseti njegovo duhovno jedinstvo, počevši od dalekih i prećutnih premisa do najmanjih odredaba, kao da je on sam tvorac svega, i da u njemu govori sam zakon. U smislu tog visokog ideala, sudija je živi pravednik, kako je to Aristotel govorio (prevod Đ. Tasića, u izdanju Biblioteke javnog prava, Beograd, 1940, str. 85).

[88] Tako, "nezavisnost sudova ne sastoji se samo u tome što će se reći da su oni nezavisni, ako se uz to ne propišu i mere koje će toj nezavisnosti dati praktičnog smisla" (Živojin Perić, O sudskoj nezavisnosti, Beograd, 1899, str. 13).

smislu njegovog slova, ili sudija izriče pravdu držeći se važećeg zakona, njegovog smisla i razuma, pa čak i drugih usvojenih pravila ponašanja koja dopunjuju zakonsku dogmatiku.[89]

Odgovor na ovo pitanje u suštini određuje granice nezavisnosti sudije u postupku primene zakona i prava uopšte. Istovremeno, to je i centralno pitanje sudijske nezavisnosti.

Kada je sudija samo automatizovani primenjivač zakonske norme, pa čak i one, koja u toliko nepodnošljivoj meri protivreči pravdi da se silom fakta mora povući pred pravdom,[90] i kada se sudiji ne dozvoljava da putem interpretacije takvu zakonsku normu privede pravičnom rešenju, onda se princip nezavisnosti sudije u postupku primene prava pretvara u svoju suprotnost. Sudija tada postaje zavisan od normativne snage jedne dogme, suprotno opštem mišljenju i svom sudijskom uverenju.

Zakon XII tablica sudijske nezavisnosti. – Na osnovu svega rečenog, mogu se postaviti dvanaest tablica sudijske nezavisnosti, i to:

I. sudija je u izricanju pravde nezavisan od bilo koje vlasti, osim vlasti legitimnog zakona; II. sudija donosi nepristrasne odluke u zakonom predviđenom postupku na osnovu procene činjenica i razumevanja zakona u smislu ostvarenja komutativne i distributivne pravde; III. sudija primenjuje i norme o ljudskim pravima koje proizilaze iz potvrđenih i objavljenih međunarodnih ugovora i opšteprihvaćenih međunarodnih standarda koji su sastavni delovi unutrašnjeg pravnog poretka svake prosvećene zajednice; IV. sudija je ličnost javnog poverenja; V. sudijska dužnost je zasnovana na visokom stupnju pravničke i opšte kulture, pa sudiji mora biti dostupna mogućnost stalnog usavršavanja; VI. sudija kao i drugi građanin, uživa opštu slobodu mišljenja, govora, izražavanja uverenja, profesionalnog udruživanja, okupljanja i kretanja, ali svagda tako da čuva dostojanstvo svog poziva i nepristrasnost i nezavisnost sudstva; VII. vršenje sudijske dužnosti ne sme biti predmet nedostojnih uticaja, podsticanja, pritisaka, pretnji ili intervencija, direktnih ili indirektnih, od strane bilo koga i iz bilo kojih razloga; VIII. svako je dužan da, u granicama prinudnih propisa, javnog poretka i morala, poštuje nezavisnost sudije i da se uzdrži od svakog akta nedostojnog uticaja. Svako lice koje svojim aktom nedostojnog uticaja naruši ili ugrozi nezavisnost sudije, kazniće se po zakonu; IX. država garantuje nezavisnost sudije doslednom primenom ustavnog načela vladavine prava i načela podele vlasti na zakonodavnu, izvršnu i sudsku, po kome sudska vlast pripada sudovima; X. sudija ne može biti pozvan na odgovornost za mišljenje ili za glas koji je dao u vršenju sudijske dužnosti. Imunitet sudije uređuje se zakonom; XI. sudija ne može vršiti vansudske poslovne aktivnosti kojima se kompromituje njegova sudska nezavisnost ili dostojanstvo; XII. sudija se mora izuzeti da postupa po određenom predmetu u slučaju da postoje takvi razlozi koji dovode u pitanje njegovu nepristrasnost, kao i kada može doći do sukoba interesa koji je nespojiv sa vršenjem sudijske funkcije i nezavisnosti sudije.

Kriza pravnog sistema

Posle izlaganja značajnih determinanti pravnog poretka, kao što je na početku ovog rada već rečeno, zadržaćemo se na dve moguće pojave: kriza pravnog sistema i pravna država kao visok stepen ostvarenja pomenutih determinanti prava.

U tom smislu, može se postaviti pitanje da li je moguće da pravna država doživi krizu pravnog sistema. Pokušaj odgovora na postavljeno pitanje zahteva analizu pojma krize prav-

---

[89] Božidar Marković, Ogled o odnosima između pojma pravde i razvitka pozitivnog privatnog prava, Beograd, 1995, naročito str. 9 i sl.

[90] Opširnije, Gustav Radbruh, Filozofija prava, Beograd, 1980, naročito str. 288.

nog sistema i pojma pravne države. Time se otvaraju nepregledni prostori postojanja i funkcionisanja pravnog sistema uopšte. I više od toga. S obzirom da se pravo, po svom izvoru, funkciji i cilju, nalazi u organskom koneksitetu sa drugim ćelijama društvenog bića ono se ne može posmatrati kao izolovan pravno tehnički pogled i fakt, već kao jedan deo integriteta društvenih institucija. Stoga, odgovor na postavljeno pitanje, mora obuhvatiti i pogled na metapravne društvene pojave i institute u meri koja bi bila dovoljna za definisanje pojma pravne države, takođe, nas plasira na široki društveni horizont, na kome se, pored pravne, nalaze i antipravne države, što je još jedna teškoća na putu odgovora na postavljeno pitanje.

Imajući, dakle, u vidu svu uslovljenost i komplementarnost pravnog i društvenog fakta uopšte, čini se, da odgovor na pitanje, da li je moguće da pravna država doživi krizu pravnog sistema, leži upravo u nekom lavirintu samog pojma krize pravnog sistema i pojma pravne države. Otuda, ovaj tekst će pokušati da odgovori na ovo pitanje, na taj način, što će nastojati da pruži karakteristična obeležja tih pojmova, posle čega, čini se, da neće biti teško pronaći odgovor na postavljeno pitanje.

Pobuna fakta protiv prava. – Pravo se, već po svojoj funkciji, uvek nalazi na putu stalnog nastavljanja procesa formiranja i primene društvenih pravila ponašanja.

Na tom putu, pravo, odnosno kao njegov reprezent, može biti u skladu sa društvenim potrebama i zahtevima, može, dakle, adekvatno izražavati legitimnu svest i htenje u vidu rezultante bitnih potreba i interesa društvene konstitucije. Kažemo da pravo tada izražava simbiozu socijalne i sistemske integracije jednog društva, da je pravo tada u skladu sa svojim materijalnim izvorom.

Međutim, na tom istom putu može se javiti manji ili veći stepen neusklađenosti društvenog fakta i pravne norme, mogućnost da pravna norma ne odražava realne društvene odnose, već da ih ili prejudicira u vidu norme želje (program, deklaracija, vizija) ili da pravna norma zaostaje za životom, kada se pretvara u mehanizam kočenja.

U oba slučaja, pravo ne izražava realne društvene odnose, stvara se suštinska i formalna neusklađenost između pravne norme i imperativa društvenog fakta, dolazi do raskoraka između socijalne i sistemske integracije pravnih institucija, dolazi do pojave "pobune fakta protiv prava"[91].

Kada, dakle, dođe do ove "pobune" postavlja se pitanje dijagnoze takvog stanja, i razume se, pitanje izlaska iz takvog stanja. Drugim rečima, postavlja se pitanje krize prava, njegovih pojedinih delova ili pitanje krize pravnog sistema u celini.

Istorija pravne civilizacije nam pokazuje da je pravna nauka uvek imala u fokusu svoje pažnje nastanak, izvore, dejstvo, organizaciju prava i pravni poredak. Kao da je zaboravila da svaki život, pa i život pravnog sistema, ima i neki svoj kraj i neke svoje faze koje mogu voditi i tome kraju.

Drugim rečima, opšta teorija prava, pa i filozofija prava, nije se mnogo bavila pitanjem krize pravnog sistema. U opštim pravničkim delima poput udžbenika i sistematskih dela, ne nailazimo na poglavlje koje bi bilo posvećeno krizi pravnog sistema. Kada bi ocenjivali znanja o ovoj pravnoj pojavi, teško da bi prelaznu ocenu dobili i oni koji su po svojoj vokaciji dužni da obrazuju pravne početnike.

Jednostavno, o toj pravnoj pojavi ne postoji koherentna teorijska celina sa svim potrebnim svojstvima jedne teorije.

I zato, postavlja se pitanje: da li je uopšte potrebno uvoditi krizu kao pravnu kategoriju i da li se može odvojiti kriza pravnog sistema od koneksiteta države, politike, ekonomije i drugih prostora društvene nadgradnje. Jednom rečju, da li je potrebno izgrađivati teoriju kri-

---

[91] G. Morin, La révoste des faits contre le code, Paris, 1920.

ze pravnog sistema koja bi, najpre, dala kriterijume za prepoznavanje te pojave u cilju ustanovljenja jedne "dijagnoze", a zatim, ukazala na moguće izlaske iz takvog stanja, u smislu preporuke odgovarajuće "terapije".

U sveopštem ambijentu društvene krize, i pravo ima svoju krizu. I pravnici i nepravnici govore o krizi prava. Pitanje je: hoćemo li i dalje govoriti o krizi prava kao nekoj vrsti komparacije i metafore, ili ćemo znati o čemu govorimo. O kakvoj toj pravnoj pojavi govorimo, sa kakvim obeležjima, dejstvima, sa kakvim vremenom trajanja te pojave, pravcima izlaska iz krize.

Hoće li, pre svega, pravnici ubuduće znati da li imaju pred sobom izgrađenu i označenu pravnu pojavu kada izgovore tu magičnu reč "kriza" ili će se i oni utopiti u vode neodgovorne upotrebe reči koje se šire kao neka vrsta epidemije.

Izvorno, pojam krize dolazi iz medicinske terminologije, gde označava odlučnu fazu u procesu neke bolesti u kojoj se odlučuje o životu ili smrti. To je, dakle, obrt i prekretnica u smislu jednog stanja u kome se javlja odlučujući trenutak transformacije i to u pravcu izlečenja ili u pravcu prirodnog kraja života neke jedinke.

U klasičnoj estetici od Aristotela do Hegela, kriza znači prekretnicu nekog sudbonosnog procesa, koji, uz svu objektivnost, ne prodire jednostavno izvan, niti ostaje van identiteta u njemu sukobljenih lica. Preko filozofije osamnaestog veka, ova figura misli prodire u evolucionističke teorije društava devetnaestog veka.[92]

Pojam ekonomske krize, kao problem ekonomske teorije, nalazi se već kod Adama Smita, Rikarda, Mila, Sismondija i drugih. U Marksovoj ekonomskoj teoriji, pojam krize se uvodi u svet ekonomske nauke, tako da ona predstavlja koherentnu teorijsku celinu sa svim potrebnim teorijskim svojstvima.[93]

U modernoj sociologiji, poznat je teorijski pojam krize, posebno u radovima J. Habermasa, profesora političke sociologije i filozofije na univerzitetu "Johan Volfgang Gete" u Frankfurtu na Majni.[94]

Po njemu, krize nastaju kada struktura novog društvenog sistema dopušta manje mogućnosti rešavanja problema nego što bi se moralo upotrebiti za održavanje ustrojstva sistema. U tom smislu, krize su stalne smetnje integraciji društva.

Nadalje, prema ovom autoru, društvene krize sistema ne rađaju se zahvaljujući slučajnim promenama okoline, nego po strukturalno zasnovanim imperativima sistema, koji su nespojivi i ne mogu se hijerarhijski postaviti. Prema tome, nisu sve strukturalne promene nekog društvenog sistema istovremeno i krize, pa ovaj autor u tome vidi i tzv. područja tolerancije, u kojima se smeju kretati poželjne vrednosti nekog društvenog sistema, a da on ne bude ugrožen, s obzirom na svoje ustrojstvo, niti da izgubi svoj identitet. Tek kada članovi društva iskuse strukturalne promene kao kritične po ustrojstvo i svoj socijalni identitet osete ugroženim, može se govoriti o krizama.

Sledstveno ovome, prema Habermasu, krizna stanja imaju oblik dezintegracije društvenih institucija. Kriza društva ne nastupa samo onda kada to kažu njegovi članovi, niti je društvo u krizi uvek kada to oni kažu. Kriza se, dakle, ne može utvrditi jedino pomoću fenomena svesti, već se moraju potražiti objektivni kriterijumi.

Razvijajući ovu misao, Habermas dolazi do zaključka da pojam društvene krize mora zahvatiti i ugroziti vezu koja postoji između sistemske i socijalne integracije. Pod socijalnom

---

[92] J. Habermas, Problemi legitimacije u kasnom kapitalizmu, Zagreb, 1982, s. 10.

[93] Z. Baletić, Marksistička teorija ekonomskih kriza, Zagreb, 1965.

[94] J. Habermas, Problemi legitimacije u kasnom kapitalizmu, Zagreb, 1982.

integracijom ovaj autor podrazumeva sistem institucija u kojima su podruštvljeni subjekti koji govore i delaju, tako da se sistem ovde pojavljuje u aspektu sveta života koji je struktuiran simbolički.

S druge strane, ovaj autor pod sistemskom integracijom podrazumeva specifične aktivnosti usmeravanja jednog samoregulativnog sistema, tako da se društveni sistemi ovde pojavljuju u aspektu sposobnosti održavanja svojih granica i svoga ustrojstva savladavanjem kompleksnosti nestalne okoline. Obe paradigme, i svet života i sistem imaju pravo, ali problem predstavlja njihovo povezivanje. Krize nastaju kada se izgubi ili bitno poremeti veza između sistemske i socijalne integracije društvenih institucija.[95]

Koneksitet. – Kao što se vidi, kriza prava se ne može posmatrati izolovano od krize sistema koji obuhvata integritet socijalnih, ekonomskih i pravnih institucija. Ona je u nekoj vrsti athezije sa stanjem ekonomske organizacije odgovarajuće društvene zajednice i njenog funkcionisanja, moralne emancipacije, filozofskog i političkog koncepta i uređenja, stepenom kulturnog razvoja uopšte.

Kada u jednoj društvenoj zajednici postoji ekonomska (privredna) kriza, koja je ustanovljena pomoću naučno zasnovanih ekonomskih parametara, tada se i kriza prava javlja kao segment takve društvene osnove, što posebno važi za one grane prava koje su u organskoj vezi sa robno-novčanim odnosima koje pravno regulišu.

Pri tome, čini se, da tu ne treba videti nikakav "automatizam" koji sam za sebe funkcioniše proglašavajući krizu prava čim nastupi privredna kriza, ali u toj "sudbinski" povezanoj celini, nalazi se i ratio krize u pravu, njegov domašaj i karakter, koji moraju doći u fokus sistematsko-teorijskog pogleda i koji bi bio u stanju da ustanovi uzroke i pojavne oblike krize prava.

Prema tome, ako je reč o krizi sistema u celini, posebno krizi ekonomske osnove, onda je teško pretpostaviti normalno stanje na prostorima prava, kao osobenog društvenog fenomena koji izražava i odražava stanje društvene osnove u celini.

Pri tome, moguća su značajna odstupanja i značajne razlike između krize pojedinih sektora društvenog života. Moguće je da kriza ekonomije ili kriza nekih drugih prostora društvene osnove, istovremeno ne dovede i do krize prava, tačnije, ne u istom trenutku.

Pravo se tada može prilagođavati kriznim situacijama u drugim oblastima društvenog života tako da ono još ne zapadne u "svoju" krizu, već da se menja, savija poput "kaučuk norme" i da sve modifikacije vrši na tzv. područjima tolerancije, koji još ne ugrožavaju pravni sistem i koji zbog toga ne zapada u "svoju" krizu.

U toj pretpostavci, pravo tada vrši tzv. povratno dejstvo na svoju osnovu i ukoliko se kriza društvene osnove transformiše u pravcu ozdravljenja, veliki su izgledi da pravo iz područja tolerancije pređe u područje "normalnog toka" izbegavajući svoju krizu. Tako, npr. velika privredna kriza s početka tridesetih godina 20. veka nije automatski, simetrično i istovremeno prouzrokovala i krizu pravnog sistema.

I obrnuto, moguće je, mada više teorijski nego praktično, da pravo zapadne u "svoju" krizu, bez krize društvene osnove. Čini se da su tada izgledi ozdravljenja prava (izlaska iz krize) objektivno lakši.

Pod zajedničkim imeniteljem društvene krize, svaka oblast društvenog života može, dakle, imati svoju krizu i svoju "autonomiju". Ta njihova relativna samostalnost u okviru krize sistema kao kumulativnog pojma, obavezuje teoriju svakog sektora društvenog života da ustanovi kriterijume za prepoznavanje krize, da odredi njene suštinske i formalne elemente, sa ciljem izlaska iz krize (npr. kriza morala, politike, filozofije).

---

[95] Habermas, ibidem.

Definicija krize pravnog sistema. – Za razliku od "krize" u smislu figure misli i načina komparacije, ovde će se učiniti pokušaji da se kriza pravnog sistema definiše i to isključivo sa stanovišta sintetičko-teorijskog pogleda jedne moguće koherentne teorije.

To, pre svega, znači da je potrebno odrediti bitne elemente toga pojma, atribute krize prava, kako suštinska tako i formalna obeležja, alternaciju ili kumulaciju svojstava, i naročito, odrediti intenzitet i stepen "pobune" fakta protiv prava da bi smo mogli govoriti o krizi pravnog sistema.

Potrebno je, dakle, prepoznati tu "odlučnu tačku" u procesu transformacije ozdravljenja ili kraha, tu graničnu liniju između područja tolerancije i prostora krize. Drugim rečima, definicija krize pravnog sistema treba, između ostalog, da pokaže do koje mere i koji stepen ugroženosti jedan pravni sistem može da "izdrži", a da nije nastupila faza njegove krize.

Ako se pođe od opštih sociooloških znanja o društvenom pojmu krize, a naročito krize u smislu ugroženosti spone između sistemske i socijalne integracije društvenih institucija, može se reći da kriza u pravu ima svoje osobne atribute, ali, koji su, u krajnjoj liniji upravo izraz raskoraka između pomenute dve paradigme kao društvene integracione celine.

Polazeći, dakle, od ove konstatacije, a imajući u vidu ulogu i prirodu prava kao svojevrsnog fenomena organizovanog društva date civilizacije, mogli bi reći, *da kriza pravnog sistema postoji u slučaju kada njegova dalja egzistencija zapadne u stanje odlučujućeg trenutka transformacije, i to usled takvih nedostataka u kakvoći i količini prava, koji su doveli do neprimene ili neobjektivne promene prava, ugrožavajući ustavnost i zakonitost do te mere, da je, po opštem mišljenju, pravna nesigurnost postala društveni fakt.*

Iz ove definicije proizilaze sledeći bitni elementi krize pravnog sistema: nedostaci u kakvoći prava; nedostaci u količini prava; neprimena ili neobjektivna primena prava; ugroženost načela ustavnosti i zakonitosti; pravna nesigurnost kao notorni društveni fakt.[96]

Ipak, ovde će se samo ukazati na zbirni atribut krize pravnog sistema koji se ogleda u nedozvoljenom stepenu pravne nesigurnosti.

U pokušaju definisanja pojma krize pravnog sistema pravna nesigurnost figurira kao skupni atribut, kao neka vrsta zajedničkog imenitelja za ostale atribute: kvalitet i kvantitet prava, neprimena i neobjektivna primena prava i ugroženost načela ustavnosti i zakonitosti.

To je stoga, što se čini, da se kroz sigurnost odnosno nesigurnost prava i neizvesnost subjekata prava, kako i prema kojoj dispoziciji treba da se ponašaju, i kako će se, i koja sankcija primeniti pod istim ili sličnim hipotezama norme, i da li će se pravo jednako ili nejednako primeniti na jednake slučajeve – ostvaruje zbirni efekat prava i njegova uloga i adekvat prema društvenom uzroku prava.

U stvari, svi nedostaci jednog normativnog sistema sintetizuju se u sintezi efekta prava, u procesu njegove primene. Kada, dakle, u procesu primene prava (razume se, i u procesu stvaranja prava) dođe do velike doze neizvesnosti, onda to unosi disharmoniju u integritet socijalnih i pravnih ustanova, nastaje socijalna, ekonomska i pravna nesigurnost subjekata prava, gubi se vera u autoritet prava, i samim tim, pravo postaje nemoćno da verno odražava karakter i prirodu društvenog uzroka prava.

Otuda, prema novoj definiciji, iako svesni nedostataka iste, čini se, da se pravna nesigurnost javlja kao kumulativni atribut pojma krize pravnog sistema, ali razume se, pod veoma kategoričnim zahtevom, da se određeni stepen pravne nesigurnosti mora ustanoviti na društveno siguran način, i u tom smislu je predložen kriterijum opšteg mišljenja.

---

[96] Zbog nedostatka prostora Autor ovde neće dalje izlagati sve atribute krize pravnog sistema, već u tom smislu upućuje na svoj tekst *Vremenske dimenzije pozitivnog i prirodnog prava,* Beograd, 2009, str. 227-255, a posebno na tekst koji se odnosi na nominalizam i valorizam kao i pitanje uticaja promenjenih okolnosti na egzistenciju obligacionog ugovora.

Opšte mišljenje. – Svaki pravni sistem obiluje određenom dozom nesigurnosti, neadekvatnim normama, pa i nejednakom primenom prava, jer nema idealnog pravnog sistema. Međutim, to su, kako je ranije već rečeno, područja tolerancije, koja sama po sebi, ne predstavljaju atribut krize.

Međutim, kada se pravna nesigurnost javlja kao posledica nedostataka u kvalitetu i kvantitetu prava, usled koje je došlo do neprimene ili neobjektivne primene prava, i to tako, da je ustavnost i zakonitost ugrožena do te mere, da je pravna nesigurnost, po opštem mišljenju, postala društveni fakt – onda se priroda i intenzitet takve nesigurnosti javlja kao kvalifikativ određenog stanja stvari.

Taj kvalifikativ može biti utvrđen jedino pomoću objektivnih naučnih metoda, dakle, postupkom naučnog saznavanja relevantnih činjenica. Moderna sociologija, svojom egzaktnošću, pruža brojne, relativno sigurne, načine utvrđivanja realnog stanja stvari i svesti ljudi o određenim društvenim pojavama. Pomenimo samo klasične: prikupljanje činjenica, posmatranje, ispitivanje (dubinsko), merenje (sociometrija), statistički podaci, eksperimenti, upoređivanje podataka, odnosno posmatranih pojava, itd.

Razume se, u sklopu pomenutih sociooloških metoda naučnog saznavanja relevantnih činjenica i društvenih pojava, važnu ulogu imaju i konstatacije i ocene stanja izrečene u najširoj i stručnoj javnosti.

Pri tome, može se reći, da opštepoznate činjenice nije potrebno dokazivati. Međutim, da li je jedna pojava opštepoznata, da li je ona izraz opšteg mišljenja, pitanje je, koje u nauci kao "organizovanoj sumnji" može izazvati različita reagovanja. Otuda, kada je reč o saznanju da li je pravna nesigurnost u jednom sistemu notorna ili nije, potrebno je da o tome naučni metod pruži notoran odgovor.

Moguće konstatacije

Ako se pođe od date definicije krize pravnog sistema, onda je moguće konstatovati da je određeni pravni sistem zapao u stanje svoje krize, ako se pravna nesigurnost, kao notorni društveni fakt, javlja kao rezultat ugroženosti ustavnosti i zakonitosti u smislu neprimene ili neobjektivne primene prava koje ima relevantne nedostatke u svom kvalitetu i kvantitetu.

Iz ovoga proizilazi kumulativnost, a ne alternativnost elemenata pojma krize pravnog sistema, pošto se intenzitet pravne nesigurnosti upravo meri po tome, da li se ona javlja kao zbirni ili samostalni atribut, i da li je pravna nesigurnost u postupku naučnog saznanja dobila kvalifikaciju notornog društvenog fakta.

Ako se pravna nesigurnost, primenom pomenutih kriterijuma, javi kao nesigurnost manjeg intenziteta (nije notorni društveni fakt, odnosno nije zajednički imenitelj svih drugih atributa krize pravnog sistema), što se ustanovljava odgovarajućim postupkom naučnog saznanja, onda takav pravni sistem egzistira na tzv. područjima tolerancije koje mogu eventualno označavati njegovo predkrizno stanje, ali takav pravni sistem nije u krizi.

Naprotiv, ako se primenom pomenutih kriterijuma, ispitivanje svih relevantnih elemenata pojma krize pokazalo da su svi ti elementi povezani u jednu celinu, koja u svom totalitetu daje zajednički imenitelj pravne nesigurnosti naučno konstatovane kao notorne društvene činjenice, onda je takav pravni sistem zapao u fazu krize.

S obzirom da kriza predstavlja odlučujuću tačku transformacije jednog pravnog sistema, i to u pravcu ozdravljenja ili komatoznog stanja, postavlja se pitanje, koji su načini izlaska iz krize.

Jedna od mogućih logičnih konstatacija je i ta, da se iz krize prava izlazi eliminisanjem atributa krize i njihovih društvenih uzroka, stvaranjem bitnih društvenih pretpostavki za kva-

litetnije pravo, koje će se objektivno primenjivati i koje neće dovesti do ugroženosti ustavnosti i zakonitosti i pravne nesigurnosti.

Na prvi pogled, ova konstatacija može ličiti na "začarani krug", ali, ako jedno odgovorno društvo, sistematski i naučno otvori procese koji će dovesti do sklada između pravne norme i društvenog fakta u opredeljenom društvenom sistemu, i ako efikasno, objektivno i dosledno sprovodi svoje pravo, poštujući svoju ustavnost i svoju zakonitost, onda izlazak iz krize prava nije nedostižna, već sasvim realna društvena pojava. Ali, na tom putu stoji još jedna konstatacija – sve zavisi od izvršenja.

Drugim rečima, ako bi jedan pravni sistem odstranio elemente krize pravnog sistema, o čemu je do sada bilo reči, onda bi taj sistem mogao poneti epitet pravne države.

Bitna svojstva pravne države

Terminološka značenja. – Da bi znali o čemu govorimo, potrebno je, pre svega, upoznati se sa različitim značenjima izraza "pravna država". Ovo tim pre, što se u našoj pravničkoj i još više u nepravničkoj javnosti, ovaj izraz često upotrebljava i zloupotrebljava uvek kada se hoće da politički "opravda" neka preduzeta mera pravne ili antipravne države.

Tako, i ova reč, sve više dobija snagu magijske reči, pomoću koje se sve i svašta pokušava obrazložiti i objasniti. Ali, ovde, ta "muka sa rečima", pored učenog neznanja, krije u sebi i jedan animus izvežbanog znanja: pred neupućenim, sve se može pokriti izgovaranjem reči "pravna država", ili "funkcionisanje pravne države".

Razume se, to nije i ne može biti opšta pojava. U mnogim slučajevima, izraz pravna država se upotrebljava u sasvim određenom stručnom i naučnom smislu. Ali, taj pravi eho je nejak da spreči buku i zbrku, koja se upotrebom i zloupotrebom tog izraza širi poput epidemije. Utehe radi, ti metanaučni tonovi dele sudbinu mesečevog sjaja, pa neće ostaviti traga u svetu nauke.

Poreklo i poređenja. – Kao pojava i kao izraz, pravna država se najpre javlja u nemačkoj političko-pravnoj teoriji s kraja prošlog i početka našeg veka (Rechtsstaat), i to naročito u radovima Labanda i Jelineka. Prema ovim izvorima, u pravnoj državi, obezbeđeno je poštovanje načela zakonitosti i pravna jednakost građana pred zakonom, jer su uprava i sudstvo stavljeni pod "vlast" zakonodavstva. U njoj je obezbeđen kontinuitet ustavne konstitucije na osnovu legitimne vlasti izabranih organa.

U periodu apsolutističke feudalne monarhije, sudski, a naročito upravni organi, nisu bili pod vlašću zakonodavstva, već su vršili svoju funkciju po "slobodnom" nahođenju držeći se svoje procene i interpretacije državnih interesa. To je bio teren na kome je carovala pravna nesigurnost građana. Shodno postavkama demokratskih buržoaskih revolucija, predaja zakonodavne vlasti parlamentu koji je izabran opštim pravom glasa, značila je, između ostalog, i stvaranje pravne države kao "juristička forme demokratije".

U stvari, pojava "pravne države" nastaje u procesu ograničavanja i "zaustavljanja" apsolutističke vlasti monarha, kao nosioca celokupne upravne vlasti, a taj proces je započet periodom demokratskih buržoaskih revolucija, prevladavanjem apsolutizma i ulaskom u period suverenosti parlamenta. S obzirom da je ovaj proces u Nemačkoj kasnio, gde je monarhistička vlast nadživela buržoaske revolucije u drugim evropskim zemljama (Engleska, Francuska), upravo u nemačkoj pravno-političkoj literaturi, dolazi do pojave pojma i izraza "pravna država" na isteku 19. i početka 20. veka, mada se ideja o pravnoj državi u ovoj literaturi začela i ranije.

U vreme, kada se u nemačkoj pravno-političkoj literaturi zasnovao i izgrađivao koncept pravne države, u Engleskoj je već bila konstituisana i teorijski izgrađena doktrina o "vladavini prava" (rule or supremacy of law). Ta teorija koju je formulisao Dajsi[97], modifikovana pa čak i negirana od izvesnih autora, ostala je do danas kao "kamen temeljac" teorije vladavine prava u engleskom konstitucionalizmu.[98]

Smeštena u kontekst individualizma common law sistema, Dajsova teorija o vladavini prava, pored načela suverenosti parlamenta, ostaće u engleskom konstitucionalizmu, jedna od glavnih tačaka, sve do današnjeg dana. Otuda, sam Dajs će reći suverenost parlamenta predstavlja formu, a vladavina prava sadržinu modernog britanskog Ustava.[99]

Prema ovoj teoriji, vladavina prava je suprotstavljena svakom sistemu vlasti koji nosiocima javnih funkcija omogućava vršenje širokih, arbitrarnih ili diskrecionih ovlašćenja prinude. Ovim se teorijama vladavine prava, u stvari, postavlja kao bedem svakoj samovolji organa vlasti, kao i političkom voluntarizmu. Nadalje, vladavina prava naročito insistira na načelu pravne jednakosti svih subjekata pred zakonom, bez obzira na njihov eventualno različit politički, imovinski ili bilo koji drugi status. Najzad, vladavina prava znači i pravnu sigurnost, koja u precedentnom pravu ima drukčiji smisao u odnosu na kontinentalno pravo.

Liberalistička suština teorije vladavine prava, koju je postavio Dajs, bila je predmet teorijske kritike tridesetih godina 20. veka, da bi došlo čak i do "antidoktrine o vladavini prava" (Laski). Primedbe se odnose na nejasnost i neodređenost teorije o vladavini prava, koja može imati više značenja (Dženings). Ipak, teorija o vladavini prava je preživela svoje kritičare, pa se čak proširila i na savremenu angloameričku literaturu (Hajek) i pored "nespojivosti" teorije o državi blagostanja (welfare state) sa teorijom o vladavini prava.

Ipak, angloamerička teorija o vladi potčinjenoj pravu (government under law), i pored svoje "originalnosti" u suštini je supstituisana i nastavljena teorija o vladavini prava, i pored različitih izraza, pa i izvesnih elemenata koji čine atribute ove teorije.

Ako bi poredili nemačku teoriju o pravnoj državi i anglo-američku teoriju o vladavini prava, sigurno je da bi našli i neke zajedničke imenitelje, jer obe predstavljaju juristička formu liberalne države[100] i, kao takve, u prvi plan ističu pravnu sigurnost i pravnu jednakost kao nužne atribute pravnog poretka. Što se tiče razlika, poslužimo se jednom formulom: dok pravna država, pod izrazitim uticajem pravnog pozitivizma, završava u krajnje formalizovanoj opštosti zakona, načelo vladavine prava počiva na zahtevu da pravda u skladu s pravom deluje bilo kao činilac odluke ili kao činilac kontrole.[101]

U francuskoj političko-pravnoj literaturi, umesto izraza pravne države ili vladavine prava, sreće se izraz "ustavna država". Međutim, bez obzira na različitost izraza, suštinski se stvar uvek postavlja u istom svetlu i sa istim pitanjima o kojima je do sada u ovom tekstu bilo reči.

Tako, kada je reč o izrazu "pravna država", njegovo značenje se može videti i u normativističkoj "čistoj teoriji" prava (Kelzen), gde se pravna država posmatra u spoljnjem svetu, kao fakt, ona kao takva. U njoj se prepoznaje jedno dvojstvo: ona stvara pravo, ali je i sama stvorena od prava, pa je, prema tome, država po svom biću "pravna država", bez obzira koja država je u pitanju.

---

[97] Dicey, The Law of the Constitution, 3 er ed., London, 1899, s. 393.

[98] Opširnije, v. odličnu studiju L. Basta, Politika u granicama prava, Bgd. 1984, s. 92.

[99] L. Basta, ibidem.

[100] Neuman, Demokratska i autoritarna država, Zagreb, 1974, s. 25.

[101] L. Basta, op. cit., s. 116.

Prema tome, kada je reč o pravnoj državi potrebno je prethodno odrediti značenje tog pojma, da bi znali o čemu govorimo. Pre nego što pređemo na pokušaj određivanja tog pojma, pomenimo i neka stanovišta naše predratne teorije o pravnoj državi. Za M. Markovića (Pravna država, Bgd., 1939, s. 10), pravnu državu imamo onda kada je celokupna vlast u državi organizovana po načelima prava i kad postoje dovoljna jemstva da će se vlast i vršiti saobrazno tim načelima. U pravnoj državi sila se stavlja u službu prava, a pravne države u stvari nema bez slobode reči, kao što ni slobode reči nema bez pravne države.

Prema ovoj tezi, u demokratskom društvenom uređenju koje polazi od pretpostavke da su sve pojedinačne volje među sobom jednake vrednosti, pravno pravilo se smatra kao najviša društvena kategorija kojoj su potčinjene, ne samo sve pojedinačne volje, nego kojoj se potčinjava i volja same države. Kad je celokupna državna vlast, a naročito vlast upravnih organa, stavljena pod pravni poredak, onda govorimo o pravnoj državi.

Inače, kao odlike pravne države, prema ovom mišljenju, treba pomenuti: jednakost svih pred zakonom, kako za one kojima se upravlja, tako i za one koji upravljaju; odnos pojedinca prema državi, u policijskoj državi pojedinac je podanik, a u pravnoj državi on je građanin; sloboda građana, sve što nije zakonom zabranjeno, dopušteno je; načelo podele vlasti kao prvi i neophodni element pravne države; sudska kontrola nad aktima upravne vlasti; načelo zakonitosti kao ugaoni kamen moderne pravne države; pravna država se ne da zamisliti bez kontrole javnog mnjenja.

Pokušaj određivanja pojma

Kao što se vidi, pojmu pravne države moguće je prići sa različitih tački gledanja. Pri tome, odmah treba naglasiti da različiti termini "pravna država", "vladavina prava", "ustavna država"), i pored razlika koji se kriju negde u bezbrojnosti ćelija ovog ili onog društvenog organizma, proizilaze iz iste suštine i istog pitanja: koja svojstva treba da ima jedna pravno organizovana zajednica u vidu državne tvorevine da bi se članovi te zajednice ponašali po onim pravilima koja odgovaraju njihovoj zajedničkoj volji i to na način da se ta pravila jednako primenjuju na jednake slučajeve.

Polazeći od ove konstatacije, a imajući u vidu društveni uzrok prava, čini se, da bi pojam pravne države trebalo, pre svega, da izrazi intimnu saglasnost većine pripadnika za određeni kvalitet i kvantitet pravnih normi po kojima će se oni pro futuro ponašati u uslovima njihove organizovane zajednice. Potrebno je, dakle, da u pravnoj državi pravo bude "svoje", da predstavlja izraz kolektivnog htenja, a da nije nametnuto agresijom manjine. S druge strane, kada se postigne taj sklad između formalnog izražavanja prava i fakta njegovog porekla, onda se javlja druga neophodna potreba, da se takvo pravo primenjuje na sve pripadnike bez ikakve diskriminacije.

Pošto, zbog prirode stvari, oba zahteva nije moguće ostvariti u bukvalnom i do kraja konsekventnom smislu, potrebno je označiti područja društvene tolerancije na kojima su moguća odstupanja, a da to ne ugrozi identitet i integritet ovih zahteva.

Proces stvaranja, a još više postupak primene prava, zahteva neophodnu dozu pravne sigurnosti, koja se zasniva na sigurnosti sistemske i socijalne integracije društvenih institucija. Pravna država, treba, dakle, da obezbedi i ovu društvenu potrebu.

Uzimajući u obzir označena svojstva pravne države, čini se, da bi njen pojam mogao biti izražen rečima, da je *pravna država takva država, koja je, u svom pravnom sistemu, u tolikom stepenu obezbedila vladavinu načela legitimiteta i legaliteta, da se ona kreću u granicama društvene tolerancije*.

Legitimitet

U pravnoj državi državna vlast i samovolja zaustavljena je ustavom i zakonom i to tako da se time neprikosnoveno štite osnovna prava i sloboda ljudi. Onog trenutka kada su ustavnost i zakonitost zamenjeni načelom celishodnosti, kada se bilo čiji interesi stave iznad ustava i zakona, tada država sve manje postaje pravna, a sve više krizna. Kada se takvom stanju doda i nelegitimnost organa vlasti, dakle, otuđenost državne vlasti od građana, onda je država i njen pravni poredak s one strane legitimnog prava i demokratskog uređenja.

Poredak jedne pravne države mora proizilaziti iz demokratije, iz sistema ljudskih sloboda i prava. Onda kada politika postane samovoljna i otuđena, kada se snagom svoje moći i diktata nametne pravu i pravnom poretku, tada pravni poredak gubi i legalnost. Ulazi se tada na prostore političke celishodnosti, gde dominira ili revolucionarna svest ili politička odanost, i tu otpočinje agonija prava, a nastaje antipravna država.

Sudbina prava se ne odlučuje na plenumima, zatvorenim kabinetima ili važnim političkim sastancima, često izolovanim i od javnosti, već u narodno-pravnom životu, u društvenom biću kao materijalnom izvoru prava. Legitimitet prava se stiče odlukom većine, a ne odlukom manjine.

Da bi se to postiglo nužno je obezbediti slobodno izjašnjavanje, a nema slobodnog izjašnjavanja u uslovima totalitarnog monizma. Tamo gde postoji takav monizam, legitimitet je fiktivan, već i zbog toga, što takav "legitimitet" ne odgovara čoveku kao misaonom i individualnom biću. Ako bi drugačije bilo, ljudi se ne bi mnogo razlikovali od neljudskih bića. Čovek je trska, ali trska koja misli (Paskal), i upravo kao misaono biće ima svoj integritet, a to znači i svoju osobenost i razliku u odnosu na druge ljude. Ako svi ljudi jedne milionske zajednice isto misle, onda oni nisu misaona bića. Otuda, legitimitet prava se ne ostvaruje prinudom, nasiljem ili "strojevim korakom" pripadnika jedne pravno organizovane zajednice, ili neistinitim prikazivanjem stvarnog stanja. On se jedino stiče putem slobodnog i demokratskog postupka izjašnjavanja.

Kada se, dakle, napusti legitimitet i legalnost i pređe na stranu otuđene političke vlasti, tada se javljaju vlasnici javnih funkcija, indoktrinirane sudije i drugi izvršioci tuđeg naloga koji nesmetano i nekažnjeno gaze pravo uvek kada im ono zasmeta. Načelo pravne sigurnosti tada ustupa mesto samovolji, i tu je kraj prava.

S obzirom da se legitimitet i granice njegove društvene tolerancije utvrđuju stepenom ostvarenja uslova da pripadnici jedne zajednice mogu slobodnim izjašnjavanjem da biraju jedno od više datih rešenja, postavlja se pitanje da li je to moguće ostvariti u uslovima totalitarnog političko-pravnog monizma, koji po svom pojmu i prirodi, ne pruža nikakve prostore za ispoljavanje bilo kakvih pluralističkih društvenih vrednosti i interesa.

Praksa je pokazala da u takvim uslovima može postojati jedan jak, okrutan, pa čak i privremeno stabilan pravni poredak, ali takav pravni poredak nije egzaltacija pravne države, nema potrebnog stepena legitimiteta, tako da on, neminovno upada u stanje krize sa katastrofalnim istorijsko-pravnim ishodom.

Dokle može ići ta monistička isključivost, neka nam posluži kao primer definicije prava koju je dao kongres nemačkih pravnika 1933. godine – "pravo je sve ono što koristi nemačkom narodu, a nepravo sve ono što mu škodi" – pri tome, da li je nešto korisno ili škodi nemačkom narodu, ceni se sa stanovišta isključivosti nacional-fašističke ideologije, a vrhovni kriterijum je shvatanje vođe. Razume se, da je tu sahranjena svaka pomisao na pravnu državu i njen legitimitet.

Ugroženost načela legitimiteta je moguća i tamo gde nema diktature jednog čoveka ili jedne stranke, ali se javlja težnja da se, pod izgovorom "jake ruke", "pune bezbednosti",

"narodnog jedinstva" upravna vlast što više oslobodi pravne kontrole i kontrole javnog mnjenja.[102]

Otuda, kada je u pitanju legitimitet svake vlasti, čini se da je uvek aktuelan aksiom legitimiteta: "Najjači nije nikad dovoljno jak da uvek bude gospodar, ako ne pretvori svoju snagu u pravo, a poslušnost u dužnost".[103]

Kao što se vidi, ova formula legitimiteta ističe dve njene osobenosti: vladavinu prava, a ne sile, i potčinjenost svih, pa i gospodara, da se ponašaju u skladu sa pravom, i to u smislu dužnosti. U stvari, to su prostori pravne države.

Legalitet

Preko zahteva legaliteta ostvaruje se vladavina prava, ili drugim rečima, pravna država. Kada se "poslušnost" zakonu pretvori u dužnost svih, pa i samog "gospodara", kada su, dakle, svi pred zakonom jednaki, pa se zakon jednako primenjuje na jednake slučajeve, onda je to drugo svojstvo pojma pravne države. To svojstvo, u pojmu pravne države, ne egzistira na zasebnom polju, ono nije izolovano, već se uzima u kumulativnom smislu sa zahtevom legitimiteta.

Načelo legaliteta, tačnije, njegova povreda najbolje se uočava u faktu neprimene zakona ili neobjektivne primene, o čemu je u ovom radu već bilo reči kod izlaganja elemenata pojma krize pravnog sistema.

Pomenimo ovde još i to, da je pitanje objektivne primene zakona, kao opšte norme na konkretne slučajeve, uvek u istoriji pravne civilizacije, bilo u samom fokusu ideje prava i pravnog poretka uopšte. Starost ovoga pitanja ne utvrđuje se brojem godina, već brojem stoleća.

Za Aristotela, strast kvari i izopačuje i najbolje magistrate i najbolje ljude, a zakon i njegova primena je inteligencija bez strasti; ljudi ne crvene kad na druge primenjuju ono što ne smatraju ni pravednim ni korisnim za sebe. Pravna država, kroz zahtev legaliteta, treba, dakle, da obezbedi, da ne "pocrvene" oni koji pravo stvaraju, koji ga izučavaju, ili koji ga primenjuju.

Kada je već reč o dalekoj retrospektivi načela legaliteta, zaslužuje da, i ovom prilikom bude pomenuto mesto iz Dušanovog zakona, prema čijoj naredbi, zakon, donet na Saboru, jači je i od samog cara; ništava je carska naredba koja je protivna zakonu, takvu naredbu, koju je car izdao po srdžbi ili ljubavi prema pojedincu sudije ne treba da izvrše; svaki sudija ima da sudi samo po zakonu, a ne po strahu od "carstva mi".

Područje društvene tolerancije. – Ako se pod idealnom pravnom državom podrazumeva država koja je obezbedila vladavinu načela legitimiteta i legaliteta do stepena zamišljene konsekvence, da je svaki zakon izraz volje svih, i da je svaki zakon uvek u svakom slučaju primenjen na pravičan i "jednak" način, onda, takve države nema, niti će je ikada i biti. U tom smislu, dakle, nijedna država nije prava. Jer, ako bi zamislili da se ona može ostvariti u tom "idealnom" smislu, onda bi to, više bila neka apostolska, a ne ljudska tvorevina.

Otuda, u pokušaju da se odredi pojam pravne države, ovde je u samoj definiciji istaknuto tzv. područje društvene tolerancije na kome vlada načelo legitimiteta i legaliteta. Kada se, dakle, povrede granice tog područja, onda se silazi sa pozornice pravne države, i ulazi u "divlja" polja antiprava.

Razume se, da se neminovno postavlja pitanje kriterijuma za prepoznavanje takvog stanja, pitanje pouzdanijih oznaka, da je, u konkretnom slučaju, ugroženo to područje društvene tolerancije, i da je pravna država izgubila to svojstvo.

---

[102] V. M. Marković, op. cit., s, 54.

[103] Ruso, Društveni ugovor, Bgd., 1949, s. 11; opširnije v. Tadić, O pojmu legitimnosti državne vlasti, Jugoslovenski časopis, 1–2, 1979.

Što se tiče kriterijuma preko koga bi se mogao "izmeriti" stepen primene načela legitimiteta, i eventualna ugroženost područja društvene tolerancije, čini se, da bi tu jedino relevantni kriterijum mogao biti u utvrđenju činjenice da li je, u konkretnoj situaciji, bila obezbeđena slobodna volja i njeno slobodno ispoljavanje svih onih koji su pozvani da donesu određenu odluku.

Po sebi se razume, da to nije moguće obezbediti u uslovima diktata bilo kog monizma, političkog, ekonomskog, pravnog ili moralnog. Pluralizam svih tih društvenih uslova je preduslov za ostvarenje načela legitimiteta, ali nije i njegov meritum. Da bi se našlo na području tzv. društvene tolerancije, načelo legitimiteta, u uslovima pomenutog pluralizma, mora biti tako ispoljeno, da se preko njega, istinito, a ne fiktivno, izražava relevantna volja većine, što se može utvrditi egzaktnim putem.

S druge strane, kada je reč o kriterijumu za utvrđivanje činjenice da li se načelo legaliteta kreće u granicama društvene tolerancije ili su te granice ugrožene, čini se, da bi stepen pravne sigurnosti odnosno nesigurnosti, tu bio "ključ" u rukama egzaktnog ispita. Pri tome, ovde se misli na pravnu nesigurnost kao zbirni i kumulativni pojam u kome su ispoljeni svi uzroci koji su doveli do te pojave, kao notornog društvenog fakta.

Zaključno stanovište

U uvodnom delu ovog poglavlja postavljeno je i pitanje da li pravna država može doći u fazu krize svog pravnog sistema.

Pošto je ovde učinjen pokušaj da se odredi pojam krize pravnog sistema i pojam pravne države, očigledno je da će se u odgovoru na postavljeno pitanje upravo poći od tog pokušaja.

Ako je za krizu pravnog sistema rečeno, da ona postoji, u slučaju kada egzistencija pravnog sistema zapadne u stanje odlučujućeg trenutka transformacije, i to usled takvih nedostataka u kvalitetu i kvantitetu prava, koji su doveli do neprimene ili neobjektivne primene prava, ugrožavajući ustavnost i zakonitost do te mere, da je, po opštem mišljenju, pravna nesigurnost postala društveni fakt – i ako je za pravnu državu rečeno da ona postoji kada u svom pravnom sistemu obezbedi vladavinu načela legitimiteta i legaliteta, i to u tolikoj meri da se primena ovih načela kreće u područjima društvene tolerancije, onda se zaključuje da te dve društvene pojave ne mogu istovremeno postojati u licu jedne državno pravne tvorevine.

Kriza pravnog sistema je antipod pravnoj državi. Sve ono što čini elemente krize pravnog sistema upravo je u obrnutoj srazmeri prema svojstvima pravne države. Pri tome, jedva je potrebno reći da obe društvene pojave nisu "okamenjene u večnosti" i da su transformacije iz jednog svojstva u drugo, ne samo moguće, već su u savremenom svetu one i realne i aktuelne.

Kada se, dakle, iz krize pravnog sistema, pokušajem eliminisanja njenih atributa, izađe na područja ozdravljenja, onda nije teško pronaći put koji vodi pravnoj državi.

Pravedno pravo kao atribut pravne države

Zadržimo se još na teorijskom konceptu pravednog prava, posebno sa aspekta količine pravde odnosno nepravde koju može sadržavati i ispoljavati konkretno pozitivno pravo. Još konkretnije – pokornost nepravednom zakonu ili odziv pravdi i savesti.

Dilema je prastara, ali uvek živa: "Sokrat i njegove sudije razilazili su se u jednom bitnom pitanju – pitanju odnosa države i pojedinca. Sudije su zastupale državno pravo zapovedanja, a Sokrat ličnu slobodu mišljenja. Po nahođenju sudija, Sokrat je sa slobodom mišljenja preteri-

vao. Ako bi svaki o svemu hteo da misli svojom glavom, šta bi ostalo od državnog prava zapovedanja? Svaki bi držao da je pametniji od države, i ona ne bi imala više kome da zapoveda. Sokrat, naprotiv, stajao je na gledištu, da bez slobode mišljenja nema moralnog razvitka za čoveka. Moralni razvitak jeste stvar naše savesti, koja ne priznaje nikakvu vlast nad sobom.

U slučaju Sokratovom postavilo se, ne može biti jasnije, pitanje odnosa između državnog autoriteta i lične slobode. To pitanje obuzelo je sveg Platona koji je uviđao njegove velike teškoće i učinio je nekoliko pokušaja da ga reši. U svojoj Apologiji (Sokratova odbrana pred sudom) Platon stoji čvrsto pri tome, da u oblasti svojih uverenja čovek ne duguje nikom pokornost, pa ni državi. Država kad ugušuje slobodu mišljenja, čini najveći zločin protiv čovečanstva. Ugušiti slobodu mišljenja, jeste to isto što i ugušiti glas savesti u nama".[104]

Iako je Sokrat, "pred sudom istorije prošao mnogo bolje nego pred sudom atinske demokratije",[105] ipak savremena pravna civilizacija, rukovođena iskustvom i filozofijom prava i pravde, ne postavlja princip nadmoći individualne volje nad zakonom kao opštim aktom zajednice.[106]

Drugim rečima, pravna i socijalna sigurnost, kao jedan deo opšte pravde, nalaže da se zakoni imaju poštovati, pa čak i u slučaju podnošljive nepravde, ali ne i u slučaju nepodnošljive nepravde.

U tom smislu pažnju zaslužuju opusi dva autora. Jedan, Gustav Radbruh[107] koji je pred očima imao nepravedne zakone iz perioda Drugog svetskog rata (otuda i njegovo delo "Zakonsko nepravo i nadzakonsko pravo") i drugi, Džon Rouls (John Ranjls) koji je, nešto oko tri decenije kasnije, dakle, u drugačijim istorijskim prilikama i u prisustvu kodifikovanih ljudskih prava od strane UN, isti problem video očima svoje "Teorije pravde" (1971). Delo koje je širom sveta izazvalo značajne komentare koji se, zajedno sa pomenutim delom, teško mogu zaobići u savremenoj literaturi posvećenoj odnosu pravde i prava.[108]

Radbruh je već u "prvom minutu" svoje filozofije prava[109] digao glas protiv slepog pozitivizma prava, a u korist viših načela prirodnog ili umnog prava koja su jača od svakog pravnog propisa. On će reći: zapovest je zapovest, to važi za vojnika, a zakon je zakon, kaže pravnik.

---

[104] Slobodan Jovanović, Iz istorije političkih doktrina, tom 9, Beograd, 1990, str. 17.

[105] Slobodan Jovanović, navedeno delo, str. 15. Tu se još kaže: civilizovano čovečanstvo slavi ga kao prvog mučenika slobode misli. U njemu se vidi čovek koji je svoja moralna uverenja stavljao iznad svega drugoga, pa i iznad naredaba državne vlasti, i koji je više voleo biti osuđen na smrt, nego se ogrešiti o svoju savest. Ustajući protiv državne svemoći u ime moralne autonomije pojedinaca, on je postavio pitanje o odnosu između politike i morala, i otkako ga je on postavio, ono stoji još uvek otvoreno.

[106] Opširnije, Gounot, Le principe de l'autonomie de la volonté, Dijon, 1912; Waline, L'individualisme et le droit, Paris, 1945; Coumaros, Le rôle de la volonté dans l'acte juridique, Bordeaux, 1931; Ripert, La régle morale dans les obligations civiles, Paris, 1927.

[107] Gustav Radbruch, Filozofija prava, izdanje Nolita, Beograd, 1980. Gustav Radbruh (1878–1949), posle završetka Drugog svetskog rata ponovo se vratio na Univerzitet u Hajdelbergu 1945, i ubrzo postao dekan Pravnog fakulteta i član Akademije nauka u Hajdelbergu i Berlinu. Opširnije, S. Vračar u predgovoru pomenutog izdanja Radbruhove Filozofije prava.

[108] John Rawls, Teorija pravde (A Theory of Justice, Harvard University Press, Cambridge, 1971), izvesna poglavlja ove knjige su objavljena u časopisu "Naše teme", Zagreb, 1990, 34(5) i 34(6). O ovoj knjizi, opširnije: Tatjana Glintić, Pravda, sloboda, jednakost – Rols i Volzer, Beograd, 1995; Milorad Ivović, Nepravedni zakoni i njihova primena, časopis Pravni život, br. 12 iz 1995, str. 95 i dalje; naročito, Raymond Boudon, Le juste et le vrai, Etudes sur l'objectivité des valeurs et de la connaissance, Fayard, Paris, 1995, str. 406 i dalje.

[109] G. Radbruh, navedeno delo, Pet minuta filozofije prava, str. 265.

Međutim, dok za vojnika prestaje dužnost i pravo na poslušnost kad on zna da je svrha zapovesti neki zločin ili neki prekršaj, dotle pravnik, u odsustvu prirodnog prava, ne zna za takve izuzetke. Shvatanje zakona po pozitivističkom učenju obezoružalo je pravnike kao i narod pred još toliko samovoljnim, još toliko surovim, još toliko zločinačkim zakonima. Takvo shvatanje u krajnjoj liniji izjednačuje pravo i silu; po njemu, samo tamo gde je sila tu je i pravo.[110]

Zato već u "trećem minutu" filozofije prava, Radbruh proklamuje pravo kao volju za pravdom. I to za onom pravdom koju je Aristotel nazvao komutativnom, i o kojoj je ovde već bilo reči.

U tom smislu Radbruh će reći: kad se ubijanje političkih protivnika slavi, kad se naređuje ubijanje ljudi neke druge rase, a to isto delo, počinjeno nad vlastitim istomišljenicima, kažnjava najsurovijim, u najvišem stepenu ponižavajućim kaznama, onda to nije ni pravda ni pravo.

Kad zakoni, dakle, svesno opovrgavaju volju za pravdom, kad se npr. ljudska prava samovoljno odobravaju ili odriču ljudima, onda ti zakoni nemaju važenje, onda im narod ne duguje poslušnost, onda i pravnici moraju naći hrabrosti da im poreknu karakter prava.[111]

Međutim, po rečima ovog autora ("četvrti minut"), svakako, da je pored pravde, i opšta korist jedan od ciljeva prava. Svakako da i zakon kao takav, čak i rđav zakon, još uvek ima neku vrednost – vrednost da obezbedi pravo nasuprot neizvesnosti. Svakako da ljudsko nesavršenstvo ne spaja uvek harmonično sve tri vrednosti prava: opštu korist, pravnu sigurnost i pravdu. Tada, preostaje samo da se odmeri da li rđavom, štetnom ili nepravednom zakonu ipak treba pridati važenje pravne sigurnosti radi, ili mu treba poreći važenje zbog njegove nepravednosti ili opšte štetnosti. U svest naroda kao i pravnika treba, međutim, duboko usaditi sledeće: mogu postojati zakoni koji su u tolikoj meri nepravedni i opšte štetni da im se mora poreći važenje, pa čak i karakter prava.

Najzad, povezujući zakone sa višim načelima prirodnog prava ("peti minut"), Radbruh će reći da su pravna načela prirodnog ili umnog prava jača u odnosu na pravne propise ako im se ovi suprotstavljaju. Svakako da u pogledu ovih načela postoje izvesne nedoumice, ali vekovni rad im je ipak dao trajnu čvrstinu, i sa tako dalekosežnom saglasnošću sakupio ih je u takozvanim deklaracijama prava čoveka i građanina, da te nedoumice može održati samo još namerna skepsa.

Nastavljajući ove ideje, Radbruh je u svome delu "Zakonsko nepravo i nadzakonsko pravo",[112] pošto je još jednom podvrgao kritici primenu nepravičnih zakona od strane sudi-

---

[110] Prema Radbruhu (navedeno delo, str. 281): Nacional-socijalizam je pomoću dva načela uspeo da veže za sebe svoje sledbenike, s jedne strane vojnike, a s druge pravnike: "Zapovest je zapovest" i "Zakon je zakon". Načelo "zapovest je zapovest" nikada nije važilo neograničeno. Obaveza na poslušnost prestala je kad su zapovednikove zapovesti imale zločinačke svrhe (Vojni KZ, 47). Načelo, "zakon je zakon", nasuprot tome, ničim nije bilo ograničeno. Ono je bilo izraz pozitivističkog pravnog mišljenja, koje je tokom mnogo vekova gotovo bespogovorno vladalo nemačkim pravnicima. Stoga je zakonsko nepravo isto kao i nadzakonsko pravo protivrečnost po sebi. Ti se problemi stalno iznova postavljaju pred praksu. Tako je u listu "Süddeutsche Juristen–Zeitung" objavljena i protumačena jedna odluka prvostepenog suda u Vizbadenu, po kojoj su "zakoni koji su proglašavali da svojina Jevreja pripada državi, u protivrečnosti sa prirodnim pravom i da su još u vreme njihovog donošenja bili ništavi.

[111] O značaju prirodnog prava kroz istoriju i mogućnosti primene ideja prirodnog prava u različitim vremenima, opširnije v., Mihailo Đurić, Iz istorije antičke filozofije, izdanje Službenog lista, Beograd, 1996, str. 322.

[112] G. Radbruh, navedeno delo, str. 281.

ja[113] izveo moguću skalu važenja i poštovanja zakona sa stanovišta količine neprava koju zakon sadrži.

Po njemu, sukob između pravde i pravne sigurnosti mogao bi se rešiti na taj način da pozitivno pravo, koje obezbeđuju propis i moć, ima prednost i onda kad je sadržinski nepravedno i nesvrsishodno, osim u slučaju kad pozitivni zakon u toliko nepodnošljivoj meri protivreči pravdi, da zakon kao "neispravno pravo" mora odstupiti pred pravdom. Nemogućno je povući oštriju liniju između slučajeva zakonskog neprava i zakona koji važe uprkos neispravne sadržine, ali se najoštrija granica može povući tamo: kad se čak i ne teži za pravdom, kad se jednakost, koja čini jezgro pravde, prilikom donošenja propisa pozitivnog prava svesno osporava, onda zakon nije, recimo, samo "neispravno pravo", on šta više uopšte nema pravnu prirodu.

Jer, pravo se, pa ni pozitivno pravo, ne može drukčije definisati nego kao poredak i propisivanje, određeni po svome smislu da služe pravdi. Ako se mere tim merilom, veliki delovi Hitlerovog nacional–socijalističkog prava nikad nisu dospeli do stepena valjanosti važećeg prava.[114]

Radbruhova teorija zakonskog neprava i nadzakonskog prava iskazuje, na paradigmatičan način, odnos između pozitivnog (često nepravednog) prava i prirodnog prava. Zakonsko nepravo i nadzakonsko pravo – reči su koje predstavljaju jednu sintagmu, tačnije, sintezu vekovne evolucije pitanja pozitivnog i prirodnog prava. U tom smislu, to je jedna juristička algebra, poput Kantovog kategoričkog imperativa ili apriorne formule pravednosti Huga Grocijusa.

Međutim, Radbruhova kategorička ocena o nevažnosti nepodnošljivo nepravednih zakona, kao da ostaje nedorečena pred pitanjem načina oslobođenja od takvih zakona. Je li to evolucija ili revolucija prava. Ali kada već takvi zakoni postoje (pretpostavka je da uživaju pravnu snagu), hoće li sud odbiti da ih primeni) što je, čini se, bliže citiranom tekstu) ili će ih možda primeniti, što bi bio nerazuman akt suda.

Razume se, da je najbolji način oslobođenja od ovakvih zakona njihovo ukidanje od strane nadležnog zakonodavnog tela.

Međutim, ako se takvi zakoni "uporno" održavaju na snazi, onda, čini se, sud ne bi mogao formalno da odbije njihovu primenu, ali ono što mora da učini to je, da putem ciljne interpretacije takve zakone "privede razumu" i da ih, tako interpretirane, primeni na način kako to odgovara nespornim načelima racionalnog (umnog) prirodnog prava koja su danas dobila potpuni legitimitet u kodifikatorskim aktima međunarodne zajednice, aktima koji su u najvećem delu postali sastavni deo unutrašnjeg pravnog poretka, a o kojima je u ovom napisu već bilo reči.

U nešto drugačijem, možda "smernijem" tonu, o pravdi kao osnovu prava, govori Džon Rouls u svome već pomenutom delu "Teorija pravde".[115] Po njemu, pravda je prva vrednost društvenih ustanova, kao što je istina misaonih sistema. Bilo koja teorija, ma koliko da je ele-

---

[113] G. Radbruh, navedeno delo, str. 286, gde se kaže: "Nijedan se sudija ne može pozivati na jedan zakon, i prema njemu stvarati sudsku praksu, na jedan zakon koji ne samo da je nepravedan nego je i zločinački. Mi se pozivamo na ljudska prava, koja stoje iznad svih zapisanih pravila, na neotuđivo, prirodno pravo, koje ne priznaje važenje zločinačkim zapovestima neljudskih tirana"; i dalje, "polazeći od takvih razmišljanja, ja verujem da se moraju optužiti sudije koje su izrekle osude nespojive sa zahtevima humanosti, i zbog sitnica donosile smrtne presude" (izvor ovih stavova, v., na str. 286 Radbruhove već citirane knjige o filozofiji prava).

[114] G. Radbruh, navedeno delo, str. 288 i sl.

[115] Opširnije, M. Ivović, Nepravedni zakoni i njihova primena, Pravni život, br. 12/1995.

gantna i ekonomična, mora da bude odbačena ukoliko nije istinita. Isto tako, zakoni i ustanove, ma koliko delotvorni i dobro uređeni, ako nisu pravični moraju da se reformišu ili napuste. Čak ni dobrobit celokupnog društva ne može da prevagne nad nepovredivošću ličnosti koja je zasnovana na pravdi. Stoga, pravda ne priznaje da se gubitak nečije slobode može opravdati većim dobrom drugih ljudi. Ona ne dozvoljava da odricanja nekolicine budu opravdana većom ukupnom dobiti koju uživaju mnogi.

Zbog toga se, prema ovom autoru, u pravednom društvu polazi od toga da su slobode jednakih građana utvrđene. Prava zasnovana na pravdi ne mogu biti predmet političkog pregovaranja ili računa društvenih interesa. Jedini razlog zbog koga možemo da prihvatimo pogrešnu teoriju jeste taj što ne znamo za bolju; analogno tome, nepravda se može trpeti samo onoliko koliko je to nužno da bi se izbegla još veća nepravda. Budući da su istina i pravda prve vrednosti ljudskog delanja, one su neprikosnovene. Javno shvatanje pravde možemo da zamislimo kao temeljnu povelju dobro uređene ljudske zajednice. Na osnovu ovoga, Rouls formuliše dva načela pravde: svaka osoba bi trebalo da ima jednaka prava na najšire osnovne slobode koje su saglasne sa istim slobodama drugih; društvene i privredne nejednakosti trebalo bi da budu tako uređene da je istovremeno (a) razumno očekivati da će biti svakome od koristi i (b) da pripadaju položajima i poslovima koji su otvoreni svima.[116]

Zaključujemo: pozitivno pravo u odnosu na prirodno pravo, može biti stavljeno u tri pozicije: prvo, pozitivno pravo je u saglasnosti (ili pretežnoj saglasnosti) sa načelima racionalnog prirodnog prava; drugo, ono je u podnošljivom "raskoraku" sa pomenutim načelima i kao podnošljivo nepravedno može biti primenjeno uz odgovarajuću asistenciju interpretacije; treće, ono je u apsolutnoj protivrečenosti sa tim načelima (npr. razne diskriminacije po rođenju ili ubeđenju), tako da je po opštem mišljenju nepodnošljivo nepravedno. Kriterijum ove kvalifikacije može se naći u granici društvene tolerancije, što se i egzaktnim putem može utvrditi (stepen pravne nesigurnosti, odgovarajući statistički podaci, raspoloženje javnog mnjenja, pokazatelji sociooloških ispitivanja, komparativni pregled, tradicija, nesporne činjenice pravne i moralne civilizacije). U prva dva slučaja, sud primenjuje zakon, a u trećem, putem interpretacije, primenjuje razumno rešenje koje je primereno notornim načelima prava i pravde i koje je u skladu sa prihvaćenim standardima međunarodne zajednice.

[116] John Rawls, navedeno delo objavljeno u časopisu "Naše teme" (op. cit.), str. 1156 i dalje, i str. 1428 i dalje.

Docent dr *Tomaž Keresteš**
Univerzitet u Mariboru
Pravni fakultet

EKONOMSKA ANALIZA TRANSFERA NASLEDNE MATERIJE SA SUDOVA NA NOTARE U REPUBLICI SLOVENIJI

Kratki pregled: *Sadašnji Zakon o nasleđivanju u Sloveniji reguliše celokupni građanski postupak sukcesije kao striktno pravosudnu nadležnost. Međutim, novi zakon sada ulazi u zakonodavni postupak prema kome će nadležnost za svu neparničnu nasleđnu materiju preći na notare. Ovo novo zakonodavno rešenje će imati znatne ekonomske posledice po javne finansije kao i na privatna lica koja učestvuju u tim slučajevima. Ovaj rad raspravlja o ekonomskim efektima reforme koja se sada odvija u Republic Sloveniji u perspektivi kako privatne tako i javne sfere.*

1. Uvod

Cilj ovog rada je da raspravi ekonomsku efikasnost transfera nasledne materije sa sudova na notare u Sloveniji. U momentu pisanja ovih redova nacrt novog zakona (Novi Zakon o nasleđivanju)[1] je u fazi unutarvladinog prilagođavanja i takođe zaglavljen u postupku usled nekih zakonodavnih problema.[2] Ovaj Novi Zakon o nasleđivanju obezbeđuje transfer nasledne materije na notare i tako menja postojeći sistem u Zakonu o nasleđivanju gde sudovi tradicionalno imaju nadležnost da odlučuju u tim slučajevima. Novi sistem zasnovan na notarima ne samo da predviđa njihovu ulogu u pomaganju sudovima koji se bave naslednom materijom već takođe ukida tradicionalna specijalizovana odeljenja koja se bave naslednom materijom pri opštinskim sudovima kao i ulogu specijalizovanih sudija koji se bave samo tim slučajevima. Osnovna pretpostavka je da učešće notara u naslednoj materiji može da posluži kao sredstvo minimalizacije troškova i da su njihovi honorari više nego kompenzovani dobitkom u sigurnosti i institucionalizovanim poverenjem (Knieper, 2010: 119). Novi nacrt je otvorio nekoliko važnih pitanja u slovenačkom pravnom sistemu; međutim, ovaj rad se koncentriše samo na pitanje ekonomske efikasnosti. Svaki pravni sistem mora da poseduje izvestan nivo društvene efikasnosti da bi pretendovao na naziv zakona. A isto važi i za institucije i pravila tog sistema. Svejedno, ovaj rad se ne bavi generalnom efikasnošću zakona već

* Originalni tekst je na engleskom jeziku.

[1] Nacrt se može videti na: http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/zakonodaja/091202_deovanje_medresorsko.pdf (28. februar 2010).

[2] Mišljenja su podeljena da li bi zakon trebalo usvojiti u formi amandmana ili kao potpuno novi zakon.

posebnom ekonomskom efikasnošću. On pokušava da analizuje širi ekonomski uticaj predložene reforme i da ispituje rezultate koje bi ta reforma mogla da ima za pojedince kao i za javnu sferu kao takvu.

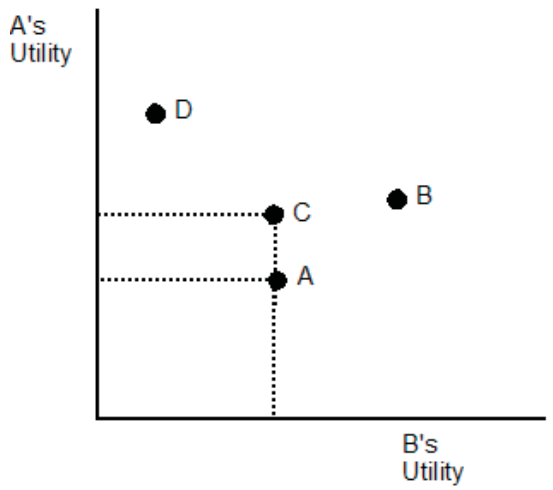
2. Ekonomska efikasnost u pravu

Efikasnost zakona je veoma važan preduslov za zakon i može se razumeti na najmanje tri različita načina. Prvo, može se tumačiti na formalan i racionalni način, gde bi bila postignuta primenjivanjem prethodno prihvaćenog postupka. Tako postignuti rezultati bi bili pošteni i racionalni. Efikasnost u ovom tumačenju apeluje na koncept instrumentalne racionalnosti. Drugo, ispravnost se može pripisati samo pozitivnom rezultatu sa pretpostavkom da dokazna stvar zakona mora biti dobijena po svaku cenu. Takva efikasnost nema veze sa etikom. Treće, kriterijum efikasnosti se može pripisati empirijskoj stvarnosti pre nego društvenom svetu pretpostavljenom našim normativnim obzirima. Shodno tome, praktični diskurs zakona se može opisati kao efikasan ako funkcioniše u stvarnom (tj. empirijskom) svetu. Utilitarizam, pragmatizam i (američki) pravni realizam sugerišu da zakon u radu je zakon koji proizvodi nove efekte u datoj društvenoj sferi (Stelmach, Brożek, 2006: 128–130). Ovaj treći pojam efikasnosti je tak koji sa svojim empirijskim osnova omogućava empirijske metodološke pristupe. A jedan od njih je ekonomska analiza zakona.

2.1. Pareto efikasnost

Većina osnovnih pojmova ekonomske analize zakona, uključujući i efikasnost, su prvobitno uvedeni da reše primedbe na moralnu teoriju utilitarizma. Utilitarizam smatra da je princip korisnosti kriterijum pravog ponašanja. Primenjivanje utilitarizma zahteva interpersonalna poređenja korisnosti što može da postavi ozbiljan problem. Paretovi kriterijumi efikasnosti su prvo uvedeni da uklone problem interpersonalne poredljivosti (Murphy, Coleman, 1990: 182).[3] Efikasnost je jedan od najvažnijih ekonomskih kriterijuma. Povezan je sa ekonomskim načinima raspoređivanja resursa na tržištu. Generalno se smatra da do ekonomske efikasnosti dolazi kada je nemoguće pomerati resurse da ljudima bude bolje a da se ne učini da je drugima gore. Dok god se faktori proizvodnje mogu pomerati tako da neki ljudi dobijaju a da drugi ne gube onda ekonomska efikasnost još nije postignuta (Glanville, 2003: 158). Kada nijedna moguća reorganizacija proizvodnje ne može učiniti nikoga imućnijim bez činjenja drugog siromašnijim, dostižemo alokativnu efikasnost ili Pareto efikasnost (Pareto optimalnost). Pod tim uslovima nečije dalje zadovoljstvo ili korist se može povećati samo smanjivanjem zadovoljstva nekog drugog (Samuelson, Nordhaus, 2005: 158).

[3] Osnovno razumevanje ekonomske efikasnosti postoji kada postoji jedan od dva uslova: a) nije moguće proizvesti istu količinu učinka korišćenjem jeftinijih kombinacija ulaganja; ili b) nije moguće proizvesti veći učinak korišćenjem iste kombinacije ulaganja. Pareto efikasnost je druga vrsta efikasnosti, koja se odnosi na problem raspoređivanja – otuda alokativna efikasnost (Ulen, Cooter, 2004: 16).



Dijagram 1: Pareto efikasnost

U Dijagramu 1 možemo da vidimo da ako pomerimo položaj osobe A sa tačke A na C to je Pareto efikasno jer to ne utiče na položaj osobe B. Pomeranje sa tačke C na B je takođe Pareto efikasno zato što poboljšava položaj i A i B. Pomeranje sa tačke C na D međutim nije Pareto efikasno jer to poboljšava položaj osobe A ali čini osobu B siromašnijom. Pareto efikasnost je stoga ograničena na veoma bazični način. Ona nam omogućuje da naručujemo ili rangiramo društvena stanja i da procenjujemo politike samo kada nema gubitnika. Većina društvenih politika i pravnih pravila, međutim, proizvode gubitnike kao i dobitnike. Pareto test je stoga skoro beskoristan u vezi sa procenom većine aktivnosti od interesa (Murphy, Coleman, 1990: 186).[4] Pareto kriterijum efikasnosti ima neka ozbiljna ograničenja. Mada se može pretpostaviti da svako Pareto efikasno stanje je bolje od neefikasnog, činjenje toga ide dosta van samog Pareto principa i odstupa od svih pojmova distributivne pravde (Schäfer, Ott, 2004: 28; Posner, 2007: 13). Lako možemo zamisliti da postoje situacije gde je neophodna promena društvenog položaja (redistribucija) ali bi to bilo nemoguće bez činjenja nekoga siromašnijim.

2.2. Kaldor-Hicks efikasnost

Međutim, postoji rešenje za Pareto problem. To je kompenzacija *ex post* za pojedinca koji je završio siromašniji. Predloženo rešenje je Kaldor-Hicks kriterijum, različita mera efikasnosti. Kaldor-Hicks kriterijum se ne bavi time da li će premeštanje resursa načiniti odre-

[4] Kaldor-Hicks je bio predmet moralne kritike (on ignoriše pitanja distribucije prihoda I stvarne distribucije i odobrava projekte koji pogađaju one kojima bi trebalo pomoći. Druga kritika je tehničke prirode, Prema Scitovskom Kaldor-Hicks ima status quo bias i obrat preferencije (Zerbe, 2001: 8). Ovaj stav je nedavno dodatno razvijen: ″Umesto da se Paretovska definicija efikasnosti uzima u smislu vektorske maksimalizacije kao mogućnost da se ispitaju pristupi normativnoj ekonomici koji nisu iz ekonomike blagostanja. Ekonomska profesija je uveliko imala poteškoća sa "nepraktičnošću" definicije. Rehabillitacija Marshall-Pigou pristupa je inaugurisana uvođenjem Kaldor-Hicks principa za potencijalno poboljšanje Pareta (pobednici u predloženoj promeni mogu da kompenzuju gubitnike ali to ne neophodno ne čine) i sa savremenim tretmanom potrošačevog viška." (Ellerman, 2009: 96).

đene pojedince siromašnijim već da li je ukupna korisnost po društvo maksimizovana ili ne. Prema Kaldor-Hicks kriterijumu efikasnosti, realokacija resursa je efikasna ako oni koji dobijaju od nje pribavljaju dovoljno da u potpunosti kompenzuju one koji gube od nje, mada ne postoji zahtev da do stvarne kompenzacije dođe (Malloy, 1990: 40).

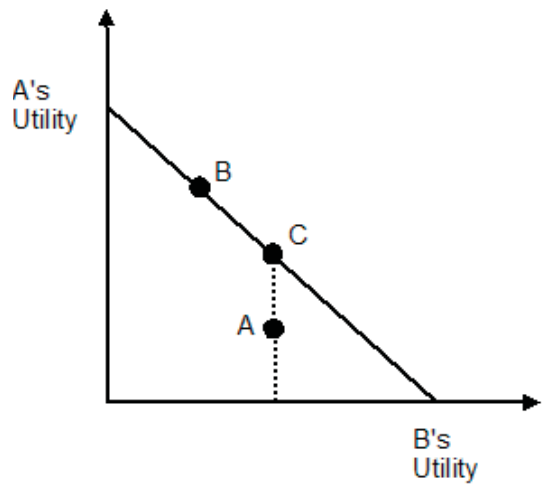


Diagram 2: Kaldor-Hicks efikasnost

U Dijagramu 2 možemo videti kako Kaldor-Hicks efikasnost deluje. Dijagonalna linija predstavlja krivu mogućnosti korisnosti za zadatu količinu resursa u društvu. Tačke uz dijagonalnu liniju maksimalizuju ukupnu korisnost društva za dati nivo resursa. Ako se osoba A pomeri sa tačke A na B, to nije Pareto efikasno zato što je osoba B siromašnija. Međutim, osoba B može biti kompenzovana za svoj gubitak pomeranjem uz dijagonalnu liniju sa B na C, što bi mu ostavilo istu korisnost koju je imao pre pomeranja. Kako bi osoba A i dalje imala više korisnosti nego što je imala u tački A, smatra se da je pomeranje efikasno po Kaldor-Hicks teoriji. Čak i ako osoba B nije stvarno kompenzovana za gubitak korisnosti, društvo je imućnije u pomeranju na tačku B zato što ima više ukupne korisnosti usled pomeranja nego što je bilo pre pomeranja.

Postoji takođe varijacija Kaldor-Hicks kriterijuma efikasnosti koju je napravio Posner. To je takođe kriterijum maksimalizacije bogatstva. Svaki položaj je bolji od drugih kada je bogatstvo u tom položaju više nego u drugim položajima. U opštim redovima ovo liči na Kaldor-Hicksa i vodi do sličnih rezultata. Kao kod Kaldor-Hicksa, Posnerova efikasnost takođe ne pretpostavlja neophodno kompenzaciju svih onih koji su osiromašeni tom maksimalizacijom bogatstva. Dovoljno je da mogu biti kompenzovani (Eidenmüller, 2005: 54).

Pristup usvojen od Kaldora i Hicksa je pokušao da razdvoji ekonomsku efikasnost od pitanja distribucije prihoda. Opšta zamisao je da se dobije mera slobodna od vrednosti razdvajanjem distributivnih obzira od ukupnih dobitaka. Promena u ukupnim dobicima će biti mera efikasnosti te je stoga došlo do razdvajanja efekata na one od efikasnosti i distribucije. Ovo razdvajanje je težilo da postavi ekonomiku na čvrstu osnovu kao instrument određene politike (Zerbe, 2001: 5). Međutim, takav pozicija, kolikogod razumno izgledala u svetlu ekonomike, postavlja ogromne probleme u oblasti prava zato što se može sukobiti sa zakonskim vrednostima i merama.

2.3. Ekonomska efikasnost kao cilj

Primena ekonomske efikasnosti u pravu takođe ima svoja ograničenja. Bogatstvo i efikasnost sami po sebi ne predstavljaju cilj društva. Efikasnost je pre instrument za postizanje određenih društvenih ciljeva i nikakva trampa između sredstava i ciljeva nema smisla. Efikasnost generalno i ekonomska efikasnost posebno bi trebalo posmatrati kao sredstva težnje ka drugom mogućem cilju kao što je povećavanje društvene korisnosti. A kriterijum te efikasnosti je Pareto a ne Kaldor-Hicks (Mathis, 2009: 191). Ekonomska analiza prava ne pretenduje da predstavi jedini prihvatljivi opis prava. Još manje pokušava da diktira kakvo pravo mora da bude. Ona, međutim, pomaže pravljenje alternativnih pravnih predloga, pomaže utvrđivanje njihovih posledica i procenjuje koje posledice najbolje pomažu ustanovljene ideale prava (Georgakopouls, 2005: 2). A ti ideali nisu isključivo, ako su uopšte, ustanovljeni ekonomskom analizom prava. Oni su češće odabrani društvenim mehanizmima van ekonomike.

3. Nasledna materija u Sloveniji

3.1. Sadašnja situacija

Nasleđivanje u Sloveniji je regulisano Zakonom o nasleđivanju (1976).[5] U sadašnjem zakonodavstvu Slovenije nadležnost za naslednu materiju u prvom stepenu je data jednom od četrdeset i četiri opštinska suda (Zakon o sudovima, čl. 99/II/2).[6] U većim opštinskim sudovima postoje specijalizovana odeljenja za naslednu i neparničnu materiju sa specijalizovanim sudijama a u manjim opštinskim sudovima nema specijalizacije u radu sudija. Sistem naslednog prava je skrojen po nemačkom modelu *ipso iure* prelaska zaostavštine na naslednike. U sudskim naslednim postupcima izdaje se samo deklarativna odluka o raspodeli (Zupančič, 2002: 113). Onamo gde zaostavština obuhvata i nekretnine sudski postupak je obavezan i inicira se *sua sponte*; inače se postupak započinje samo po zahtevu strana. U sudskom postupku strane moraju da plate taksu i ako se to primenjuje, porez na nasleđivanje, sve u skladu sa vrednošću zaostavštine koju proceni sud u odluci o raspodeli (Rijavec, 1999: 161). Kao pravni lek protiv odluke o raspodeli dozvoljena je posebna žalba višem apelacionom sudu (Višje sodišče).

3.2. Predložene reforme

Prema predloženoj reformi celokupni postupak u naslednoj materiji u prvom stepenu biće prebačen na javne notare. Javni notari u Sloveniji su latinskog tipa i osnovani prema austrijskom modelu. Međutim, trenutno notari imaju veoma ograničene nadležnosti u oblasti nasledne materije, uglavnom u vezi sa testamentima i kodicilima. Stoga je cilj reforme da

---

[5] Zakon o dedovanju (ZD), Službeni list SRS, no. 15/1976, 23/1978; Službeni list RS, no. 17/1991-I-ZUDE, 13/1994-ZN, 40/1994 Odl.US: U-I-3/93-17, 82/1994-ZN-B, 117/2000 Odl.US: U-I-330/97-28, 67/2001, 83/2001-OZ.

[6] Zakon o sodiščih (ZS), Službeni list RS, no. 19/1994, 45/1995, 26/1999-ZPP, 38/1999, 45/1999 Skl.US: U-I-144/95, 28/2000, 26/2001-PZ, 56/2002-ZJU, 16/2004-ZZZDR-C, 73/2004, 23/2005-UPB1, 72/2005, 100/2005-UPB2, 49/2006-ZVPSBNO, 127/2006, 27/2007-UPB3, 67/2007, 94/2007-UPB4, 101/2007 Odl.US: Up-679/06-66, U-I-20/07, 31/2008 Skl.US: U-I-304/07-11, 45/2008, 47/2009 Odl.US: U-I-54/06-32 (48/2009 correction), 96/2009

proširi nadležnosti notara u naslednim postupcima prema modelu nekih drugih zemalja (Austrija, Hrvatska, Francuska, Nemačka i Mađarska). Tehnički aspekt reforme je da se izvrši novelom Zakona o nasleđivanju (1976) sa uvođenjem novog poglavlja o nadležnostima notara u naslednoj materiji. Po predloženoj reformi više neće postojati opšta sudska nadležnost za naslednu materiju u prvom stepenu. Notari će biti jedini organ koji sprovodi nasledne postupke osim u slučaju spora o činjenicama slučaja koji će biti rešen u parničnom postupku u sudu. To bi vodilo do *de facto* ukidanja specijalizovanih odeljenja i sudija za naslednu materiju.

Po prijemu smrtovnice notar će pokrenuti nasledni postupak. Nadležni postupak će biti definisan pravilima notarske komore i takođe postoji izvesni osnovi eliminacije. Sudska odluka o raspodeli biće zamenjena notarevim aktom o zaostavštini sa istim efektima i vrednošću koji ima sudska odluka. Strane će biti obavezne da plate honorar notaru, i ako se to primenjuje, porez na nasleđe, sve u skladu sa vrednošću zaostavštine procenjene od strane notara. Poseban pravni lek protiv akta notara u vidu žalbe biće dozvoljen pred Višim apelacionim sudom.

3.3. Osnovi reforme

Postoji nekoliko različitih osnova za predlog reforme nabrojanih u nacrtu zakona za noveliranje Zakona o nasleđivanju (1976). Kao najvažnija osnova za reformu pominje se problem sudskih odlaganja i čestih narušavanja prava za dobijanje sudske odluke u razumnom roku. Postupak pred notarom bi trebalo da bude ekspeditivniji nego u sudu i na taj način rasterećene sudije bi se mogle uključiti u poseban plan za smanjivanje sudskog kašnjenja. Drugi razlog je potreba da se obezbede neophodne kompetencije notara. Notari u Sloveniji obavljaju javnu službu i stoga je preduslov da im se obezbede adekvatne kompetencije da bi im se omogućilo postojanje. Notari u Sloveniji su u prošlosti izgubili neke kompetencije u legalizaciji dokumenata a i njihov broj je povećan (sa 68 na 98). Transfer nasledne materije na notare bi stoga kompenzovao notare i omogućio im da obavljaju njihovu dužnost javne službe. I konačno, postoji verovanje da bi reformisani nasledni postupak bio efikasniji.

4. Efikasnost transfera u perspektivi javne sfere

U detaljnom komentaru Novog Zakona o nasleđivanju možemo naći tvrdnju da primena novog zakona neće zahtevati nikakva dodatna finansijska sredstva u državnom budžetu. Da li to znači da je novi zakon neutralan u pogledu ekonomske efikasnosti i pogotovo javnih finansija? Usled nepotpunih podataka o pravosuđu ovo je prilično teško izračunati ali ipak možemo da napravimo neku osnovnu procenu.[7]

4.1. Sadašnja situacija

Ne postoje egzaktni podaci o ukupnoj sumi svih sudskih taksi prikupljenih u naslednoj materiji. Prosečna sudska taksa prikupljena u Opštinskom sudu Ljubljane (koji barata sa 14.68 % ili 3.393 od ukupno 23,107 naslednih slučajeva koje su slovenački sudovi primili u

[7] Svi proračuni u ovom poglavlju su zasnovani na podacima koji se sadrže u Keresteš, 2009 i blago odstupaju od podataka prezentovanih u nacrtu Novog Zakona o nasleđivanju. Pošto su sve brojke uglavnom približne ovo odstupanje je zanemarljivo.

2008.) je € 600. Ovo bi značilo da je samo Opštinski sud Ljubljane prikupio € 2,035,800 takse u naslednim slučajevima u 2008. Jedini drugi važeći podaci su prosečna procena prikupljenih taksi od opštinskih sudova u Vrhniki, Slovenj Gradecu i Tolminu, koji su približno € 300 po slučaju. To bi vodilo do zaključka da su preostali sudovi u Sloveniji u svojih 19,714 slučajeva prikupili € 5,914,200. Gruba procena bi stoga bila da su slovenački sudovi prikupili u 2008. godini nekih € 8,000,000. Ova procena je zasnovana na delimičnim podacima koji postoje samo za Opštinske sudove Ljubljane, Vrhnike, Slovenj Gradeca i Tolmins. Ne postoji nikakva druga statistika i trenutno preciznija procena nije moguća. Ovo nam daje informaciju da prosečno prikupljene takse u Ljubljani su dvostruke u odnosu na takse prikupljene u ostatku Slovenije. Ovo se može objasniti barem dvostruko većim cenama nepokretne imovine u Ljubljani u poređenju sa ostatkom zemlje.

Prema konačnom obračunu za 2007. Slovenija je prikupila € 35,788,372 sudskih taksi i ova brojka je ostala približno ista tokom nekoliko godina. Ne postoji detaljnija raspodela taksi prema tipu postupka. Međutim, u 2008. prikupljenih € 8,000,000 predstavlja 22.4 % svih prikupljenih sudskih taksi. Ove podatke bi trebalo uporediti sa procentom naslednih slučajeva u ukupnom broju sudskih slučajeva. U 2008. godini sudovi su primili 681,069 novih slučajeva od kojih je 23,107 ili samo 3.4 % naslednih slučajeva. Ovo bi takođe značilo da u 3.4 % naslednih slučajeva 22.4 % svih sudskih taksi je bilo prikupljeno. Prema podacima u 2008. godini je bilo 1,067 sudija u Sloveniji a od ovih 503 u opštinskim sudovima. Prema zvaničnoj statistici pripremljenoj od strane Vrhovnog suda Slovenije u naslednim slučajevima bi trebalo da radi 38.2 sudija;[8] ili 3.6 % od svih sudija; ili 7.6 % od svih sudija u opštinskim sudovima. Zvanična norma za nasledne slučajeve[9] bi nas dovela do zaključka da mora da je više sudija radilo na naslednim slučajevima – barem 51. U tom slučaju sudije koje rade u naslednim slučajevima bi bile 4.8 % od svih sudija; ili 10.1 % od svih sudija u opštinskim slučajevima.

Kao privremeni zaključak možemo videti da u perspektivi javnih prihoda nasledni slučajevi u sudstvu su veoma efikasan način za popunjavanje državnog budžeta. Slučajevi zaostavštine predstavljaju samo otprilike 3.4 % svih sudskih slučajeva i njima se bavi otprilike 10 % ili manje od svih sudija u opštinskim sudovima (ili manje od 5 % od svih sudija). Međutim, nasledni slučajevi predstavljaju 22.4 % (tj. € 8,000,000) svih prikupljenih sudskih taksi. U perspektivi javnih finansija nasledna pitanja predstavljaju jedan od finansijski efikasnijih sudskih postupaka.

4.2. Predložene reforme

Transfer nasledne materije na notare bi predstavljao gubitak od otprilike € 8,000,000 u državnom budžetu *per annum*. Uz pretpostavku da se obim naslednih slučajeva ne menja mnogo iz godine u godinu i uzimajući u obzir da su notari morali da prihvate 10 % smanjenje postojećih tarifa u naslednim slučajevima, prihod notara bi bio približno € 7,200,000.[10] Svejedno, notari koji bi se bavili naslednom materijom bi predstavljali izvor prihoda za jav-

---

[8] Ovi podaci su izračunati na pretpostavci da izvesne sudije ne rade samo na naslednim slučajevima. Postoji takođe pretpostavka da samo 37 sudija radi na naslednim slučajevima. Ova procena je izvršena po računovodstvenim podacima (MFERAC) i još manje je pouzdana. Ovih 37 sudija bi predstavljalo 3.5 % svih sudija u Sloveniji i 7.4 % svih sudija u opštinskim sudovima.

[9] To je bilo 450 slučajeva *per annum* u to vreme.

[10] Notari su pristali na 10% umanjenje postojećih tarifa u naslednim slučajevima da bi stišali zabrinutost javnosti u vezi toga da će ova služba postati skuplja jer u javnosti postoji generalna percepcija da su notari skupi.

ne finansije putem PDV i poreza na prihode. Sa stopom PDV od 20 % država bi dobijala otprilike € 1,440,000. Teže je izvršiti procenu prihoda od poreza na prihod. Važeća poreska stopa za notare je 41 %; međutim, ona se primenjuje na prihod redukovan materijalnim troškovima notarove kancelarije. Ne postoji kredibilna procena notarskih troškova u vezi sa bavljenjem naslednim pitanjima. Nezvanična procena izvršena od Notarske komore je da bi troškovi bili otprilike 25 % od svih prihoda.[11] To znači da bi oporezovani prihod od € 7,200,000 bio samo € 5,400,000. Pri stopi poreza na prihod od 41 % država bi na svoj račun dobila € 2,214,000. Ovo znači da bi budžetski prihod od nasledne materije bio otprilike € 3,654,000 ili samo 45 % od onoga što država sada dobija. Iz perspektive javnih finansija transfer nasledne materije na notare ne izgleda mnogo efikasan. Čak i 10 % umanjenje postojećih tarifa učinjeno kao ustupak javnosti doprinosi ovoj neefikasnosti u svetlu javnih finansija. Slika je još mračnija kada uzmemo u obzir da najmanje 38 sudija (ili čak 51) ostaje u kancelarijama na teret državnog budžeta mada se više ne bave naslednom materijom.

Međutim, postoje neki drugi argumenti koji podržavaju efikasnost ovog transfera nego što izgleda iz perspektive „gubitka taksi". Prvi argument je povezan sa akutnim problemom sudskih odlaganja ili kašnjenja u Sloveniji. Odlaganja u naslednim slučajevima postepeno opadaju od 86.52 % u 2005. Slična je situacija sa svim sudskim slučajevima, naročito u opštinskim sudovima. To je direktni rezultat složenog programa"Lukenda" koji je uveden nakon što je Slovenija počela da redovno gubi slučajeve u Evropskom sudu za ljudska prava zato što ne obezbeđuje presude u razumnom roku.[12] U ovom širem obimu izgleda važno što će transfer nasledne materije na notare osloboditi do 51 sudija u opštinskim sudovima. Ove sudije bi onda mogle biti relocirane u sudove i oblasti sa visokom stopom odlaganja i pomoći da se opšta slika popravi. Bez ikakve sumnje možemo se složiti da ove sudije predstavljaju oslobođene resurse pravosudnog sistema koji mogu biti angažovani negde drugde i tako doprineti opadanju sveukupnog kašnjenja sudova. Problematičnije je pitanje kako kvantifikovati ovu korist. Bez dalje analize pravosudnog sistema to izgleda nemoguće. Svejedno, jasno je da bi takvo skraćivanje sudskih odlaganja zaista imalo pozitivni ekonomski uticaj na ekonomiju u celini kao i na strane koje učestvuju u tim slučajevima.

Teorija mikroekonomike postavlja tri preduslova da bi institucije bile efikasne: a) odgovarajuće institucije su dobro definisane; b) sve neophodne informacije su proverljive; i c) nepostojanje troška za prebacivanje ili osiguravanje imovinskih prava. U takvom okruženju cenjkanje može da dovede do Pareto efikasne raspodele dobara. U stvarnosti tako savršeni uslovi ne postoje. Neefikasnosti su obične povezane sa asimetrijama informacija gde se ne mogu predvideti sve okolnosti i *a priori* uključiti u ugovore. Jedna takva informacija je predviđanje kako će sudije slediti skup datih pravila (Köhling, 2000: 5). Slaba i korumpirana uprava može negativno da utiče na ekonomiju iznuđavanjem rente na aktivnost stranaka isključivo na osnovi svog diskrecionog ovlašćenja. Na pravosuđu je da vrši kontrolu nad takvom korumpiranom upravom i stoga je nepristrasno i efikasno pravosuđe od suštinskog značaja za ekonomski razvoj (Köhling, 2000: 6). To nije samo efekat efikasnog pravosuđa. Ono takođe utiče na celokupni sistem razmene i upotrebe imovinskih prava koji pokreće ekonomsku aktivnost. Većina ugovora u svakodnevnim poslovima nisu sporna ali se oni oslanja-

---

[11] Teško je napraviti takvu procenu jer je povezana sa proporcijom svih slučajeva sa kojima se bavi notarska kancelarija. Za neke notare nasledni slučajevi bi predstavljali veću proporciju nego kod drugih.

[12] Prema čl. 6(1) Konvencije za zaštitu ljudskih prava i osnovnih sloboda (ECHR). Više informacija o projektu "Lukenda" može se naći na:
http://www.mp.gov.si/fileadmin/mp.gov.si/pageuploads/2005/PDF/projekt_Lukenda.pdf

ju na pretpostavku da osnovni ugovor može biti sproveden. Stoga je od suštinskog značaja za ekonomiju da država obezbeđuje efikasno i efektivno pravosuđe. U slučaju nedostatka ili nefunkcionisanja pravosuđa čak i najjednostavniji ugovori mogu biti neispunjeni praveći dodatni rizik za ekonomske učesnike. Uloga pravosuđa je stoga da postavi okvir u kome nadmetanje za imovinska prava sledi unapred određena pravila i pruža jasnu i brzu odluku u slučajevima sumnje. Jasna definicija i efikasno sprovođenje imovinskih prava su srž celokupne ekonomske aktivnosti (Köhling, 2000: 8).

Iako je nemoguće kvantifikovati direktni efekat na oslobođene resurse u pravosudnom sistemu putem transfera nasledne materije na notare, jasno je da se ti resursi mogu angažovati u smanjenju sudskih odlaganja koja postoje u Sloveniji. To smanjenje bi imalo direktni efekat na ekonomsku situaciju jer bi učinilo sprovođenje imovinskih prava efikasnijim i definisanje zakonskih pravila jasnijim. To sve bi konsekventno smanjilo troškove transakcija i koristilo svakom pojedincu koji učestvuje u sistemu razmene. Dalje uštede bi se mogle postići u pravosudnom sistemu na račun nekih novih nadležnosti datih opštinskim sudovima gde bi se mogli angažovati oslobođeni resursi.

Druga manje očigledna korist od transfera je povezana sa porezima na nasledstvo. Kada dođe do sukcesije između lica koja nisu u najbližem srodstvu zaostavština se oporezuje. Ovaj proces na prvi pogled ne bi trebalo da pretrpi direktan uticaj transfera nasledne materije na notare. U sadašnjem sistemu na sudovima je da procene vrednost zaostavštine koja će onda služiti kao osnova za oporezivanje. U reformisanom sistemu ovu dužnost će preuzeti notari generalno ne bi trebalo da bude promena. Ipak se očekuje da će prihod od poreza na nasledstvo porasti. Razlog za ovakav razvoj događaja je jednostavan. Notarev prihod zavisi od vrednosti zaostavštine i u njegovom je direktnom ekonomskom interesu da se pobrine da procena zaostavštine bude poštena. Mesečni prihod sudije je njegova plata i stoga on nema tako jak podsticaj traga za stvarnom i poštenom vrednošću zaostavštine. Ovo posledično utiče na visinu prikupljenih poreza na nasledstvo. Međutim, ako je ova pretpostavka istinita to bi takođe značilo da bi ukupni prihod države u naslednoj materiji kojom se bave notari bio viši do neutvrđenog stepena, mada verovatno ne značajno.

Bez obzira na gore prezentovanu kalkulaciju efekata, transfer nasledne materije na notare u nacrtu zakona se procenjuje kao budžetski neutralan akt. Glavni razlog za takvu procenu leži u predviđenim troškovima novih nadležnosti datim opštinskim sudovima Zakonom o mentalnom zdravlju[13] i Zakonom o izmenama i dopunama Zakona o građanskom postupku (D),[14] koji oba prouzrokuju dodatne troškove. Troškovi Zakona o mentalnom zdravlju bi ukupno bili € 3,847,788, od kojih samo € 570,043 predstavljaju troškove radne snage (10 sudija i 15 administrativnih radnika). Troškovi Zakona o izmenama i dopunama Zakona o građanskom postupku (D) nisu razrađeni. Ovo znači da samo € 570,043 predstavlja dodatni trošak koji može biti ublažen transferom nasledne materije na notare i oslobađanjem sudija opštinskih sudova za druge dužnosti. Ostalo predstavlja dodatni trošak za državni budžet koji je svakako pogođen transferom. Transfer nasledne materije će doneti gubitak od € 4,346,000 *per annum* po državni budžet. Čak i kada uzmemo u obzir uštedu od € 570,043 na ime Zakona o mentalnom zdravlju i pretpostavimo sličnu brojku (1,140,086 sve ukupno) na ime Zakona o izmenama i dopunama Zakona o građanskom postupku (D), još uvek će postojati jaz od barem € 3,000,000.

---

[13] Zakon o duševnem zdravju (ZDZdr), Službeni list RS, br. 77/2008.

[14] Zakon o spremembah in dopolnitvah Zakona o pravdnem postopku (ZPP-D), Službeni list RS, br. 45/2008.

Transfer nasledne materije bi jasno doprineo dobrobiti notara. Međutim, ovo povećavanje dobrobiti notara u drugu ruku (barem kratkoročno) dolazi sa pogoršavanjem položaja državnog budžeta. Takav transfer stoga nije Pareto efikasan. Međutim, on još uvek može da postigne Kaldor-Hicks efikasnost ako sveukupno bogatstvo društva bude povećano dovoljno da notari budu u položaju da kompenzuju druge. Ovo bi bilo moguće ako bi takva preraspodela vodila do poboljšane produktivnosti. A to bi bilo moguće samo ako bi bila realizovana ušteda prema Zakonu o mentalnom zdravlju i Zakonu o izmenama i dopunama Zakona o građanskom postupku (D) od € 1,140,086. U tom slučaju možemo videti (Slika 1) novogenerisano bogatstvo od € 340,086 od ušteda u sistemu. Notari bi u teoriji bili u mogućnosti da kompenzuju državu za celokupni gubitak budžetskih prihoda i dalje zadrže € 340,086.

	DRŽAVA	NOTARI	UKUPNO
Sadašnji prihod	8,000,000	0	8,000,000
Budući prihod i ušteda	4,794,086 (3,654,000 + 1,140,086)	3,546,000	8,340,086

Slika 1: Distribucija prihoda i uštede

Očigledni dobitnici ove distribucije bi bili korisnici usluga u naslednim slučajevima. Usled sigurnosti kraja života to bi bili svi mi kao pojedinci. Uz 10% umanjenu notarsku tarifu plaćali bismo manje za istu ili bolju uslugu. Međutim, ovaj dobitak bi mogao biti poništen realističnoj procenom vrednosti zaostavštine od strane notara. Ako to nije dovoljno onda bi trebalo dodati da budžetski jaz od otprilike € 3.000.000 bi morao biti popunjen nekim drugim sredstvima (najverovatnije porezima ili višim taksama).

5. Efikasnost transfera iz perspektive pojedinca

Iz perspektive pojedinca kvalitet usluge u naslednoj materiji ne bi trebalo da se značajno promeni usled transfera na notare. Čak se očekuje da će se kvalitet usluge vremenom poboljšati mada sudovi obavljaju svoju uslugu prilično dobro. Direktniji uticaj transfera bi bio u visini taksi plaćenih u postupcima. Reforma predviđa 10 % smanjenje taksi (PDV uključen) od strane notara u poređenju sa postojećim tarifama. Cilj ovog smanjenja je da se umiri javnost koja obično povezuje notare sa visokim cenama i ne mora neophodno da prepozna koristi njihovih usluga. Ovo bi izgleda značilo da je takav transfer Pareto efikasan jer ne samo da na pojedince nema uticaj dobitak notara – oni čak profitiraju. Čak i kada ne bi bilo 10 % umanjenja taksi takav transfer bi bio naizgled Pareto efikasn jer pojedinci ne bi bili osiromašeni dobitkom notara. Ovo, međutim, nije tačno. Transfer nasledne materije na notare će ostaviti jaz od otprilike € 3,000,000 u državnom budžetu na ime manje prikupljenih sudskih taksi (Vidi gore Pog. 4). Istovremeno veličina pravosudnog ogranka se neće smanjiti što znači da će tih € 3,000,000 morati biti pokriveno drugim sredstvima (npr. povećavanjem sudskih taksi ili poreza). Ovo u stvari znači da za dobitak notara svi će morati da plate više. A to važi i za pojedince koji učestvuju u postupcima nasleđivanja koji bi imali korist od 10 % smanje-

nja taksi. Za njihov dobitak svi drugi bi morali da plate i stoga osiromašili. Ovo znači da iz perspektive pojedinaca ovaj transfer nije Pareto efikasan. Moramo dodati da takođe postoje predviđanja kako će notari biti realističniji u proceni vrednosti zaostavštine jer njihov honorar (i prihod) zavise od toga. To bi vodilo do većeg oporezivanja zaostavštine i blago bi smanjilo jaz u budžetu. Međutim, ove više poreze bi takođe morali da plate pojedinci koji bi istovremeno plaćali više notarske honorare (usled realističnije vrednosti zaostavštine). Sve ovo vodi ka zaključku da će pojedinci biti u gorem položaju i da Pareto efikasnost ne bi mogla biti postignuta.

Ovo ne znači da se ne može dosegnuti Kaldor-Hicks efikasnost. Transfer bi i dalje bio Kaldor-Hicks efikasan ako je strana u dobitku toliko obogaćena da može, makar u teoriji, da kompenzuje one koji su siromašniji. Strana koja dobija su naravno notari a osiromašeni su država (direktno) i pojedinci (indirektno). Kaldor-Hicks efikasnost može biti postignuta samo kada bi transfer nasleđivanja na notare generisao dodatu vrednost npr. kao uštedu u pravosudnom ogranku. Inače bi ovaj transfer bio samo preraspodela imovine na notare što bi pojedince ostavilo siromašnijim a notare u položaju da ne mogu da ih kompenzuju.

	POJEDINCI	NOTARI
Pre reformi	0	0
Nakon reformi	-3,000,000	+3,000,000

Slika 2: Dobici i gubici

Kao što možemo videti u Slici 2, pre reformi situacija je neutralna. Pojedinci moraju da plate u formi taksi € 8,000,000 da bi podržali pravosudni sistem koji se bavi naslednom materijom a notari ne dobijaju ništa. Nakon reforme pojedinci i dalje moraju da plaćaju notarima približno isti iznos (ili 10 % manji) ali takođe moraju da pokriju jaz od € 3,000,000 u pravosudnom budžetu a notari dobijaju € 3,000,000. Međutim, ako notari kompenzuju pojedince za njihov dodatni gubitak od € 3,000,000, oni ne dobijaju ništa i takva preraspodela nije čak ni Kaldor-Hicks efikasna. Samo kada bi notari stvarali dodatnu vrednost uštedom u pravosudnom sistemu bio bi dosegnut Kaldor-Hicks položaj.

6. Zaključak

Jasno je da ekonomsko (i finansijsko) merenje efikasnosti ne može biti jedini argument da li bi trebalo doći do neke pravne reforme ili ne. Takva analiza može samo doprineti vredne podatke koji su potrebni zakonodavcima da predvide društveni i ekonomski uticaj određenih zakonskih rešenja. Nikakva podrobna ekonomska analiza nije vođena u vezi sa predloženim transferom nasledne materije sa sudova i takođe ne postoje pouzdani podaci za takvu analizu. Sve brojke prezentovane javnosti su puke procene zasnovane na statističkim uzorcima i posledica toga je da ima značajnih odstupanja među različitim procenama. Bilo kako bilo, ova analiza pokušava da sumira sve javno dostupne podatke i primeni ih na dva glavna ekonomska kriterijuma - Pareto i Kaldor-Hicks efikasnost. Transfer nasledne materije bi bio Pareto efikasan ako nečiji dobici ne bi stavili nekog drugog u siromašniji položaj. I

bez obzira na Pareto efikasnost, bilo bi Kaldor-Hicks efikasno ako bi nečiji dobici bilo dovoljno visoki da omoguće, makar teoretski, kompenzaciju svih gubitaka koje su podneli drugi pojedinci.

U sadašnjoj situaciji moramo da razmotrimo pozicije troje glavnih igrača: notare, pojedince i državu. Jasan dobitnik u transferu nasledne materije su notari. Pre reforme nisu dobijali ništa od naslednih slučajeva a nakon reforme bi dobijali otprilike neto € 3,546,000 *per annum* u formi notarskih honorara za nasledne slučajeve. Država je naizgled gubitnik u ovoj reformi. Pre reforme ona dobija otprilike € 8,000,000 per annum u formi sudskih taksi za nasledne slučajeve. Nakon reforme ona gubi svih € 8,000,000 prihoda od taksi u naslednim slučajevima ali dobija € 3,654,000 od prikupljenog PDV i poreza na prihod od notara. Takođe bi dobila neku uštedu unutar pravosudnog ogranka oslobađanjem sudija koji se bave naslednom materijom da se angažuju u drugim slučajevima, što bi moglo doneti neku dodatnu uštedu, čak možda i do € 1,140,086 *per annum*. Svejedno, ovo i dalje ostavlja otprilike € 3,000,000 dubok jaz u budžetu pošto nijedan sudija ne može biti otpušten u ime reforme. Ovaj jaz bi čak mogao biti nešto manji usled pozitivnih efekata angažovanja dodatnih sudija u procesu smanjivanja sudskog kašnjenja. Usled nedostatka podataka nemoguće je kvantifikovati ovaj dobitak ali možemo da načinimo poštenu procenu da bi veliki jaz u budžetu i dalje ostao. Međutim, ovaj jaz bi morao biti popunjen od strane pojedinaca koji plaćaju poreze i takse. Mada pojedinci na prvi pogled takođe imaju korist u reformi od 10 % smanjenja taksi, oni takođe u stvarnosti plaćaju veliki jaz u budžetu koji ostaje nakon reforme. Poštena procena bi bila da jaz u budžetu nadmašuje dobitak od smanjenih taksi. Takva situacija bi nas ostavila sa jednim igračem (notarima) kojem je bolje i dva igrača (pojedinci i država) kojima je gore. Stoga možemo zaključiti da reforma očigledno nije Pareto efikasna.

Pitanje da li je reforma Kaldor-Hicks efikasna ostaje nerešeno. Uzimajući u obzir samo relocirane finansijske dobitke ne izgleda da je tako. Dobitak notara im ne dozvoljava, usled 10% smanjenja honorara, da kompenzuju državu i pojedince za smanjene javne prihode. Međutim, još uvek moramo da razmotrimo oslobođene potencijale pravosudnog sistema u obliku sudija i administrativnog osoblja koje se predhodno bavilo naslednom materijom a sada bi moglo biti angažovano u drugim slučajevima i tako generisali uštede. U slučaju da su te uštede dovoljne da komenzuju one osiromašene, naročito pojedince koji nose teret finansiranja pravosuđa, onda bi transfer nasledne materije bio Kaldor-Hicks efikasan i generisao bi novo bogatstvo. Jedini problem je taj da je to veoma teško izračunati na osnovu sadašnjih podataka.

Bez obzira na pitanje Pareto i Kaldor-Hicks efikasnosti ova analiza ne odgovara na pitanje da li bi trebalo da usledi ta reforma i transfer nasledne materije na notare. Ona samo objašnjava ko su dobitnici i gubitnici te preraspodlee i da li se novo bogatstvo stvara ili ne. Međutim, pitanje redistribucije nije samo ekonomsko već i društveno pitanje. Pored toga može biti i neke druge vrednosti generisane tom reformom koja nije razmatrana u čisto ekonomskom modelu. Konačna odluka ostaje na zakonodavcu. Ali sa valjanom ekonomskom analizom to bi bila informisana odluka.

Bibliografija i izvori

Cooter, R., Ulen, T. (2004) *Law and Economics*: Pearson Addison Wesley.

Eidenmüller, H. (2005) *Effizienz als Rechtsprinzip*. Treće izdanje: Mohr Siebeck

Ellerman, D. (2009) *Nomeraire Illusion: The Final Demise of the Kaldor-Hicks Principle*. U: White, M. (ed.) Theoretical Foundations of Law and Economics: Cambridge.

Georgakopoulos, N. L. (2005) *Principles and Methods of Law and Economics. Basic Tools for Normative Reasoning*: Cambridge University Press.

Glanville, A. (2003) *Economics from a global perspective*. Drugo izdanje: Glanville Books Oxford.

Keresteš, T. (2009) *Finačne posledice zakona o dedovanju in prenosa zapuščinskih zadev s sodišč na notarje - vmesno poročilo o raziskavi* [Finansijske posledice Zakona o nasleđivanju i transfer nasledne materije sa sudova na notare – Privremeni izveštaj o istraživanju]: Institut za ekonomsku analizu prava

Knieper, R. (2010) *Eine ökonomische Analyse des Notariats*: C.H. Beck.

Köhling, W. K. C. (2000) *Economic Consequences of a weak Judiciary. Insights from India*: Centre for Development Research

Malloy, R. P. (1990) *Law and Economics: A Comparative Approach to Theory and Practice*: West Publishing Co.

Mathis, K. (2009) *Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*: Springer.

Murphy, J. G., Coleman, J. L. (1990) *Philosophy of Law. An Introduction to Jurisprudence*: Westview press.

Posner, R. (2007) *Economic Analysis of Law*. Sedmo izdanje: Wolters Kluwer.

Rijavec, R. (1999) *Dedovanje. Procesna ureditev* [Nasleđivanje. Procesno uređenje]: Gospodarski vestnik.

Samuelson, P. A., Nordhaus, W. D. (2005) *Economics*, Osamnaesto izdanje: McGraw Hill Irwin.

Schäfer, H.-B., Ott, C. (2004) *The Economic Analysis of Civil Law*: Edward Elgar.

Stelmach, J., Brożek, B. (2006) *Methods of Legal Reasoning*: Springer.

Zerbe, R. O. Jr. (2001) *Economic Efficiency in Law and Economics*: Edward Elgar.

Zupančič, K. (2002) *Dedovanje* [Nasleđivanje]: Uradni list RS

Profesor Dr. Dres. h.c. *Rolf Knieper**

EKONOMSKE TEORIJE O PRAVU U TRŽIŠNIM ODNOSIMA

1. Modeli pretpostavke neoklasičnih ekonomija

Ekonomisti tvrde da su u svojim istraživanjima prvenstveno posvećeni poboljšanju životnih uslova ljudi u njihovom svakodnevnom okruženju[1] i održivom razvoju čovečanstva uopšte.[2] Ekonomska nauka ide dalje u pretpostavci da ljudi imaju, u principu, neograničene potrebe, dok su sredstva koja su im dostupna da zadovolje svoje potrebe ograničena[3] i krenula je da prouči kako se ova nedovoljna sredstva mogu najefikasnije iskoristiti za proizvodnju vrednih roba i kako proizvedena roba može najefikasnije da se distribuira unutar bilo kog datog društva. [4]

Fokus na pojedinca predstavlja osnovu posvećenosti individualizmu i iz metodološke i iz normativne perspektive. Kao prvo, metodološka pretpostavka polazi od toga da pojedinci

legitimno pokušavaju da povećaju sopstvenu prednost i korist i da se sa ekonomskog stanovišta vrednost roba, usluga, a takođe i pravila može zbog toga procenjivati isključivo u smislu njihove korisnosti za jednog ili više pojedinaca. U tom kontekstu, koncept korisnosti nije ni materijalistički ni psihološki niti je inherentan robi. Korisnost se pre mora razumeti kao idejna konstrukcija koja predstavlja način na koji ljudi koriste svoja oskudna sredstva da bi zadovoljili svoje potrebe za robom.[5]

Individualizam je normativan u tome što tvrdi da bi društvene, javne i državne funkcije trebalo da budu direktno ograničene svojom orjentacijom ka sklonostima pojedinaca. [6]

Niko ne tvrdi da je svet dvojnog individualizma naseljen stvarnim ljudima. Njegovi stanovnici su pre oblikovani na osnovu višestrukih pretpostavki, tj. da imaju različite sklonosti i objektivne i subjektivne prirode koje egoistično nastoje da nametnu racionalnim korišćenjem svojih skromnih sredstava. Što se tiče „ispravnosti" njihovih sklonosti, nisu odgovorni nikome. Međutim, opcija racionalnog delovanja pretpostavlja (i) svesnost da će izbor neke određene robe rezultirati troškovima oportuniteta i da će unapred sprečiti realizaciju ostalih

---

* Originalni tekst je na engleskom jeziku.

[1] Na taj način, predstavljajujći mnoge druge, *P. A. Samuelson/W. D. Nordhaus*, Economics, 18. ed. 2005, str. 6.

[2] *S. J. Roth*, VWL für Einsteiger (Makroekonomija za početnike), 2006, str. 1.

[3] *Schäfer/Ott*, *H. B. Schäfer/C. Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts (Udžbenik o ekonomskoj analizi građanskog prava), 4. ed. 2005, str. 58.

[4] *Samuelson/Nordhaus*, loc. cit., str. 4.

[5] Na taj način, predstavljajujći mnoge druge, *Samuelson/Nordhaus*, loc. cit., str. 84 et seq.; *Schäfer/Ott*, loc. cit., str. 3, 57 et seq.; *Roth*, loc. cit. str. 1 et seq.

[6] *Schäfer/Ott*, loc. cit., str. 3; *R. Nozick*, Anarchy, State, and Utopia, 1974.

sklonosti, (ii) da je model pojedinca potpuno informisan o robi koju treba steći, takođe i u poređenju sa drugom robom, (iii) da ekonomski sistem nastanjuju inteligentna bića koja prerađuju informacije[7], i da (iv) realizacija sklonosti neće biti ometana ili čak sprečavana intervencijom javnih ili privatnih sila. Međutim, činjenici da se racionalnost stvarnih ljudskih bića razlikuje od veštačkog *homo oeconomicusa,* i da je ne samo ograničena[8], već i van domašaja kontrolisane racionalnosti[9], pridaje se malo pažnje (bez ikakve važnosti), ako se uopšte i stavlja u razmatranje.

Mesto da se realizuju individualne sklonosti je, par ekselans, tržište, gde potrošači vladaju bez premca i pokušavaju da kompiliraju, neobavezno i bez nekog centralnog plana, skup potrošačke robe koji obezbeđuje maksimalnu korisnost unutar granica bilo kojih datih sredstava. Čineći to oni dobro paze na troškove oportuniteta – čak i ako nikad nisu ni čuli za taj koncept – i svesni su, kao prvo, da kako kvantitet neke robe raste, granična korisnost jedinice te robe, koja je poslednja u nekom datom trenutku, opada, i drugo, da je pametno biti fleksibilan u izboru robe, možda menjajući jednu robu za drugu ako može da obezbedi istu ili sličnu korisnost. Potrošači biraju iz širokog spektra roba i usluga koji im preduzeća nude. Ova preduzeća, sa svoje strane, ne obavezuje nikakav plan da deluju na određeni način, već pre njihova sebična želja da uvećaju svoju korist racionalnim sredstvima. Oni to postižu maksimiziranjem svojih profita realizovanjem najvećeg mogućeg diferencijala između svojih tržišnih prihoda s jedne strane i svojih proizvodnih troškova sa druge strane. Njihov metod da troškove drže što nižim je da kupe i koriste različite proizvodne faktore što je moguće jeftinije. Da bi povećalo svoj prihod, preduzeće će pokušati da proda svoju robu po najvišoj mogućoj ceni.

Unutar ovog sistema, tržište je osetljiv i visoko fleksibilan mehanizam, preko kojeg se ukupna individualna (tj. makroekonomska) potražnja i ukupna individualna (tj. makroekonomska) ponuda susreću. Cena je regulator miliona odluka koje donose kupci i dobravljači. Pošto obe strane traže najbolje moguće rešenje, cene se kreću ka tački u kojoj su ponuda i potražnja u ravnoteži i tržište je rasčišćeno. Ovo se zasniva na pretpostavci da niko nije u stanju na nametne cenu. Pošto cena ne izražava objektivnu vrednost, već samo subjektivne sklonosti učesnika u tržištu i pošto su cene izražene u monetarnim terminima, što samo čini kompleksnu razmenu ili, bolje rečeno, kupovne transakcije mogućim, dalji preduslov da bi ovaj mehanizam glatko funkcionisao je da sam novac bude takav da je prihvatljiv kao likvidnost, kao sredstvo razmene, kao nosilac vrednosti.[10]

Ako su ovi zahtevi ispunjeni i, povrh toga, svi modeli pojedinci potpuno informisani i deluju na racionalan način, optimalna i uspešna raspodela oskudnih sredstava će se materijalizovati bez planiranja ili intervenisanja ili bez daljeg inputa. Ovo ima za rezultat rast dobro-

---

[7] *Samuelson/Nordhaus*, loc. cit., str. 705.

[8] Videti *O. E. Williamson*, The Economic Institutions of Capitalism, 1985, naročito, str. 47 et seq., str. 64 et seq.

[9] U pogledu rzličitih oblika ograničenja, cf. *Schäfer/Ott*, loc. cit., str. 65 et seq.

[10] Novac može samo da „postoji" ako se ukloni iz tržišnog mehanizma. U modernim ekonomijama, gde novac više nije vezan za robu kao što je zlato, samo vlada može njim da upravlja. To znači da, gde god se zahteva „neutralan" novac, slobodan od političkih manipulacija, to sigurno konstituiše normativnu izjavu uperenu prema zakonodavcu i izvršiocu, što se ne može definisati kao tržišni mehanizam. U pogledu ove centralne tačke raison d'être slobode od državne intervencije, videti *R. Knieper*, Gesetz und Geschichte – Ein Beitrag zu Bestand und Veränderung des Bürgerlichen Gesetzbuches (Pravo i istorija – esej o postojanju i promenama u građanskom pravu Nemačke), 1996 (ukratko: Pravo), str. 234 et seq.; *Samuelson/Nordhaus*, loc. cit., str. 510 et seq., str. 531 et seq., str. 667 et seq.

biti, pošto se korist pojedinaca povećava pomoću transakcija bez smanjenja koristi za ostale ljude. Ovo ne implicira procenu rezultata koji se tiču sadržaja, već pre strogo subjektivnu procenu koristi koju izvlače učesnici na tržištu. Iz perspektive metodološkog individualizma, ovo je očigledno i bez dokaza. Povećanje koristi učesnika na tržištu rezultira iz činjenice da su oni dobrovoljno ušli u razmenu dobara.[11]

Opšte je mišljenje da se ispitivanje tržišnih mehanizama, određivanje cena, raspodela dobara i individualizam ne bave raznobojnom raznovrsnošću stvarnog sveta. Slično pravnoj nauci ili eksperimentalnoj fizici, koje se koncentrišu na pojedine dobro definisane i oblikovane parametre, ispitujući delovanje varijabli utvrđivanjem da druge varijable ostaju nepromenjene i fokusiranjem na ono što je samo po sebi definisano – *lege artis* – kao vitalno pitanje da se postignu rezultati, ekonomske nauke operišu sa modelima pretpostavki, pretpostavkama i apstrakcijama. Na ovaj način, one dolaze do rezultata i često vremenski pouzdanih prognoza.

2. Rastojanje neoklasične teorije od prava

Iznenađujuće je što izgleda da (neo)klasična ekonomija ne vidi potrebu da sazna uslove zakonskog okvira u kojem se razvijaju trendovi balansiranja ponude i potražnje, određivanja ravnoteža cena i efikasnosti raspodele. Ovo se odnosi i na određivanje početne istorijske aproprijacije i distribucije vlasništva, odakle potiče dinamika tržišnih odnosa, kao i na zakonsku manifestaciju samih tih tržišnih odnosa.

Indikativno je da standardni međunarodni udžbenik o makroekonomiji koji su napisali *Paul Samuelson* i *William Nordhaus* i koji se često citira u ovoj analizi, na više od 1.100 strana uopšte ne pominje zakon o sastavljanju, izvršavanju i raskidanju ugovora ili zakon o stvaranju, sadržini, prenosu ili opterećenju vlasništva, a ipak podvlači realnost miliona dnevnih činova razmene. Drugi udžbenik o makroekonomiji kratko navodi da je prirodno da će i tržišnim ekonomijama trebati državni okvir rukovođen merilom zakona da štiti vlasnička prava i čini ugovore zakonski punovažnim.[12] Međutim, model ignoriše činjenicu da bi svaki od ovih miliona činova razmene zahtevao ugovor o kojem treba pregovarati, kojeg treba izvršavati i sprovoditi i koji potencijalno može da se prekrši u svakom trenutku.

Ako se uloga države ikada ispituje, onda se to ispitivanje prvenstveno fokusira na uplitanje u kompetitivnu raspodelu sredstava, intervenciju u stanje ravnoteže i ponovne podele koje ometaju tržišni proces. Prema toj doktrini, kao odstupanje od stanja laissez-faire, sve te mere zahtevaju opravdanje i postojanje tržišnog neuspeha možda daje zakonsku, mada nedovoljnu, osnovu. *Walter Eucken* predstavlja izuzetak. Iako posvećen liberalnoj, tržišno orjentisanoj tradiciji makroekonomskog istraživanja, on iznosi argumente protiv uobičajene karakterizacije laissez-faire ekonomske politike kao ekonomije u kojoj nema državne intervencije:

---

[11] Formulacija koncepta efikasnosti raspodele datira od rada italijanskog sociologa i ekonomiste Vilfreda Pareta (1848-1923) i zato je još poznata kao „Paretova efikasnost". Cf. *Roth*, loc. cit., str. 18 et seq.; *Samuelson/Nordhaus*, loc. cit., str. 158 et seq.; *Schäfer/Ott*, loc. cit., str. 24 et seq.; *R. A. Posner*, Recht und Ökonomie: eine Einführung (Pravo i ekonomija: uvod), štampano u isečcima u: Assmann/Kirchner/Schanze, Ökonomische Analyse des Rechts (Ekonomska analiza prava), 1993, str. 80 et seq., str. 87.

[12] *Roth*, loc. cit., str. 142.

„Kratka provera istorijske stvarnosti bi otkrila da je ovaj odgovor pogrešan. Upravo u to vreme je država osmislila stroga zakonska pravila u vezi sa vlasništvom, ugovorima, kompanijama, patentima i tako dalje. Svako preduzeće i svako domaćinstvo je radilo, dan za danom, unutar parametara te od države nametnute zakonitosti, bilo da su prodavali ili kupovali nešto, uzimali zajam ili obavljali neku drugu trgovinsku delatnost."[13]

Štaviše, neoklasična ekonomija je, sa dobrim razlogom, što je diskutabilno, bila žigosani zbog svoje nerealne pretpostavke da ekonomski učesnici maksimalno uvećavaju svoju korist dok u isto vreme deluju u punoj saglasnosti sa zakonima i ugovorima. Ova kritika je poticala iz sledeće perspektive o ekonomskoj nauci:

„Tako dok se neoklasične transakcije dešavaju unutar tržišta gde se ‚bezlični' kupci i prodavci...susreću...na trenutak da razmene standardizovanu robu po uravnoteženim cenama' (*Ben-Porath*, 1980, str. 4), razmene koji su podržane transakcijski određene investicije nisu ni bezlične ni trenutne".[14]

Očigledno je da uglavnom zbog idealno-tipične konstrukcije ravnoteže cena i tržišta kao dela razvoja makroekonomskih doktrina, modeli korišćeni da se mapiraju odnosi razmene u velikoj meri se ne povezuju sa zakonom i njegovim pravilima.[15] Koncept vladavine tržišta koja nije osujećena zakonom upotpunjen je idejom o minimalnoj državi.

Međutim, u pogledu zakonskih manifestacija izvornih aproprijacija i distribucije vlasništva, odakle potiče efikasnost raspodele tržišnih odnosa, doktrina o minimalnoj državi u stvari priznaje da „su neki ljudi opljačkali, prevarili i podjarmili druge", ali radi društvenog mira, istorijska patina mora da se očisti od nepravdi uz pomoć propisa od pamtiveka. [16]

3. Mešanje modela i stvarnosti

Ovo bi bilo sasvim prihvatljivo i ne bi imalo štetan efekat kada bi bilo jasno obelodanjeno kao razmišljanje u okviru apstraktnih modela idealno-tipičnih konstrukcija i kada ovi idealni tipovi ne bi, iznenada, ponovo bili označeni kao faktički ili čak normativni uzori. Ovo se dešava kad god se liberalni principi koji konstituišu osnovne principe minimalne države primenjuju ne samo na državno-intervencionistička pravila, već i na predmete državom propisanog vlasničkog i ugovornog prava, koji formiraju okvir tržišnih odnosa. Ovo preplitanje i mešanje pitanja može imati ozbiljne posledice ako se koristi u vezi sa *idealno-tipičnom* ravnotežom modela pretpostavke da se otvoreno iznese kritika *stvarnosti* postojećeg zakona i/ili da bi se dali predlozi zakonske politike za poboljšanja u oblasti vlasničkog i ugovornog prava koji bi omogućili funkcionisanje ravnoteže u stvarnom svetu.

Posle Maksa Vebera, Elizabet Gobel je priznala rizik razvojnih ekonomskih doktrina sa normativnom namerom, opisujući svoj pristup na sledeći način:

„Kao prvo, ideja o idealno tipičnoj situaciji je smišljena, dolazeći do optimalne početne alokacije sredstava koju svi smatraju pravednom. Onda se sredstva razmenjuju, isklju-

---

[13] *W. Eucken*, Grundsätze der Wirtschaftspolitik (Principi ekonomske politike), 1959, str. 34. (prevod autora)

[14] *Schäfer/Ott*, loc. cit., str. 109, 397.

[15] *Williamson*, loc. cit., str. 55 et seq.; citiran rad *Ben-Porath* je objavljen u: Population and Development Review 6 (1980), str. 1 et seq

[16] Doktrina 'Šta je bilo, bilo je': *Nozick*, loc. cit., str. 150.

čivo preko dobrovoljnih ugovornih sporazuma, gde su svi pojedinci potpuno informisani o uslovima razmene. Nema spoljnih delovanja niti javnih dobara. Sva imovina je u dobro definisanom privatnom vlasništvu koje drže pojedinci (...) Nije teško prepoznati makroekonomski idealni svet u ovom modelu. Ako tržište sa svojim odnosima razmene funkcioniše tako savršeno, jedino je logično da država treba da se uzdrži od uplitanja u tržište. Međutim, pošto savršenstvo tržišta nije realnost, ovaj zaključak je zabluda. (...)"[17]

Istaknut primer za ovako nezadovoljavajući metodološki pristup, koji čak nije održiv ni iz perspektive koncepta minimalne države, su *Izveštaji o poslovanju* Svetske banke[18]. Izabrao sam ovu publikaciju jer ona ima nameru da, poduprta autoritetom Svetske banke, izvrši liberalizirajući uticaj na građansko, trgovinsko i privredno pravo svih zemalja širom sveta.

Dajući makroekonomske modele pretpostavki i zavisno od ispitanog kriterijuma, *Doing Business Report* zamišlja kompaniju sa ograničenom odgovornošću koja ima pet akcionara, kojoj su dostupne potpune i kompletne informacije[19], zapošljava između 50 i 201 osobe[20], u proseku muškarce stare 42 godine, koji nisu organizovani u sindikat i koji pripadaju istoj etničkog grupi i religiji kao i većina populacije unutar određene privrede.[21] Kompanija poštuje zakon,[22] pridržava se pravila tržišta, prilagođava svoje cene u skladu sa potražnjom i spremna je ili da napusti ili da ponovo uđe na tržište u zavisnosti od konkurentne situacije.[23] Izveštaj više puta naglašava da u svojim procenama o podržavajućoj, povoljnoj, naprednoj i superiornoj poslovnoj klimi[24] ne uključuje makroekonomske uslove bilo koje date zemlje, kvalitet njenih infrastruktura i institucija i nivo obrazovanja njenog stanovništva zbog toga što bi bilo teško tretirati sve zemlje – od Avganistana do Zimbabvea[25] – u skladu sa istom formulom.

U smislu modeliranja, ovo je sve legitimno, na isti način kao što bi bilo legitimno zasnovati model na pretpostavci ozloglašenih oportunističkih kompanija koje krše zakone i totalno nekvalifikovane i nepismene radne snage. Ono što je, međutim, krajnje problematično i navodi na pogrešno mišljenje - i iz praktične i iz akademske perspektive - je napor da se modeli pretpostavke iznenada proglase za idealni prototip i čak se ide tako daleko da se model redefiniše kao stvarnost kojoj treba stremiti, a onda pozvati zemlje sveta da usklade svoje zakone i institucije tako da odgovaraju ovom modelu. Zaista, Izveštaj bira da ignoriše

– da je niko drugi nego *Adam Smit* povezivao potencijalne pozitivne efekte „nevidljive ruke" sa stvaranjem i održavanjem fizičke i društvene infrastrukture od strane države i njihovo finansiranje putem progresivnih poreza;[26]

---

[17] *E. Göbel*, Neue Institutionenökonomik – Konzeption und betriebswirtschaftliche Anwendungen (New Institutional Economics – concept and business administration applications), 2002, str. 354 (prevod autora).

[18] Koristim ediciju šest izveštaja iz 2009. god: The World Bank and the International Finance Corporation, Doing Business – 2009, Washington D.C., 2008 (ukratko: „Business").

[19] Business, str. 61.

[20] Business, str. 63, 64, 66, 67, 73, 75.

[21] Business, str. 66.

[22] Business, str. 66.

[23] Business, str. 10.

[24] Business, str. V, 1, 79.

[25] Business, str. III.

[26] *A. Smith*, Eine Untersuchung über Natur und Wesen des Volkswohlstandes, 1776 (Deutsche Ausgabe von 1923), peta Knjiga, Poglavlje I, deo 3.

– da je *John M. Keynes* demonstrirao mogućnost tržišne ravnoteže između ukupne ponude i ukupne potražnje u privredi dok je u isto vreme nezaposlenost, sa svojim katastrofalnim posledicama, visoka;[27]
– da je ekonomska nauka opširno raspravljala o realnosti tržišnog neuspeha;[28] i
– da je *Ronald H. Coase* identifikovao neizbežan manjak informisanosti učesnika na tržištu, i rezultirajuće, isto tako neizbežne, transakcione troškove kao glavni razlog za stvaranje kompanija i zaista kao movens (pokretač) „prirode firme".[29]

Ovo su ne samo osnovna načela makroekonomije, ona su takođe zasnovana i na čvrstoj empirijskoj osnovi. To ne znači da se ona moraju slediti. Međutim, to bi sigurno prekršilo fundamentalne metodologije, čak i one iz ekonomske nauke, da se ignoriše neko takvo načelo i da se odbaci samo na osnovu zaključivanja. Jedino kršenje minimuma standarda koje su nametnule naučne metodologije dozvoljava da se kvalifikuju zemlje koje imaju potpuni nedostatak zaštite zaposlenih kao posebno pozitivno okruženje ili pripisivati, ništa manje nego u 2009. godini, kao uzor funkciju zakonima SAD-a u pogledu prenosa i registrovanja vlasništva zemlje, stvaranja kreditne sigurnosti, zaštite (malih) investitora i sprovođenje ugovora, upravo zbog toga što nema javnih registara i beležničke overe/legalizacije.[30]

Ideološki cilj svega ovoga je da se demonstrira veza između pravila i poslovne neefikasnosti. Mogućnost postojanja veze između nedovoljne regulisanosti i poslovne neefikasnosti čak se i ne razmatra. Još jedanput je idealno-tipični model tržišnih procesa koji su najefikasniji u samoregulaciji predstavljen kao uzor, stvarajući od tržišnih učesnika sveobuhvatno informisane, samostalno odgovorne i racionalne *homines oeconomici* koji nastoje da povećaju svoje pojedinačne koristi. Neuspeh tržišta se ne razmatra kao mogućnost.

Ovo je bio jedan od, sada razbijenih, potpornih stubova deregulacije širom sveta i vašingtonskog Konsensusa u vezi sa transformisanjem post-sovjetskih ekonomija[31] i koji je sada obeležje različitih EU reformskih programa koji su pod pritiskom da opravdaju tržišnu liberalizaciju.

4. Neo-liberalni koncept Države

U pozadini ovih fenomena, čini se da je neophodno istraživati pitanje da li struktura tržišnih interakcija dozvoljava zaključak da razvijeno materijalno i proceduralno građansko pravo nije potrebno, jer će same tržišne sile obezbediti odgovarajući režim, ili da li neokla-

---

[27] *J. M. Keynes*, General Theory of Employment, Interest and Money, 1936, naročito pogledati Knjigu V.

[28] Na taj način, predstavljajući mnoge druge, *Samuelson/Nordhaus*, loc. cit., str. 166 et seq.

[29] R.H. *Coase*, The Nature of the Firm, u: Economica 1937, 386-405386 et seq.

[30] Business, str. 24-53; samo preterani patriotizam može da podržava ove rezultate naspram empirijskih podataka sa globalnog tržišta. Osim toga, osam od deset pravnih sistema u svetu sa najvišim građanskim i trgovinskim rezultatima su jurisdikcije običajnog prava, od koji su neki iskusili posebno oštre finansijske i ekonomske krize tokom 2008/2009, kada su ove krize nastale, prema opštem konsenzusu među ekonomistima, uglavnom zbog nedovoljnih zakona i pravila. Zaista je potpuno zapanjujuće da Svetska banka, koja je po službenoj dužnosti dužna globalnoj zajednici, dopušta da se širi patriotizam i podjednako je zapanjujuće da Izvršni direktori Francuske i Nemačke, na primer, propuštaju da insistiraju da im se objasni metod koji ima za rezultat da je Francuska 31. po rangu iza Letonije i Litvanije i da Nemačka pada, u 2009. godini, sa 20. na 25. mesto (Business, str. 6).

[31] Za više detalja pogledati *Knieper*, Möglichkeiten und Grenzen der Verpflanzbarkeit von Recht (Mogućnosti i granice transplantacije zakona, u: RabelsZ 72 (2008), str. 88 et seq.

sična ekonomija razdvaja svoje modele od prava samo zato što se poštovanje zakona od strane učesnika na tržištu podrazumeva ili zato što se poštovanje zakona postavlja kao parametar koji čini model „čistim".

Pre bavljenja novijim ekonomskim teorijama koje namerno procenjuju zakon i ostale institucije koje nameću „ograničenja u ljudskoj interakciji koje je smislio čovek"[32] kao sastavne delove ekonomskog sistema koji podstiče efikasnost i bogatstvo, moramo utvrditi da li čista tržišna teorija može konzistentno i realno da tvrdi da bi same tržišne sile bile sposobne da stvore uspešne interakcije. Kada bi ovo bio slučaj i pod uslovom da ne postoji neuspeh tržišta, sofisticirani zakon o dodeli, opterećenju i prenosu vlasništva ili zaključenje i izvršenje ugovora kao i sankcionisanje povreda ugovora i nametanje izvršenja bi zaista bilo nebitno.. Naposletku, moglo bi se argumentovati da u savršenoj konkurenciji svi učesnici koji se opiru prirodnim zakonima razmene tako što prekrše svoje obećanje da isporuče robu ili prisvoje imovinu treće strane bez plaćanja bi, pre ili kasnije, nestali sa tržišta. Ostali učesnici na tržištu, za koje se pretpostavlja da su potpuno informisani, jednostavno bi izbegavali svako poslovanje sa tim crnim ovcama, na taj način čineći da ovi nestanu sa tržišta.

Dok se neoklasična ekonomska teorija nije bavila ovim pitanjem, filozof *Robert Nozick,* koji je dobar poznavalac neoklasične tradicije, predstavio je detaljan argument u svom radu „Anarhija, Država i Utopija": Ovaj argument je zasnovan na konceptu slobode ugrađenom u normativnom i metodološkom individualizmu koji zabranjuje prekoračenje granica minimalne države i bilo kakvu intervenciju u interesu distributivne pravde, socijalne ravnoteže ili dobrobiti društva.[33] Što se tiče interakcija između pojedinaca ili grupa pojedinaca, on istražuje da li se posvećenost može postići privatnim dogovorima, društvenom kontrolom ili moralnim barijerama i dolazi do zaključka da bi se od nepristrasnih lica treće strane koja nisu uključena u transakciju tražilo da utvrde validnost svakog zahteva u slučaju neslaganja među stranama. Dok bi se ovaj proces mogao preduzeti bez uplitanja države, putem privatno dogovorenih arbitraža na primer, interpersonalni zahtevi za prinudnim izvršenjem i prisilno sprovođenje ugovora zahtevaju monopol države na upotrebu sile. Monopol države na upotrebu sile mora da se proširi na sve pojedince, a ne samo one koji se dobrovoljno podređuju ovom monopolu, mada bi ovo u izvesnoj meri imalo redistributivni efekat.[34] Sam autor je opisao ovu poziciju kao strogo „liberalnu". Ali čak i ovaj ekstremni argument u korist minimalne države ne dovodi u pitanje neophodnost uloge države u uspešnosti ugovora i vlasničkog prava. Moć tržišta da se samostalno izleči ima svoje granice, čak i bez tržišnog neuspeha.

Povrh toga, spoznaja da se uklanjanje crne ovce ne može prepustiti tržištu takođe je podržana konceptom uspešne raspodele, što je glavni kriterijum neoklasične teorije. Naposletku, uspešnost raspodele opisuje stanje u kojem do poboljšanja situacije jedne osobe ne sme da se dođe tako što će se pogoršati situacija druge osobe.[35] Model pretpostavlja da je ovo dokumentovano ugovorom, međutim, neko bi mogao da primeti, samo ako je ugovor propisno zaključen i izvršen. Gde povrede ugovora nisu sankcionisane i gde bi učesnici koji ne poštuju ugovore samo mogli da budu izgurani sa tržišta kao deo procesa učenja učesnika na tržišta da obrađuju podatke, neki pojedinci bi sigurno bili u nepovoljnom položaju tokom takvog procesa učenja. Ovo je neefikasno. Šta više, oni bi bili instrumentalizovani radi meha-

---

[32] *D. C. North*, Institutions, Institutional Change and Economic Performance, 1998 (1990), str. 3.

[33] *Nozick*, loc. cit., str. 149 et seq. (u pogledu približnosti liberalnoj ekonomiji, pogledati str. 302).

[34] *Nozick*, loc. cit., str. IX, 12 et seq., str. 149.

[35] Na taj način, predstavljajući mnoge druge, *Schäfer/Ott*, loc. cit., str. 24 et seq. and *Samuelson/Nordhaus*, loc. cit., str. 158 et seq.; *Roth*, loc. cit., str. 18 et seq.

nizma tržišta. Izjava *Ričarda Posnera,* prema kojoj se neto povećanje efikasnosti po svoj prilici postiže kada se sredstva prenose dobrovoljnom razmenom, pošto se takav prenos ne bi desio kada obe strane ne bi očekivale da budu bogatije kao rezultat prenosa,[36] može se stoga samo prihvatiti kao izjava idealno-tipične prirode. Ona ne opisuje stvarnost tržišnih aktivnosti. U isto vreme ona ignoriše, na primer, faktor koji Nemački Savezni Ustavni sud (Bundesverfassungsgericht) smatra jednim od aktuelnih premisa lične autonomije, naime približan balans snaga među partnerima u razmeni, bez kojeg se odgovarajuće pomirenje interesa ne može postići,[37] što u svrhu metodološkog individualizma znači nedostatak efikasnosti.

Možemo stoga da idemo dalje sa pretpostavkom da čak i najliberalniji tržišni koncept ipak zahteva delotvoran ugovor i imovinsko pravo kao preduslov. Međutim, ovo postavlja pitanje o značenju „delotvornog" po ovom konceptu. Jasno je da, u svrhu normativnog i metodološkog individualizma, ovo ne uključuje kriterijum jednakosti distribucije, već pre pravila koja deluju protiv nesigurnosti dok u isto vreme doprinose informisanju učesnika na tržištu, omogućavajući realizaciju sklonosti datim sredstvima i zadržavaju korist transakcije koju sami učesnici na tržištu autonomno definišu.

Sigurno bi zbog toga bilo protivno premisama ovog koncepta kada bi građansko pravo unapred predočilo sadržaj transakcija, na primer, postavljanjem gornjih ili donjih limita cena ili kvantiteta i kada zakon ne bi bio suočen sa mogućnošću tržišnog neuspeha, bez obzira na to kako se takav neuspeh može manifestovati. Nasuprot tome, statutarni princip lične autonomije i ugovorne slobode je, baš kao apsolutna raspodela imovine u privatnom vlasništvu, nužan preduslov za dnevnu realizaciju onih miliona tržišnih kretnji koji služe da maksimalno povećaju korist pojedinaca. Sloboda da se izabere protivna strana i da se odredi sadržaj ugovora, zajedno sa zaštitom privatnog vlasništva i pravila njegovog prenosa, su zakonski izrazi ekonomskog mehanizma spajanja i balansiranja ukupne ponude i potražnje u primeni individualnih sklonosti.

Međutim, imovinsko i ugovorno pravo ni u kom slučaju samo ne prate model volju *homo oeconomicus-a*. Imovinsko i ugovorno pravo pre određuju preduslove koji moraju biti prisutni da bi odluka bila validna i obavezujuća. Ono propisuje da, od trenutka kada je ugovor zaključen, ni jedna od strana nema pravo da razvrgne svoju obavezu vis-à-vis druge strane sprovođenjem svoje slobodne volje i drži svaku stranu za njihova obećanja. Uprkos ideji o opsežnoj individualnog slobodnoj volji, ovo ni u kom slučaju nije samo po sebi očigledno.[38] Osim toga, imovinsko i ugovorno pravo propisuju da validno stvorena ugovorna obaveza mora da se izvrši i da moraju da se obezbede institucije koje nameću to izvršenje. Nadalje, imovinsko i ugovorno pravo utvrđuju rezultat ekonomske transakcije u formi nove alokacije vlasništva, sa obavezujućom snagom za i protiv svakoga i stvara odbrambena prava koja se mogu nametnuti. Pošto je sve ovo povezano sa silom kada se suočava sa protivljenjem da se ugovor izvrši, nasilno sprovođenje ugovora konstituiše, kao što smo videli, jedan od glavnih razloga zašto su zagovornici ekstremnog individualizma prinuđeni da priznaju da je, mada minimalna, država i njeni zakoni nužna.

Čak i ako ekonomska nauka tržišnih sila i kretanja ne pominje izričito zakon kao temu, postojanje zakona se ipak podrazumeva i u skladu je sa tržištem barem zato što omogućava učesnicima na tržištu da smanje nesigurnost u isto vreme unapređujući stepen informisanosti, pošto su to preduslovi za artikulisanje i realizovanje njihovih preferenci i maksimalno povećanje koristi.

---

[36] *R. A. Posner*, loc. cit., str. 87.

[37] BVerfG BB 1990, str. 440; ditto BVerfGE 89, str. 214 et seq.; BVerfG NJW 1994, str. 2749.

[38] Cf. *Knieper*, The Code, str. 115 et seq.

5. Pretpostavka institucionalne ekonomije u pogledu zakona

Zakonodavac, sud i pravni system, posebno u oblasti materijalnog i trgovačkog prava, su u svojim odvojenim zaključivanjima, uvek pripisivali centralnu ulogu ekonomskom okviru i njegovim uslovima, zahtevima i posledicama po zakonitost i zakonske akte. Izjava data u standardnom udžbeniku inspirisana takozvanom „ekonomskom analizom građanskog prava", odnosno da je „osnovna uloga zakonskog sistema da osigura sigurnost i olakša zakonske transakcije, posebno u razmeni roba i usluga",[39] svoje argumente zasniva direktno na socijalnoj ekonomiji. Međutim, ova izjava bi podjednako mogla da se zasniva na zakonodavnim motivima predloga zakona Građanskog zakona za Nemački Rajh iz 1888. godine (u daljem tekstu "Motivi").

Ovi Motivi sadrže načela za veliki broj različitih zakonskih institucija kao što su ugovori, agencije, zakonsko lice, odštete, značenje vlasništva, diferencijacija između vlasništva i posedovanja, neophodnost i granice bona fide kupovina, zaštita od ometanja i granice nametnute dometu ove zaštite kroz neophodnosti ekonomskog života i poslovnih odnosa kao i zakonska sigurnost pošto su ovi koncepti, u to vreme, smatrani nužnim u poslovanju između lica i ustanova.[40]

Lista zakonskih koncepata čija logička osnova se zasniva na sigurnosti transakcija bi mogla da se nastavi ad infinitum. Izbor načinjen radi ove analize zasniva se na razmišljanju da su ovo pitanja na koje se fokusira sadašnja debata oko sveže logičke osnove za institucije i položaj zakonske politike. Ovo takođe uključuje trenutne rasprave o vlasničkim pravima i vlasničkoj ekonomiji koje se bore sa značenjem „koncentrisana" i „razvodnjena" prava na delovanje[41] ili apsolutnim i relativnim pravima raspolaganja koja se tiču korišćenja (usus), proizvoda (usus fructus), modifikacije (abasus), prenosa i isključivanja trećih strana[42] u vezi sa efikasnom ili neefikasnom alokacijom sredstava. Ovo nipošto nisu nova pitanja. Takozvani dogmatski pravnici neće imati problema da razlikuju statutarne diferencijacije prema vlasništvu ili posedovanju i ograničena prava in rem, kao i njihov domet i definicije, čiji su ekonomski, kulturni, istorijski i društveni konteksti bili predmet intenzivnih i vrućih debata mnogo pre nego što su se desili kodifikacija zakona trgovinske razmene i tržišni odnosi.

Pravnicima nije iznenađujuće što ekonomisti pokušavaju da kompenzuju, iz makroekonomske perspective, čisto neoklasični pristup modela i njegov nedostatak kontakta sa realnošću. Ovo ne dovodi u pitanje osnovne pretpostavke ličnog interesa i računice kao oruđa da se stekne uvid u tržišne mehanizme, ali sama model pretpostavka društveno neslojevitih, podjednako snažnih/nemoćnih, savršeno racionalnih pojedinaca koji se bave, savršeno informisani, maksimalnim povećanjem svojih koristi u (tržišnom) svetu bez transakcionih troškova. Čak i unutar oblasti ekonomskih nauka, tokom poslednjih nekoliko decenija pojavilo se shvatanje da takav konstruisan model svet ne dozvoljava da se iznose

---

[39] *H. B. Schäfer/C. Ott*, loc. cit., str. 523 et seq.

[40] Motives, Vol. I, p. 223; ovo je samo mali broj primera citata izabranih donekle nasumično; pogledati na primer i bez pretenzija da je i blizu kompletnosti, Vol. I, p. 78; Vol. II, p. 30; Vol. III, p. 344. U pogledu celokupnog konteksta, pogledati *R. Knieper*, The Code.

[41] See *Schäfer/Ott*, loc. cit., str. 529 et seq.; cf. plodonosan rad *O. Steiger*, Property Economics versus New Institutional Economics, u: Journal of Economic Issues, 2006, str. 183 et seq.

[42] Kao što je nabrojao *E. Göbel*, loc. cit.str. 66 et seq.

tvrdnje o stvarnom svetu. Uprkos razilaženju po određenim pitanjima,[43] Nova Institucionalna ekonomija je učinila svojom misijom da uključi empirijske opservacije i realnost u njihove modele. Činjenica da učesnici na tržištu nisu u potpunosti informisani i da deluju sa tačke nesigurnosti, da su prava raspolaganja robom koja se razmenjuje na tržištu različito strukturisana, da pojedince ne pokreće samo tržišno-racionalna rizik/nagrada kalkulacija, već deluju, pod uslovima ograničavajuće stvarnosti ili na kooperativan ili na oportunistički način, bilo poštujući ili ne poštujući zakon i da kupovanje informacije, proizvodni proces i same transakcije koštaju stvarni novac i oduzimaju stvarno vreme - sve to se sada priznaje. Formalne i neformalne institucije, zakoni i pravila, trgovinske prakse, običaji i njihova praktična implementacija pojavljuju se i razvijaju u zamenu za ove činjenice i zahtevaju razumevanje.

Samo kada teoriju podržavaju empirijske opservacije, uticaj institucija na ekonomski razvoj i povećanje dobrobiti može biti procenjen, ocenjen i možda promenjen. Modeliranje i utvrđivanje individualnih sklonosti, donošenje odluka kroz interpersonalnu interakciju pod uslovima nesigurnosti i izražavanje ograničene racionalnosti, nova ekonomija se više ne oslanja na bezličnog *homo oeconomicus-a,* već koristi matematički proverene rezultate teorije igre, koja obećava da će doprineti boljem razumevanju stvarnih transakcija razmene i tržišnih procesa, naročito iz persepktive „strateških igara".[44]

Gore-pomenuto istraživanje *Coasa*, koji je čak 1937. godine izneo da neće biti podsticaja u formiranju hijerarhija unutar korporacija ako svi učesnici na tržištu ne budu potpuno informisani i ako nisu naneti nikakvi transakcioni troškovi[45] i da će se optimalna efikasnost raspodele sredstava postići pregovorima bez potrebe da se dodele prava na delovanje, vlasnička prava ili bilo koji zakon nametnut od države, formira metodološku početnu tačku kritičke ekspanzije makroekonomske doktrine.[46]

Međutim, nasuprot neoklasičnoj ekonomiji, *Coase* spremno naglašava da modeli pretpostavke ne dopuštaju analizu stvarnog tržišta i njegovih institucija. U stvari, on primećuje da je pretpostavka da nikakvi troškovi nisu uključeni u sprovođenje tržišnih transakcija „naravno, veoma nerealna pretpostavka."[47] Iako se obavlja s vremena na vreme, ove tvrdnje se ne mogu koristiti za izvlačenje teoreme prema kojoj bi bilo moguće preneti model svet u stvarni svet, eliminisati troškove transakcija i tako postići efikasnost raspodele. Tržišni troškovi transakcija su difuzni, ne mogu se meriti individualno, ali su ipak neizbežni i s njima se mora računati. Oni objašnjavaju stvarno postojanje preduzeća i složene dogovore u vezi sa troškovima dok u isto vreme imaju za cilja minimiziranje nesigurnosti i na taj način troškova.

Otvorio se jedan broj fokusa istraživanja ekonomske nauke, manje ili više eksplicitno zasnovanih na ovim razmišljanjima, koji istražuju razloge za nesigurnost i kako ova nesigurnost može da se prevaziđe (što je process koji nanosi troškove) u okviru konteksta odnosa na stvarnom tržištu, kao i institucija koje su usmerene ka smanjenju baš tih troškova. Iz zakon-

---

[43] Od velikog broja radova posvećenih evoluciji i različitim pristupima institucionalnoj ekonomiji, volio bih da citiram *M. Erlei/ M. Leschke/D. Sauerland*, Neue Institutionenökonomik (New Institutional Economics), 1999; *R. Richter*, The New Institutional Economics: Its Start, its Meaning, its Prospects, u: European Business Organization Law Review, 6 (2005), str. 161 et seq.; *E. Göbel*, loc. cit., naročito deo II.

[44] Pogledati na primer *M. D. Davis*, Game Theory: A Nontechnical Introduction, 4. ed. 2005; *C. Rieck*, Spieltheorie (Game theory), 8. ed. 2008.

[45] *R. Coase*, Nature, str. 386 et seq.

[46] *R. Coase*, The Problem of Social Cost, u: H. D. Assmann/C. Kirchner/E. Schanze, Ökonomische Analyse des Rechts (Ekonomska analiza zakona), 1993, str. 129 et seq. („Social Cost).

[47] *Coase*, Social Cost, str. 148.

ske perspektive fokusi istraživanja se razlikuju prema tome da li stavljaju jači naglasak na imovinsko ili na obligaciono pravo.

5a) Vlasnička ekonomija

Proizilazeći iz koncepta vlasništva, jedan pristup zamera difuznoj ideji prava na delovanje i insistira da, kao osnova opsežne moći da se deluje, koristi, raspolaže i kolateralizuje, postojanje izvesnog, transparentnog, formalizovanog vlasničkog prava koje se može utvrditi bez velikih troškova informacije bude ključ ekonomske dinamike. Ovaj koncept pravi razliku između vlasništva i posedovanja, pošto ovo drugo ustanovljuje fizičku kontrolu. Zaključak je da zamah ekonomskog razvoja nastaje usled činjenice da sigurnost zakonskih prava vlasništva dozvoljava (privremeno) predavanje upotrebe bez rizika kao i upotrebe u kolateralizacione svrhe, na taj način omogućujući postojanje kreditnog tržišta.

Prema tome, vlasništvo bi smanjilo troškove transakcija, pošto su njegove sklonosti jasno artikulisane. Prema ovom pristupu, odlučujuća tačka je da, ako je potrebno, imovinska prava i ugovori mogu da se ostvare pred nezavisnim sudovima. Kao posledica toga, društva koja su stvorila institucije da otelotvore i formalizuju i zakonsko pravo vlasništva i zajam i koja čine da se i zakonska prava vlasništva i sigurnost mogu prinudno ostvariti protiv svih, uspešna su u organizovanju efikasnih odnosa proizvodnje i raspodele koji štite prosperitet.[48]

Jedan važan aspekt koji proizilazi iz formalizovanja prava vlasništva je njegova prenosivost i hipotekarna založljivost. U sukobu između očuvanja status quo stanja i prolaznosti na tržištu, naglasak se premešta na prolaznost na tržištu: *North* veruje da je za istorijski razvoj moderne trgovine bilo od suštinskog značaja što su principi običajnog prava o apsolutnoj zaštiti vlasništva prevaziđeni i da je *bona fide* kupac mogao da stekne vlasništvo od nekoga ko nije vlasnik kada su kupovni ugovori potvrđeni pečatom, tj. u obliku javnog dokumenta.[49] Učinak dokumenta i, moglo bi se dodati, registra trebalo bi da bude stvaranje sigurnosti, poverenja i predvidljivosti time što se pretpostavlja da se činjenice unete u dokument i/ili registar smatraju tačnim i proverenim.

Međutim, usvajanje formalizovanih prava vlasništva i njegovog zakonskog načela neizbežno ima društvenu cenu koju ne bi trebalo ignorisati.[50] U stvari, individualizovano vlasništvo može da uništi društvene strukture i solidarnost, koji se mogu zasnivati na difuznim pravima grupe i obavezama oblikovanim neformalnim shvatanjima i tradicijama i ovlašćenjem na učešće u društvenoj imovini, njeno korišćenje i očuvanje. Gde je apsolutno vlasništvo individualizovano, što je neizbežno u tržišnim ekonomijama, ono mora biti praćeno socijalnom politikom koja nadomešta razbijanje tradicionalnih struktura društvene zaštite kako bi se izbegle socijalne katastrofe.

5b) Ekonomija transakcionih troškova

Drugi pristup stavlja naglasak na uvođenje, pregovaranje, zaključivanje, izvršenje i sprovođenje ugovora. Uz objektivne neizvesnosti, čije rešavanje nanosi troškove i osim vremena i veština uloženih u komunikaciju, pregovaranje i formulisanje ugovora, manifestacija oportunističkog ponašanja naročito vodi transakcionim troškovima. Ova vrsta ponašanja se

---

[48] Cf. rada *O. Steiger*, Property Economics versus New Institutional Economics, u: Journal of Economic Issues, 2006, str. 183 et seq.; takođe pogledati *K. Boudreaux/P. D. Aligica*, Paths to Property, 2007, str. 30 et seq.; možda i *H. de Soto*, The Mystery of Capital, 2000.

[49] *North*, loc. cit., str. 129.

[50] Posebno primetio *Steige*, loc. cit., str. 195.

odnosi na „nepotpuno ili iskrivljeno saopštavanje informacija namerno smišljenih da zavedu, izvrnu, prikriju, smute ili na drugi način zbune".[51] Institucije služe da spreče oportunizam, da ustanove pouzdana očekivanja ponašanja, da se pobrinu za „verodostojnu posvećenost" i da navedu ugovorne strane da se pridržavaju svojih ugovora, čak i kada oni više ne odgovaraju njihovim prioritetima i željama. Isplativa i brza tvrdnja i, ako je potrebno, ostvarivanje prava na delovanje kao i ugovornih prava smatra se fundamentalnim za trajne i održive tržišne uslove i dinamičnu ekonomiju koja se zasniva na podeli rada.

Poverenje je ključna reč. Njegova prisutnost može da poveća efikasnost interakcije, dok u isto vreme smanjuje troškove tokom svih faza ugovornog odnosa. Međutim, poverenje se mora utvrditi, rizično je i ne može se pretpostaviti niti bez rezerve preporučiti.[52] I formalne i neformalne institucije mogu da smanje preduslove i efekte asimetričnih informacija i da uspostave poverenje. Jedna od mogućih alternativa je stvaranje hijerarhijskih odnosa, zamenjujući poverenje poslušnošću. Ova struktura može biti organizovana u obliku kompanije, ali se u principu primenjuje isto tako i na porodice ili klanove koji zahtevaju apsolutnu lojalnost i sposobni su da nametnu takvu lojalnost ako je potrebno. Međutim, domet organizovanja ekonomskih odnosa putem ličnih lojalnosti je veoma ograničen u razvijenim monetarnim ekonomijama i ima malu upotrebu u globalizovanom svetu. Da bi se organizovala „bezlična razmena" nužno je postojanje nezavisnog uterivača treće strane sa silom prinude i „korpusom pravila" koje primenjuje delotvorno pravosuđe.[53] Pošto ovom raspravom dominiraju autori iz Sjedinjenih država, sistematska kodifikacija kao osnova normativnog poverenja teško da igra ulogu.[54] Međutim, ne može biti sumnje da su, u poređenju sa Evropom, visoki troškovi pregovora i zaključivanja ugovora nad kojim često lamentiraju u Sjedinjenim državama suštinski prouzrokovani nedostatkom kodifikovanog građanskog prava. Postojanje obligacionog prava oslobađa milione ugovora o razmeni dobara za novac od detaljnih pregovora. Slično tome, i ekonomske teorije se ne oglašavaju u vezi sa idejom standardizovanog poverenja, iako ovaj koncept dozvoljava i depersonalizovan normativan odgovor na oportunizam.[55] Poverenje je zamenjeno kodifikovanim pravom.

5c) Primeri

Dva prethodno opisana pristupa shvatanju institucija naglašavaju dva različita nivoa sigurnosti: sigurnost zakonskog prava vlasništva kod vlasničke ekonomije i sigurnost u evoluciji sklonosti kod Ekonomije transakcionih troškova. Oba nivoa dopunjuju jedan drugog. Pokušaću da demonstriram njihovu efikasnost upotrebom dve društveno i ekonomski važne problematične pravne oblasti, tj. transakcije nekretninama i porodičnog prava.

---

[51] *Williamson*, loc. cit., str. 47.

[52] *Williamson*, loc. cit., str. 47, 64 et seq.; *North*, loc. cit., str. 27 et seq., str. 125 et seq.; *id.*: Institutions and Credible Commitment, u: Journal of Institutional and Theoretical Economics 149/1(1993), str. 11 et seq.; *Schäfer/Ott*, loc. cit., str. 499 et seq.; *Göbel*, loc. cit., str. 6 et seq., str. 118 et seq.

[53] *North*, loc. cit., str. 35.

[54] *North*, loc. cit., str. 125 et seq. je izuzetak. On opisuje razvoj kodifikovanog merkantilnog prava kao značajnog napretka u odnosu na običajno pravo u smislu razvoja dinamičnih tržišta zasnovanih na podeli rada.

[55] Cf. rada *C.-W. Canaris*, Die Vertrauenshaftung im deutschen Privatrecht (Ugovorna odgovornost u nemačkom privatnom pravu), 1971.

5c1) Transakcije nekretninama

U svom radu „Institucije, institucionalne promene i ekonomska performansa", za koje je dobio Nobelovu nagradu iz ekonomije, ekonomista *Douglass North* opisuje odnos između prava i obaveza u jednoj transakciji razmene, sa datim troškovima transakcije, pozivajući se na

> "(…) prenos stambenog vlasništva u modernim Sjedinjenim državama. Ovaj prenos uključuje čitav niz prava nad fizičkom imovinom u zamenu za sumu novca. (…) Institucije određuju koliko košta da se izvrši razmena. Troškovi se sastoje od sredstava neophodnih da se izmere i zakonski i fizički atributi koji se razmenjuju, troškova upravljanja ugovorom i njegovog sprovođenja, kao i popusta na nesigurnost koji odražava stepen nesavršenosti merenja i sprovođenja uslova razmene. Na visinu popusta na nesigurnost uticaće faktori specifični za ugovor kao što su nesimetrične informacije o uslovima kuće (poznate prodavcu) i finansijsko stanje kupca (poznato kupcu), faktori cele zajednice kao što su delotvornost sprečavanja kriminala i nacionalni faktori kao što je stabilnost nivoa cena.
>
> Koristi prodavca su cena, uslovi i sigurnost ugovorne obaveze, to jest, verovatnoća da će se kupac pridržavati ugovora ex post. Vrednost stambenog prostora za kupca je funkcija ne samo cene i kreditnih uslova već i atributa koji se prenose prodajom. Neki, kao što su zakonska prava se prenose i dimenzije vlasništva i kuće se lako izmere, a neki, kao što su opšte karakteristike vlasništva, se lako primete pri proveri. Ali drugi, kao što su troškovi održavanja i osobine suseda, mogu se daleko teže odrediti. Podjednako, sigurnost vlasništva od neispunjavanja obaveza, eksproprijacije, *nesigurnog prava vlasništva*, i krađe će varirati u odnosu na to koliko je teško utvrditi verovatnoću i, prema tome, njihovu važnost.
>
> Sada u tradicionalnoj neoklasičnoj paradigmi, sa savršenom informacijom (tj. nultim transakcionim troškovima), vrednost imovine koja se prenosi podrazumeva ne samo savršenu informaciju već i savršena vlasnička prava. U tom slučaju, jer je i kupcu i prodavcu teško da besplatno utvrde vrednost atributa (i fizičkih i vlasničkih prava) i nema neizvesnosti ili nesigurnosti vlasničkih prava, standardni modeli ponude i potražnje stanovanja sa nultim troškovima transakcije bi definisali vrednost imovine.
>
> Troškovi transakcije prenosa su delimično tržišni troškovi, kao što su zakonske takse, honorar agenta za prodaju nekretnina, osiguranje prava vlasništva i istraživanja kreditnog rangiranja i delimično troškovi vremena koje svaka strana mora da posveti prikupljanju informacija, istraživanju i tako dalje. Pribavljanje informacija o stepenu kriminala, policijskoj zaštiti i sistemu obezbeđenje povlači sa sobom troškove za kupca.
>
> (…) Državni zakoni koji definišu prenošenje karakteristika nekretnina, zakoni koji ograničavaju prava koja se mogu prenositi, podupiranje od strane običajnog i statutarnog prava, definisanje ili ograničavanje mnoštva dobrovoljnih organizacije – sve to utiče na transakcione troškove. Agenti za prodaju nekretnina, *osiguranje prava vlasništva*, kreditni biroi i štedne i zajmovne asocijacije koje utiču na hipotekarno tržište – svi će osetiti uticaj. Efikasnost ovih organizacija je funkcija strukture vlasničkih prava i sprovođenja, kao i kapitalnog tržišta. (…)
>
> Moj opis naglašava institucije koje smanjuju transakcione troškove, ali neke, kao što su pravila koja ograničavaju ulazak, zahtevaju beskorisne inspekcije, podižu troškove informisanja ili čine vlasnička prava manje sigurnim - u stvari podižu transakcione troškove. (…) Pošto je ovo tržište nesavršeno, institucije su svuda jedna mešavina sastavljena od onih koje smanjuju troškove i onih koje ih povećavaju. (…)

> Vredno se naglasiti da gore-opisane neizvesnosti u pogledu sigurnosti prava predstavljaju kritičnu razliku između relativno uspešnih tržišta zemalja sa visokim prihodom danas i ekonomija u prošlosti, kao i onih u Trećem svetu danas.[56]

Izabrao sam da uključim ovaj opširan citat jer on prenosi jedan broj centralnih uvida. Kao prvo, on potcrtava nepotpunost neoklasičnih hipoteza i njihovu nesposobnost da objasne i efikasnost i nedostatke tržišta nekretnina, koje karakteriše visoka raznolikost informacija, troškovi kupovine i transformacije uz mrežu institucija. Predlozi zakonske politike zasnovani na deduktivnim logičnim modelima pretpostavki koji se odvajaju od stvarnosti su osuđeni na neuspeh.

On takođe ilustruje da složenost transakcije i činjenica da je kupovina stambenog vlasništva za kupca često jedinstveno, egzistencijalno i verovatno najveće sticanje njegovog odraslog života, generišu visok nivo nesigurnosti i veliku potrebu za informacijom. Po rečima *Northa*, ovo je „nesavršeno tržište."

Vreme i novac da se pouzdano kupi ova informacija imaju svoju cenu, gde tačan iznos troškova zavisi od institucija, koje se razlikuju od zemlje do zemlje. Što je potrebna informacija manje javno dostupna preko nekog sredstva informisanja i čiji sadržaj se nepobitno pretpostavlja da je tačan, veći su i troškovi. U zemlji kao što je Nemačka, gde katastar i katastarska uprava garantuju tačnost informacija o fizičkim karakteristikama i zakonskim okolnostima vlasništva, potencijalni kupac ne mora da troši vreme istražujući ove činjenice. Gde upis u registar garantuje javno poverenje u pravo vlasništva prodavca i gde *bona fide* kupac stiče neotuđivo pravo vlasništva, nesigurna prava vlasništva ne postoje. Ovo je prilično drugačije u Sjedinjenim državama, gde nepostojanje registara zahteva da potencijalni kupci istražuju „lanac prava vlasništva", što može rezultirati visokim troškovima i gde se nedostatak sigurnosti delimično kompenzuje osiguranjem prava vlasništva koje, sa svoje strane, takođe povlači troškove, mada bez utvrđivanja istog stepena sigurnosti i transparentnosti kao profesionalno održavani registri koji podležu principu javne otvorenosti.

Gde ovakvi javni registri postoje teret privatnog troška je smanjen pošto su ovi registri ustanovljeni i održavaju se pomoću javnih sredstava. Pošto zemlja koja ih osniva ima opšti interes u sigurnosti transakcija privatnih nekretnina, ali nikakav određen interes u nekoj individualnoj transakciji per se, informacija sadržana u ovim registrima je pouzdanija od bilo koje informacija koju obezbeđuju ljudi koji imaju (zakonom) utvrđen interes u toj transakciji.

Tamo gde se garantuje tačnost informacije sadržane u javnom registru i gde obe strane u legalnoj transakciji savetuje i poziva na opreznost nepristrasan i kompetentan advokat građanskog zakona, poverenje se može slobodno uložiti i oportunističko ponašanje je obeshrabreno. Neko bi mogao da primeti, u skladu sa teorijom igre, da se u okolnostima transparentnih informacija kooperativno ponašanje nagrađuje dok se svako odstupanje od kooperacije, u obliku povrede ugovora i drugog oportunističkog ponašanja povezuje sa visokim rizicima.[57] Zbog toga ne iznenađuje što su rasprave o nekretninama pred nemačkim sudovima odgovorne tek za puki delić svih sudskih procesa u oblasti obligacionog prava. Ostvarivanje prava preko suda (deljenje pravde „prema činjenicama") rezultira smanjenim troškovima preko sistema javnih registara i javnog beležničkog overavanja (legalizacije) kao preventivnog deljenja pravde.

---

[56] *North*, loc. cit., str. 61-63.

[57] *C. Rieck*, loc. cit., str. 127 et seq. naročito

Zahtevi potencijalnog kupca za informacijom ostaju nezavisni od institucionalnog okruženja i takve informacije se traže „dok granični troškovi potrage za informacijama ne dostignu graničnu korisnost dodatne informacije"[58] Potencijalni kupac će koristiti agente, brokere i eksperte koje treba obeštetiti, ali koji, ipak, služe da smanje transakcione troškove.[59] *North* ističe ovaj factor pominjanjem institucija koje služe da povećaju ili smanje transakcione troškove, gde se pravni saveti računaju među institucije koje smanjuju troškove. On smatra „nesposobnost društva da razvije efektivno, jeftino sprovođenje ugovora (…) najvažnijim izvorom i istorijske stagnacije i sadašnje nerazvijenosti u Trećem svetu."[60] On dalje objašnjava da je „upotreba (…) beležničke evidencije kao dokaza u sporovima dozvolila da dokaz postane osnova za utvrđivanje činjenica u sporovima ", što je prema *Nortu*, uveliko poboljšalo sprovođenje ugovora,[61] kao i izbegavanje sporova kada su činjenice jasne.

Postalo je jasno da neoklasicizam nije zainteresovan za realnost ugovora, već pre ide dalje sa pretpostavkom o izolovanim ugovorima o razmeni koje zaključuju i izvršavaju bezlični kupci i prodavci koji imaju opsežno znanje i deluju potpuno racionalno prema svom interesu. Institucionalna ekonomija je odbacila ovaj nerealističan model i umesto toga je ugovore pretvorila u predmet istraživanja, gde je fokus na „odnosni", tj. dugoročnim, ugovornim odnosima zbog njihovih potencijano visokih i heterogenih transakcionih troškova. Kao rezultat njihovog dugotrajnog efekta, objektivne nesigurnosti budućnosti i ranjivosti prema subjektivnom, oportunističkom i nepokornom ponašanju, ovi ugovori su, više od drugih, izloženi problemu informacionih troškova. *Oliver Williamson* je posebno ispitivao strategije upravljanja za takve ugovore koji su nužno nepotpuni i analizirao metode kojima se smanjuju transakcioni troškovi, koji obuhvataju pažljivo planiranje, razvijanje poverenja, prilagođavanje i oslanjanje na trgovinske prakse sve do vertikalne integracije.[62] (Ne iznenađuje, međutim, da kodifikovan zakon, kao što je građanski zakon, ili u međunarodnim trgovinskim odnosima, UN Konvencija o prodaji[63] kao instrumenti koje je država obezbedila da bi smanjila transakcione troškove, ne figurira u napisima autora iz Sjedinjenih američkih država.)[64]

Ova analiza se ne proteže na ugovore čiji je predmet jedinstvena posebna transakcija, ali koji su ipak od velike važnosti za jednu ako ne i obe strane, kao što je kupovina stambene imovine, što je obično događaj koji se dešava jednom u životu. Teorija igre u službi ekonomije, objašnjava, i mi nemamo razlog da sumnjamo u to, da korisnost robe, u svetlu pretpostavki metodološkog individualizma, nije inherentna samim objektima već se samo može identifikovati prema subjektivnim sklonostima i da bi ta teorija korisnosti stoga trebalo da se razvija iz ovih sklonosti. Ona takođe demonstrira da se odluke o razvijanju sklonosti donose na različite načine, uprkos tome što su situacije i okolnosti identične, ako su ove situacije opi-

---

[58] *Fleischer*, loc. cit., str. 131.

[59] *W. Weigel*, Rechtsökonomik (Zakonska ekonomija), 2003, str. 47.

[60] *North*, loc. cit., str. 54; pogledati takođe str. 59, 62, 67, 134 et seq.

[61] *North*, loc. cit., str. 127.

[62] *O. Williamson*, loc. cit., str. 68 et seq.

[63] United Nations Convention on Contracts for the International Sale of Goods of 1980 – Federal Law Gazette (BGBl.) 1989 II str. 588.

[64] Zapanjujuće je, međutim, da su čak i autori iz kontinentalne Evrope prevideli ove centralne institucije u svojim radovima o problemima u SAD – npr. Austrijanac *Weigel* (loc. cit., str. 44 et seq.) koji zanemaruje Opšte građansko pravo Austrije (Allgemeines Bürgerliches Gesetzbuch, „ABGB"); različito: *Schäfer/Ott*, loc. cit., str. 426.

sane na različite načine.[65] Otuda je rukovođeni, da ne kažemo manipulativni, opis situacije ili imovine centralni element objašnjenja tržišnog mehanizma, pošto je u stanju da stvori, ili barem oblikuje, sklonosti. Primenjujući ove uvide na egzistencijalno važne odluke kao što je kupovina nekretnine, trebalo bi da zapamtimo da se raspravljamo sa parametrima mikroekonomske logike metodološkog individualizma i rezultirajuće zakonitosti subjektivnih sklonosti, jer su ovi učinili svojom misijom da unaprede uslove života ljudi u njihovom svakodnevnom okruženju. (*Samuelson/Nordhaus*). Ove pretpostavke sugerišu da se stvore uslovi pregovaranja u kojima je pojedinac informisan *ex ante,* na kompetentan i nepristrasan način, o posledicama predstojeće transakcije od materijalne važnosti za pojedinca.

S ciljem postizanja povećanja efikasnosti i smanjenja troškova na stvarnim tržištima, Ekonomija transakcionih troškova je pomerila „svet ugovora"[66] u centar debate ekonomske nauke. Iako je fokus na dugoročnom nepotpunom ugovoru, izjave ipak zahtevaju univerzalnu validnost. U jednoj naširoko poznatoj publikaciji piše:

> *James Buchanan* zastupa „da se ekonomija približava tome da bude „nauka ugovora" pre nego „nauka izbora" (na račun čega) maksimizator mora biti zamenjen arbitratorom, autsajderom koji pokušava da napravi kompromise među suprotstavljenim zahtevima.[67] Pristup upravljanja prihvata nauku ugovorne orjentacije ali spaja arbitratora sa institucionalnim specijalistom za dizajn. Cilj je ne samo da se reši konflikt koji je u toku već i da se prepozna potencijalni konflikt unapred i da se osmisle upravljačke strukture koje će ga preteći ili umanjiti."[68]

Očigledno je da su troškovi za institucionalnog dizajnera namenjeni smanjenju ostalih ugovornih troškova, posebno troškovi „*ex post"* sudskih odluka i podjednako je očigledno da je, u Nemačkoj, ovo obuhvaćeno konceptom preventivnog deljenja pravde i da institucionalni dizajner korespondira sa advokatom za građansko pravo.

Sledi da posledice izmanipulisane odluke o sklonosti moraju biti uzete u razmatranje u obliku i individualnih i društvenih troškova, kao što je naglašeno demonstrirano krizom koja nije primarna. Slično tome, procena svih taksi/troškova nanetih nepristrasnim „opisom" i savetom moraju uzeti u obzir faktor kompromisa oko smanjenja ovih posledičnih troškova. Ovi troškovi rezultiraju iz frustracije očekivanja pojedinaca, čije su odluke bile pod uticajem nekompetentnog saveta i/ili saveta umrljanog subjektivnim interesom posrednika.

Murray[69] and *Shiller*[70] su naveli da su takvi subjektivni interesi od strane posrednika pojačani i deluju protivno interesima kupca, ako postoje strukturno-ugrađeni savezi između brokera, finansijskih institucija i osiguranja, gde svako sledi svoju sopstvenu agendu profita. Ovo su tipični problemi koji nastaju u odnosima između poslodavca i agenta, u kojima oba slede svoje divergentne sklonosti ka koristi i koje stoga vode ka nesigurnosti, koja rezultira upravljačkim troškovima.[71] Sasvim ispravno, oni su parirali ovom scenariju uključivanjem

---

[65] *M. D. Davis*, loc. cit., str. 73 and 13; pogledati takođe *Rieck*, loc. cit., str. 166 et seq.

[66] *Williamson*, loc. cit., str. 30.

[67] Ovo je citat iz rada *Buchanan* „A contractarian paradigm for applying economic theory", un: American Economic Review 65 (1975), str. 225 et seq., str. 229.

[68] *Williamson*, loc. cit., str. 29.

[69] *P.L. Murray,* Real Estate Conveyancing in 5 European Union Member States: A Comparative Study, 2007

[70] *R.J. Shiller, Robert J.*, The Subprime Solution – How Today's Financial Crisis Happened, and What to Do about It, 2008

[71] Cf. pregled u *Göbel*, loc. cit., str. 98 et seq.

kompetentnog javnog službenika u vidu advokata za građansko pravo kao finansijski povoljnom alternativom koja obezbeđuje sigurnost, nepristrasna je i, u smislu teorije igre, obavezna da obezbedi objektivan opis koji osigurava da potencijalni kupac dođe do informisane odluke o prioritetu.

Povrh toga, realnost, sa svojom brutalnom neosetljivošću je otkrila neadekvatnosti u sistemu Sjedinjenih država, što je prouzrokovalo masovne gubitke prava i imovine, uništilo, uz gorke posledice, iluziju i ideologiju tržišne ekonomije slobodne of državne intervencije i, još jednom, dovelo do uvida u napred navedeno, poznato od vremena *Adama Smita,* da „nevidljivoj ruci" tržišta treba „vidljiva ruka" formalnih državnih institucija.[72] Fijasko sa nekretninama nije zadesio deregulisana tržišta neočekivano, tj. ona tržišta koja ne vode javne registre koji podležu principu javne otvorenosti i održavaju ovaj registar sa velikom profesionalnom kompetencijom, drugim rečima: tržišta koja ne zahtevaju transparentnost i u kojima *pre* transakcije nema saveta advokata i overavanja.

Po veliku finansijsku cenu, država mora da spasi sistem od propadanja, pošto jedino država može da deluje direktno u najboljem interesu društva i nije upletena u zakonito[73] praćenje bilo čijeg ličnog ili privatnog interesa. Ovo ne znači, međutim, da je država Nemačka ostala nepogođena, pošto su se posledice izloženosti nemačkih banaka stranim deregulisanim tržištima reflektovale nazad na nemačko tržište, iako su institucije koje se primenjuju na nemačko tržište nekretnina pouzdano sprečile lokalnu krizu.

Potrebni obim državne intervencije samo dokumentuje koliko su veliki troškovi posledica i frustracije zavedenih odluka o prioritetima i na individualnom i na društvenom nivou, koji su mogli biti sprečeni, ili barem smanjeni, troškom *ex ante* saveta, overe i registracije u institucijama koje je obezbedila država. Činjenica da se legitimnost državne intervencije danas podrazumeva među narodima koji slede različite ideologije takođe donosi poruku da je osnivanje i održavanje institucija koje obezbeđuju uređeno i sigurno tržište nekretnina javna funkcija i izraz suverenih aktivnosti.

5c2) Porodično pravo

Institucije su „svaki oblik ograničenja koji izmisle ljudska bića da bi oblikovali interakciju među ljudima", mogu biti formalne, državom propisane ili neformalne, otelovljene u običajima i tradiciji; njihova glavna uloga je da „smanje nesigurnost ljudske interakcije stvaranjem stabilnog (ali ne i obavezno efikasnog) reda i smanjenje troškova".[74]

Društvena promena je neizbežna i to nosi sa sobom nove neizvesnosti. Institucije mogu da ispune svoju funkciju samo ako se i one menjaju, definišući i sprovodeći nove slobode i restrikcije u tom procesu. Ovo se odnosi na institucije koje su osnovane formalnim pravnim procesom, kao i na institucije koje su nastale neformalnim konvencijama. Ove druge imaju izrazit zaostatak u kretanju unutar dužih vremenskih rokova, namenjene su u okviru društva i formiraju „deo nasleđa koje se zajednički naziva kultura".[75] One samo mogu da obezbede

---

[72] U toj meri, kontradikcija koju je istakao *Richter*, loc. cit., str. 165 ne postoji; međutim, sasvim je drugo pitanje da li formalne institucije koje je stvorila država mogu i dalje biti vezane za nacionalnu državu. Ali, da bi se istražilo ovo pitanje, prekoračio bi se delokrug ove analize. Zato upućujem čitaoca na *R. Knieper*, Nationale Souveränität – Versuch über Ende und Anfang einer Weltordnung (Nacionalni suverenitet – esej o početku i kraju svetskog poretka), 1991.

[73] Naglašavam ovo da bih pokazao da je pogrešno pripisivati krivicu za krizu pohlepi pojedinaca. Ova kriza je, u stvari, izazvana neadekvatnim institucijama.

[74] Predstavnik ostalih *North*, loc. cit., str. 3, 4, 7, 36; *Göbel*, loc. cit., str. 1 et seq.

[75] *North*, loc. cit., str. 37.

adekvatan okvir (koji prethodi otvorenoj sili) mirnom toku društvenih interakcija, ali su nesposobne drže korak sa naglim prekidima i ne garantuju red.

Ova razmatranja mogu da se transponuju, uz pomoć primera, na razvoj bračnih, porodičnih i partnerskih odnosa i interakcija, koje karakteriše nagli raspad tradicionalnih uloga polova, povećanje lične autonomije u oblikovanju odnosa među partnerima i potpuno novi naglasak na emocionalnost ovih odnosa. Još uvek neizazvane konvencije koje se tiču zaštite materijalne egzistencije članova porodice, dominacije muža, heteroseksualnosti, obostranih obaveza održavanja i pravo na nasledstvo se raspadaju. Deca dobijaju sve veći stepen autonomije, sa trajnom društvenom potrebom za roditeljstvom punim ljubavi još uvek prisutnom, pošto ne postoji alternativa koja može da obavi istu funkciju. Dok se ovaj proces prihvata bez žaljenja, on zaista vodi opadanju nepobitne sigurnosti koja leži u svakoj tradiciji i koja se mora institucionalno nadomestiti.

Složenost i mešavina emocionalnosti i finansijskih interesa, sklonosti na nivou individualnog i partnerskog, kratkoročna i dugoročna sebičnost, kao i među-generacijska solidarnost sadrže visok potencijal nesigurnosti, asimetrične informacije i neravnoteže snaga koji zabranjuje ostavljanje njihovog reda neregulisanim interakcijama. Ovo ne bi povećalo slobodu, već bi pre ohrabrilo oportunističko i eksploatatorsko ponašanje.[76]

Institucije koje ograničavaju interakciju su nužne u utvrđivanju nove sigurnosti, pomirenju povećanja autonomije sa stepenom sigurnosti potrebnim za dugoročne statusne i finansijske odnose, namećući fer odnos u partnerstvima i obezbeđujući poštovanje javnih interesa koji su, u izvesnoj meri, takođe formulisani kao obavezne konstitucionalne direktive. Pošto stare konvencije i rutine „ugrađenog seta institucija"[77] patrijarhata više nisu prihvatljive i pošto će se nova kultura razvijati tokom vremena, društvena promena se može odraziti samo u promeni formalnih institucija zakona.

---

[76] Cf. *G. Heinsohn/R. Knieper*, Theorie des Familienrechts. Geschlechtsrollenaufhebung, Kindesvernachlässigung, Geburtenrückgang (Teorija porodičnog zakona. Raspadanje uloga polova, zanemarivanje dece, opadajući trend rađanja), 2. ed. 1976.

[77] *North*, loc. cit., str. 22.

Prof.Dr. *Mišel Šmigelou (Michele Schmiegelow)**

INTERDISCIPLINARNI PRISTUPI UPOREĐIVANJU KVALITETA PRECEDENTNOG PRAVA[1] I GRAĐANSKOG PRAVA[2]

I. „Uporedni kvalitet" precedentnog prava i građanskog prava kao političkog pitanja

Tokom pola veka nakon završetka Drugog svetskog rata, shvatanje o neophodnosti prava kao okvira za liberalnu demokratiju i slobodno tržište bilo gde u svetu bilo je široko rasprostranjeno u Zapadnom sistemu vrednosti (M. Šmigelou, 1997). Nakon završetka hladnog rata, pomoć Zapada pravnim reformama u bivšim državama Istočnog bloka je prema tome bilo prirodno političko angažovanje kako u Evropi tako i u Americi. Od kraja 1990-ih, međutim, debatu o tome da li su pravi izbor obrasci precedentnog ili građanskog prava na neki način kao da lišavaju takva angažovanja dela njegovog *a priori* legitimiteta.

Na iznenađenje agencija za pružanje pomoći i pravnih zajednica velikih zemalja-donatora s tradicijom građanskog prava, godišnji izveštaj Svetske banke pod imenom „Doing Business" („Kako se posluje") počeo je od 2000. godine da nagoveštava, ako ne i otvoreno iznosi, rastuće probleme građanskih pravnih sistema, i nastavio da to radi otada (Svetska banka-IFC, 2008). Ovaj iznenadni pomak u mišljenju odražavao je rastući uticaj grupe politikologa i ekonomista koji često nazivaju „LLSV" (po inicijalima prezimena La Porta, Lopez-de-Silanes, Šlajfer (Shlefier) i Višni (Vishny) u sektoru Svetske banke koji je nadležan za izradu Izveštaja „*Doing Business*". Na osnovu nekonvencionalne kombinacije sociologije religije, pravne istorije, političke teorije, ekonomije i ekonometrije, ova grupa stručnjaka tvrdila je da je se zemljama s tradicijom precedentnog prava bolje upravlja i da one nude superiorno poslovno okruženje u odnosu na zemlje s tradicijom građanskog, odnosno kontinentalnog prava, bilo da je ono francuskog, ili nemačkog „pravnog porekla" (LLSV, 1999, LLS, 2007).

Najsmelija pretpostavka grupe LLSV je dvostruka: s razloga koji potiču iz sociologije protestantizma, precedentno pravo favorizuje poverenje neinformisanih vlasnika kapitala u stručne profesionalce koji deluju kao agenti u najboljem interesu svojih punomoćnika. Obrnuto tome, građansko pravo, shvaćeno u širem smislu, od rimskog doba je izraz volje vladara i, štaviše, katoličkog nepoverenja u strance. Otuda, kapital lakše do korporativnog sektora i finansijskih tržišta teče u zemljama precedentnog prava, što dovodi do većih prihoda po glavi stanovnika nego u zemljama kontinentalnog prava (LLSV 1999).

Ova osnovna pretpostavka inspirisala je LLSV da sastavi takozvanu „teoriju pravnog porekla" (TPP) (*„legal origins theory" – LOT*). Da bi kvantifikovala kvalitet pravnog pore-

---

* Originalni tekst je na engleskom jeziku.

[1] *Engl: common law (prim. prev.)*

[2] Građansko pravo u širem smislu; kontinentalno pravo (*prim. prev.*)

kla, TPP je morala da primeni ekonometrijske metode. S druge strane, ekonometrijske metode, da bi pružile značajne rezultate, zahtevaju pojednostavljenje objekta koji se meri, što je nešto čega druge naučne discipline imaju tendenciju da se gnušaju. Pozajmljujući pojam „pravnih sistema" ili „*Rechtskreise*" iz teorije uporednog prava (Cvajgert i Koc, *Cweigert* i *Kotz*, 1996), i pritom ga pojednostavljujući tako da jedva bude prepoznatljiv, TPP deli svet u pet „pravnih porekla": englesko, francusko, nemačko, skandinavsko i „socijalističko". Po jedno „pravno poreklo" pripisano je svakoj od prvobitnih 152 države. Njena mapa sveta data je u prilogu 1 radi lakšeg razumevanja. Otprilike polovinu sveta, uključujući i najveći deo Južne Amerike, veći deo Afrike, jugoistočne Azije, islamskog sveta i bivšeg Sovjetskog Saveza, pripisuje francuskom pravnom poreklu. Grupa zemalja koje imaju englesko pravno poreklo čini jedva polovinu onih koje imaju francusko „poreklo", i koncentrisane su u Severnoj Americi, Africi, južnoj Aziji i Australiji/Novom Zelandu. Zatim sledi nemačko pravno poreklo koje je takođe po površini dvostruko manje od engleskog, i ima ga u centralnoj Evropi i istočnoj Aziji. Šest skandinavskih zemalja sačinjavaju skandinavsko pravno poreklo. Tu su još samo tri države (Severna Koreja, Mijanmar i Kuba) koje su ostale verne „socijalističkom" pravnom poreklu u mapi sveta koju zastupa TPP.

Od svih mogućih pravnih instituta, TPP je odabrala one za koje smatra da su od krucijalne važnosti za privrednu istoriju Engleske i SAD-a kao one koji su univerzalni pokazatelji kvaliteta državne uprave, a to su prava akcionara, zaštita stvarnih i imovinskih prava, zaštita poverilaca, izvršenje ugovora. Koristeći šarolike izvore iz različitih vremenskih perioda, TPP je uspela da sakupi impresivan niz podataka o ovim pokazateljima za svaku od 152 države koje je uzela u obzir. Kako bi uporedila ekonomske posledice svakog od ovih pet pravnih porekla, ona je integrisala ove podatke regresijom na poslednji kvadrat. Testirala je rezultate kontrolišući ih logaritmom podataka o BNP po glavi stanovnika za poslednje dve ili tri decenije, vodeći računa da eliminiše pristrasnosti (favorizovanje zemalja umerene klime), i etno-lingvističku frakcionalizaciju (što negativno deluje na privredne performanse). Uzimajući Ujedinjeno Kraljevstvo i SAD kao države u kojima je „englesko pravno poreklo" nastalo kao standard, TPP nalazi najveću prosečnu devijaciju u zemljama koje smatra da su „francuskog pravnog porekla". Iako priznaje da su države koje smatra da su nemačkog pravnog porekla dosegle čak i veći prosečni BNP po glavi stanovnika između 1960. i 2000. godine (Mahoni, Mahoney, 2000; LLS, 2007), ne priznaje ovo kao dokaz za njeno pobijanje, već to koristi kao osnov za „političku teoriju" LLSV-a (LLSV, 1999), odnosno gorepomenute osnovne pretpostavke o građanskom pravu.

Institucionalna konkurencija između precedentnog i građanskog prava jeste legitimna i poželjna sve dok je otvorena i bez izobličenja. S obzirom na globalni institucionalni uticaj Svetske banke, i njeno prihvatanje pristupa grupe LLSV, ova teorija je podignuta iz statusa nekonvencionalne akademske ideje na nivo fundamentalnog političkog izazova za države građanskog prava koje su donatori, kao i za njihova nastojanja da pomognu transformaciju i razvoj drugih država. Države u tranziciji ili razvoju koje započinju ili nastavljaju svoje reforme pravnog sistema će oklevati da prihvate savete koji potiču iz principa građanskog prava, s obzirom na činjenicu da većina njih računaju sa finansijskom pomoći bilo same Svetske banke, bilo privatnih investitora koji obraćaju pažnju na mišljenje Svetske banke. Ova činjenica će biti izraženija usled toga što se „DB" izveštaji koriste kao reference u analizi individualnih država od strane najvećih agencija za određivanje kreditnog rejtinga, i otuda imaju snažan uticaj na njihov međunarodni rejting. Bez iscrpnog uvida u metodologiju LLSV-a i DB izveštaja, institucionalno takmičenje između precedentnog i građanskog prava deluje izobličeno.

Do sada, reakcije iz država sa građanskopravnom tradicijom bile su mlake. Francusko Ministarstvo pravde jeste započelo program o „ekonomskoj privlačnosti prava", koji se bavio

pitanjem loših ocena koje je Francuska dobijala na rang-listi „Doing Business“ izveštaja Svetske banke, kao i u analizama država rejting agencija. Ovaj program je dovodio u pitanje mogućnost kvantifikacije kvaliteta poslovnog okruženja kakav postoji u DB-u, ali se nije bavio pitanjem transplantiranja, ili pomoći razvoju država u tranziciji. Maks Planck Institut za međunarodno i strano privatno pravo u Hamburgu je jedan od svojih žurnala otvorio kao forum za jedan članak o nemačkoj i japanskoj pomoći u transformaciji pravnih sistema koji je sadržao prvu kratku kritiku političke teorije LLSV-a, kao i religijske sociologije i ekonometrije (H. Šmigelou, 2006).

Što je još važnije, sveobuhvatniji potezi su povučeni u zemljama anglosaksonskog, odnosno precedentnog prava kako bi se testirao pristup rada LLSV-a. U nizu radova, istraživači sa Centra za poslovna istraživanja Univerziteta u Kembridžu tvrde da ekonometrija LLSV-a sadrži pristrasnost kojom se maskiraju nefunkcionalni činioci u korporativnom upravljanju u SAD-u i Ujedinjenom Kraljevstvu, dok se u isto vreme pojačavaju negativni aspekti u poslovnoj klimi država sa građanskopravnim sistemom. Na Institutu Brukings (*Brookings Institute*), Kenet Dam (*Kenneth Dam*) je identifikovao još neke slabosti u radu LLSV-a, kao što je njihov pogrešan tretman skoro svih država Južne Amerike kao država sa „francuskim pravnim poreklom“, nedovoljno pružena pažnja ugovornom pravu, kao i anomalije u ekonometriji. Štaviše, postavio je intrigantno pitanje o tome da li visok rast kineske privrede od kada je prigrlila tržišnu ekonomije ne baca sumnju na „čvor“ između prava i razvoja kako to pretpostavljaju institucionalni ekonomisti, pa i LLSV.

Naš projekat „Institucionalna konkurencija između precedentnog i građanskog prava u zemljama u razvoju i tranziciji“ na Univerzitetu u Luvanu (Louvain) čini se kao prvi na evropskom kontinentu koji pokušava da zauzme institucionalni pristup u poređenju precedentnog i građanskog prava uz korišćenje metodologije koja je solidnija nego što je to bilo u slučaju LLSV-a i „*DB*“ izveštaja. Prva međunarodna radna grupa vezana za projekat održana je 10. marta 2009. godine u Luvan-la-Nuvu (*Louvain-la-Neuve*)[3]

Najzad, u jednoj izvanrednoj evaluaciji objavljenoj juna 2008. godine, nezavisna grupa za evaluaciju Svetske banke – *IEG* (*World Bank Independent Evaluation Group)* prepoznala je jedan broj metodoloških problema u „Doing Business“ izveštajima Svetske banke (Svetska banka-IEG, 2008). Konkretnije, postavljeno je pitanje u vezi sa isključivim fokusom na cenu regulative za pojedinačne firme bez uzimanja u obzir namenu njihovog rada, odnosno društvenih koristi ili razvojnih ciljeva. U ovoj evaluaciji je primećeno da je baza ljudi od kojih su sakupljali informacije (70% su predstavnici globalno prisutnih privatnih advokatskih firmi, pri čemu su samo jedan ili dva čoveka uzimani za svaki od pokazatelja u svakoj od 178 država) daleko premala za bilo kakav nepristrasan rezultat. Nađen je i problem u nedostatku transparentnosti načina na koji kadrovi koji rade na „DB“ izveštajima Svetske banka-IFC-a obrađuju podatke kako bi dobili rejting individualnih država, i način na koji dolazi do promene u rangu tokom vremena. Međutim, iako preporučuje različite procedure za odabir pokazatelja, i poboljšanu metodologiju istraživanja kako bi se ti podaci o pokazateljima dobili, pre samog objavljivanja od strane Svetske banke, IEG se nije bavila problemom štete koju pravi neispravna metodologija kojom se pripremaju „Doing Business“ izveštaji. Problem izobličenja institucionalne konkurencije između precedentnopravnih i građanskopravnih država prema tome nije rešen u inače korisnoj evaluaciji IEG grupe Svetske banke.

---

[3] http://www.uclouvain.be/269923.html

U implicitnom odricanju od TPP, Svetska banka-IEG (2008) priznala je, međutim, da bi hipotetična građanskopravna zemlja, koja bi kombinacijom najviših ocena po svakom od 10 pokazatelja koje imaju precedentnopravne zemlje, dostigla tek treće mesto u ukupnom rangu.

U svom izlaganju na našoj radionici 10. marta 2009, Viktorija Eliot (*Victoria Elliot*), glavni autor izveštaja IEG grupe Svetske banke 2008. godine, posebno je kritikovala pokazatelj zapošljavanja radnika (*Employing Workers Indicator – EWI*) u „DB" izveštaju, prepoznajući nedoslednosti između pažnje koju *EWI* pridaje troškovima zapošljavanja radnika i trvrdnje da se pri njegovoj izradi poštuju standardi Međunarodne organizacije rada (*International Labour Organisation – ILO*) (Eliot, 2009). U jednom uzbudljivom preokretu, 27. aprila 2009. godine Svetska banka objavljuje notu, u kojoj navodi da „pokazatelj *EWI* ne odražava politiku Svetske banke i ne bi trebalo da se koristi kao osnov za savetovanje povodom političkog smera, niti u bilo kojem programu za pojedinačnu državu kojim se daje pregled, ili ocenjuje razvojna strategija ili program pomoći u datoj državi recipijentu." Notom je izražena volja da se pokazatelj *EWI* isključi iz svih prethodnih Ocena državne politike i institucija Svetske banke (CPIA) (*World Bank Group's Country Policy and Institutional Asssssment*), da se *EWI* revidira, napravi novi pokazatelj – *Worker Protection Indicator* (pokazatelj zaštite radnika) (*WPI*), i da se od nove konsultantske grupe zatraži da pruži šire ideje po pitanju tržišta rada kako bi se promovisali propisi kojima bi se stvarala sigurnija radna mesta na kojima bi radnici bili adekvatno zaštićeni (Svetska banka IFC, 2009).

Ovi novi koraci pokazuju da iako Grupa svetske banke ostaje pri stavu da je „DB" izveštaj jedan od njenih „glavnih aduta" (Svetska banka IFC, 2009), ona je ipak prijemčiva za metodološku kritiku. Iz toga sledi da ima smisla proširiti kritiku i izvan ograničenog pokazatelja *EWI*, i staviti pod lupu i ostalih devet pokazatelja koji se koriste u izveštajima u svetlu nalaza IEG grupe Svetske banke, razviti nove pokazatelje koji bi bili od koristi u stvaranju pravca pravnih reformi, i zameniti metod prostog uprosečavanja pokazatelja pri stvaranju rang-listi država metodom ponderisanih pokazatelja koji bi imali težinu samo u skladu sa njihovom relevantnosti u ekonomskoj i pravnoj razvojnoj strategiji. Osnovne pretpostavke političke teorije LLSV grupe, religijska sociologija, ekonomski model i ekonometrijski pristup, koji nadilaze metode kojima se priprema „DB" izveštaj, sama LLSV grupa mora iscrpno da revidira koristeći sve kognitivne resurse svake od disciplina koje su tako smelo dodirnute, ili pod hitno da prestane da ih uzima u obzir.

II. Problemi teorije pravnog porekla (TPP) pod svetlom političkih nauka, sociologije, ekonomske nauke, prava i istorije

Akademske zajednice država koje su dotaknute ovom teorijom trebalo bi da pruže materijal za transparentno institucionalno takmičenje između precedentnog prava i građanskog prava. Kako LLSV i „DB" zauzimaju interdisciplinarni pristup, tako bi trebalo da radi i svaka rasprava koja ima za nameru da pruži kritiku o njihovim zaključcima, kao što bi trebalo da bude i sa bilo kojom političkom idejom koja je u suprotnosti sa njihovim preporukama. Kao što je slučaj kod svih diskusija koje su u vezi sa ekonomskim razvojem, za ovakvu raspravu potrebno je angažovanje politikologa, ekonomista, sociologa i naravno stručnjaka posvećenih pravnim naukama.

Ako bi „pravno poreklo" navodno trebalo da utiče na razvoj, posebna pažnja mora se posvetiti političkoj teoriji, teoriji međunarodnih odnosa, institucionalne ekonomije, teoriji

ekonomskog razvoja, ekonometriji, uporednom pravu, sociologiji prava, pravnoj istoriji i, posebno, istoriji neuspešnih i/ili uspešnih „transplantacija" pravnih sistema u drugu državu. Ovo proizilazi iz različitih metodoloških problema u pristupu LLSV grupe i Svetske banke na koje su se do sada objavljene kritičke analize fokusirale, među kojima su:

- Ekonomske anomalije, kao što su odabir pokazatelja u skladu samo sa političkom teorijom LLSV grupe, vremenski periodi uzimanja uzoraka se ne slažu sa periodom primene poređenih pravnih režima, i tretman „pravnih porekla" 152 države kao konstante, uprkos veoma različitih stepena integracije pravnih standarda u privrednom životu (Šmigelou, 2006, IEG Svetske banke, 2008)
- Veliko neslaganje, koje i sama LLSV (1999) i LLS (2007) grupa priznaje, između prosečnih dugoročnih privrednih performansi država „nemačkog pravnog porekla" od 1960-ih naovamo (koje statistički imaju korist od uključivanja od strane TPP Japana, Južne Koreje, Tajvana, Kine u „nemačku" grupu) u poređenju sa državama precedentnog prava, i „političke teorije" (LLSV, 1999) koju njeni autori i dalje zastupaju, i koja kaže da je kvalitet državne uprave u precedentnopravnim zemljama bolji
- Kognitivni nedostaci u pravnoj istoriji, posebno istoriji rimskog prava, kao što je njena prevashodna zabrinutost za zaštitu imovine (Robaj, *Robaye*, 1997) precedentnog prava, kao što su njegovi dugovi prema rimskom pravu (Hajek, *Hayek,* 1973), kao što je ekonomski liberalizam francuskog, nemačkog i japanskog pravnog sistema (H. Šmigelou, 2006)
- Sociologija religije zasnovana na tezi Roberta Patnama (Robert Putnam) da protestanti imaju više poverenja u nepoznate ljude nego katolici, ali očigledno opovrgljiva kao i protestantsko objašnjenje kapitalizma Maksa Vebera istorijom srednjovekovnih bankara kao što su Mediči, Fugers i Velsers, kao i savremenim japanskim i kineskim kapitalizmom (M. Šmigelou i H. Šmigelou, 1989). Iako poverenje investitora u menadžment preduzeća može da bude uslov za njihovu odluku da kupe akcije tog preduzeća i prema tome igraju funkcionalnu ulogu u ekonomskim performansama istog (Rou, *Roe*, 2006), teorija mehura i finansijska kriza pokazuju koliko disfunkcionalno takvo poverenje može postati, ako je zasnovano na iracionalnim očekivanjima, ili, kao u krizi *subprime* kredita, čak i ako je zasnovana na racionalnim očekivanjima usled nedostataka u modelima finansijskog inženjeringa (H. Šmigelou i M. Šmigelou, 2009; Rajnhart. *Reinhart* i Rogof, *Rogoff,*, 2008, 2009)
- Nedovoljna pažnja institucionalnoj ekonomiji ugovornog prava, posebno kodifikovanim podrazumevanim pravilima, koja smanjuju troškove platnog prometa i uravnotežuju sinalagmatičke interese proizvođača i potrošača, stanodavaca i stanara, poverilaca i dužnika (H. Šmigelou, 2006)
- slabosti u uporednom pravu, kao na primer kategorizacija južnoameričkih pravnih sistema među one „francuskog pravnog porekla" (Dam, 2006)
- propust da se razmotri teorija međunarodnih odnosa koja bi zahtevala pravljenje razlike između kolonijalnih transplantacija prava, što se desilo u većini zemalja u razvoju koje su pripadale bivšoj britanskoj i francuskoj imperiji, od dobrovoljnog učešća u evropskom pokretu kodifikacije u 19. veku, kao što je to slučaj kod Japana (Berkovic, *Berkowitz*, Pistor i Ričard *Richard*, 2003, H. Šmigelou, 2006)

III. Funkcionalni pristup „Pravu i ekonomiji“

Da bi se rasprava preusmerila u korist pravnih reformi u tranzicionim i zemljama u razvoju, čini se da je neophodno da se povrati prvobitna pažnja na institucionalnu ekonomiju, odnosno na ulogu smanjenja troškova prometa koju bi pouzdani ugovori i regulatorni okvir za slobodno tržište trebalo da imaju, uravnoteženjem interesa proizvođača i potrošača, stanodavaca i stanara, poverilaca i dužnika, poslodavaca i zaposlenih, akcionara, vlasnika udela i menadžmenta preduzeća. Precedentnopravne i građanskopravne tradicije – bez obzira na razlike u stilu i sudskoj praksi – dele posvećenost vladavini prava kao univerzalnog dobra. I jedna i druga tradicija su na najrazličitije načine bile prihvaćene u kulturama i privrednim uslovima pojedinačnih društava, uključujući i društva u svojim zemljama porekla. Potreba za pravom u današnjim tranzicionim i zemljama u razvoju podrazumeva očekivanje takve prilagodljivosti. Pod uslovom da odgovore na to očekivanje za prilagodljivošću, i precedentnopravne i građanskopravne tradicije mogu da posluže kao rezervoari funkcionalnih rešenja za pravne reforme u tranzicionim i zemljama u razvoju.

1. Funkcionalna analiza u oblasti prava, sociologije i ekonomije

Iako su stručnjaci za uporedno pravo koristili funkcionalnu analizu kao metod uporednog prava već dugo vremena (Daneman - *Dannemann*, 2006; Majkls *Michaels*, 2006), malo njih bi bilo sklono da u zbilji upotrebi ekonometrijske regresije na upadljivo ograničenom broju pokazatelja kao meru funkcionalnog kvaliteta precedentnog prava ili građanskog prava. Ipak, postoji rastuća svest da na izazov LLSV-a treba odgovoriti upravo u areni koju je LLSV odabrao, odnosno fundamentalnim sociološkim funkcionalizmom, kvantifikovanim pokazateljima lako merljivim uz pomoć ekonometrijskih regresija i kontrolisanim logaritmom bruto nacionalnog proizvoda po glavi stanovnika, ili drugih promenljivih poređenih zemalja.

U cilju da se poveže sa interdisciplinarnim pokušajem LLSV-a i njegovim širokim sociološkim referencama, moj suprug je predložio korišćenje kategorija sociološkog funkcionalizma Talkota Parsonsa (*Talcott Parsons*) kao grubih orijentira (H. Šmigelou, 2006). U prethodnim slučajevima, našli smo da su ove kategorije bile vrlo korisne u analizi izuzetnog privrednog rasta Japana između 1960-ih i 1980-ih. (M. Šmigelou i H. Šmigelou, 1989). Sigurno je da sociološki funkcionalizam Parsonsa nije zamena za rigorozne političke teorije, ekonomske analize, ili pravnu nauku. Parsonsov samoproklamovani eklekticizam je evidentan u njegovom kombinovanju teorije opšte ravnoteže zasnovane na alatima Pareta i Maršala (*Pareto, Marshall*) sa sociološkim objašnjenjem kulture, privrede i društva Maksa Vebera (Parsons, 1968). Ali, upravo samo ta kombinacija može da pomogne da se odgovori LLSV grupi. Naravno, 1960-ih i 1970-ih godina, postalo je moderno da se Parsonsova sociologija smatra kao deplasirana konceptualna kolekcija. Ali za sadašnju raspravu o odnosu između prava i ekonomije, ova kombinacija je od *prima facie* važnosti.

Parsonsove kategorije predstavljaju elementarne matrice neophodnih komponenti bilo kojeg održivog društva i mogu da posluže kao sistem ranog upozoravanja na sve previše redukcionističke pretpostavke. Parsons drži da svaki društveni sistem ili čin ima četiri funkcionalna uslova, odnosno: postignuće cilja, prilagođavanje, održavanje šablona i integraciju. U savremenim društvima, ovi zahtevi su ispunjeni od strane političkog sistema (gr. „*polit*“), privrede, kulture i prava (Parsons i Smelser, 1956). Na slici 1, ove funkcije su predstavljene jednostavnom matricom od četiri kvadrata.

Slika 1: Četiri funkcionalna zahteva društvenog sistema ili društvenog razvoja

1. **Postizanje cilja**	**2.** **Prilagođavanje**
3. **Održavanje šablona**	**4.** **Integracija**

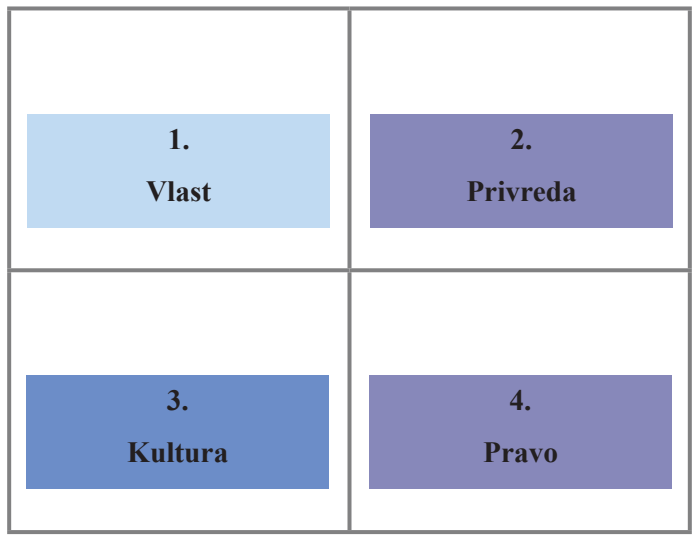
Četiri zahteva društvenog delovanja zavise jedni od drugih. Svaki od njih je i nezavisna i zavisna promenljiva. Ovo poziva na oprez u odnosu na previše sigurne pretpostavke o hijerarhiji važnosti između ove četvorke. Ovaj oprez je naročito važan ako se ova četiri zahteva podignu na viši nivo društvenih podsistema društva (vidi Parsona i Smelser, 1956). Slika 2 odmah objašnjava kako je ovakvo uzdizanje dogmatski ili ideološki osetljivo.

Slika 2: Četiri funkcionalna zahteva Društva (nacionalne države)

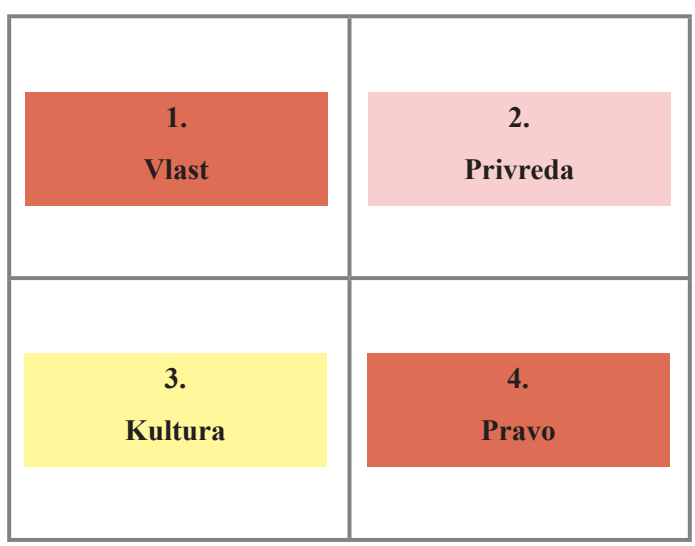
1. **Polit** **(vlast)**	**2.** **Privreda**
3. **Kultura**	**4.** **Pravo**

Najraširenije pretpostavke odmah padaju na um: anglosaksonske nacionalne države ističu 2 i 4 (slobodno tržište, snažnu vladavinu prava), dok kontinentalne evropske nacionalne države ističu 1 i 4 (velika vlada, obimni propisi). LLSV grupa izgleda da deli ovakav stav, pri čemu dodaje intrigantan naglasak na 3 kao faktor koji objašnjava razlike između 2 i 4, naime: anglosaksonska kultura podržava jaku privredu zasnovanu na snažnoj vladavini prava. Disocijativne kontinentalne kulture koreliraju sa velikim vladama, regulisanim tržištem i slabom privredom. U skladu s tim, lako je „obojiti“ Parsonsove kvadrate, kao na slikama 3. i 4.

Slika 3: Česte pretpostavke o anglosaksonskim privredama i društvima



Slika 4: Česte pretpostavke o građanskopravnim privredama i društvima



Naravno, dokazi do sada razmotreni bacaju sumnju na smele pretpostavke na ovom nivou opštosti. Ideološka neslaganja o navodnom rasedu između anglosaksonskih, odnosno precedentnopravnih, i kontinentalno-evropskih, odnosno građanskopravnih obrazaca je ovde „programiran".

Ali četiri funkcionalna zahteva Parsonsovog sociološkog funkcionalizma mogu se lako razbiti na više koncentrisane nivoe pravnih i privrednih sistema, kao na slikama 5. i 6. Na ovim nivoima, do sporazuma bi trebalo mnogo lakše doći. Malo njih će osporiti nesumnjivi cilj svakog pravnog sistema, tojest pravdu, kao na slici 5. Većina pravnih stručnjaka, osim preostalih predstavnika pozitivizma, priznaju da u interesu pravde, pravo s vremena na vreme mora da se prilagodi ekonomskim i društvenim razvojima. Većina ekonomista i praktičnije orijentisani pravnici će se takođe saglasiti da bi pravo trebalo da služi za smanjenje troškova prometa u privredi. Studenti profesora Knipera će zastupati da je kulturni kontekst funkcionalna potreba prava. A ko bi sumnjao da bi ova tri zahteva trebalo da budu integrisana u četvrti, odnosno visok standard poštovanja zakona njegovog sprovođenja?

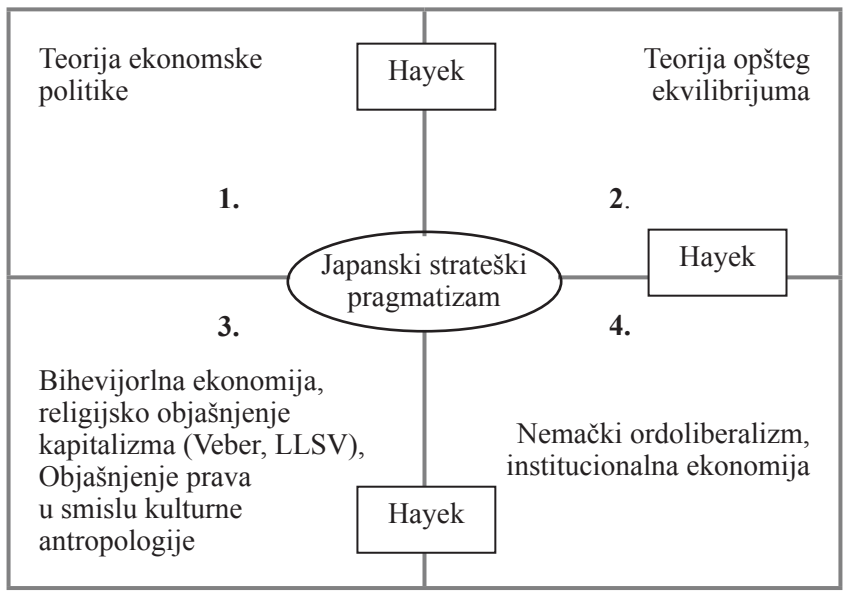
Slika 5: Funkcionalni zahtevi pravnih sistema

1. **Pravda za sve (nesporni cilj)**	**2.** **Prilagođavanja ekonomskom i društvenom razvoju, smanjenje troškova prometa**
3. **Mogućnost brzog odgovora na kulturni kontekst**	**4.** **Visok standard sprovođenja i poštovanja zakona**

Slika 6 Ilustruje podelu rada koja se dešava u ekonomiji u različitim školama ekonomske misli. Teorija ekonomske politike drži u žiži interesovanja dostizanje konkretnih ciljeva, kao što je držanje inflacije pod kontrolom, ohrabrivanje investicija ili angažovanje u reformama pravnog ambijenta na tržištu. Teorije opšte ravnoteže analiziraju kako se tržišta samostalno prilagođavaju impulsima kao što su promene cena. Bihejvioralna ekonomija objašnjava ekonomske obrasce izvan racionalnih očekivanja, kao što to radi Maks Veber u svom „protestantskom" objašnjenju kapitalizma i, kao što to, konačno, radi i LLSV. Naposletku, nemački posleratni „ordoliberalizam" i nova institucionalna ekonomija naglašavaju važnost pouzdanog pravnog okvira koji pomaže tržištima da ostanu konkurentna i funkcionišu na najnižim mogućim cenama troškova prometa.

Povremeno dolazi do dogmatskog razdora između ovih škola mišljenja. Protagonisti takvog razdora bi trebalo da razmisle o tome kako je japanski strateški pragmatizam sasekao suprotstavljene doktrine i doveo do izuzetnog privrednog rasta u Japanu od 1950-ih do 1980-ih.

Slika 6. Funkcionalna podela rada između različitih ekonomskih teorija



Slika 6. pokazuje da se, uprkos mnogim metodološkim problemima LLSV-a, njihova teorija ne može jednostavno odbaciti kao manifestacija „neoliberalnog" napada na pravne i ekonomske tradicije kontinentalne Evrope. Njena zasnovanost na bihejvioralnoj ekonomiji (kvadrat 3 na slici 6) je čvršća nego što izgleda pod zaslepljujućim svetlom preteranih pretpostavki i metodoloških problema ekonometrije TPP. Ipak, najsnažnije pobijanje TPP nudi metodološki čvrsta institucionalna ekonomija (kvadrat 5 na slici 6).

2. Kako je teorija pravnog porekla zanemarila teoriju ugovora

TPP svoj sistem gradi na uticajnom pobijanju efikasne tržišne paradigme u finansijama Andreja Šlajfera (Andrei Shlefier) i Roberta Vishnija (Robert Vishny). Njihovo istraživanje bihejvioralnog finansiranja ih je dovelo do zaključka da tržišta ne eliminišu automatski poremećaje cena zahvaljujući pretpostavljenom prisustvu velikog broja „arbitražera", ili mešetara. Našli su da sam ograničeni broj stručnih insajdera koji imaju pristup velikom i „strpljivom" kapitalu jesu sposobno da prevagnu nad masama neefikasnih „trgovaca koji samo prave buku" i to uz pomoć „kontraških" strategija u dugom vremenskom periodu (Šlajfer, Višni, 1997). Otuda, TPP u žižu interesovanja prirodno stavlja pravila po kojima kapital dolazi na finansijska tržišta. Pitanje je da li sme tako smelo, kao što i radi, da ustvrdi da je anglosaksonsko pravo ekonomski superiorno nad građanskim pravom. Kao što smo već videli, TPP zastupa mišljenje da iz razloga protestantske sociologije, precedentno pravo favorizuje poverenje neinformisanih vlasnika kapitala u stručne profesionalce koji deluju kao agenti u najboljem interesu svojih nalogodavaca. Religijska sociologija koja se ovde koristi u ovom argumentu jednako je sporna kao i tvrdnja da je građansko pravo, još od rimskog doba, izraz volje vladara i katoličkog nepoverenja prema nepoznatima. Dovoljno je skrenuti pažnju na

građansko pravo protestantske Holandije, ili precedentno pravo katoličke Irske. I pored svega, postoji nesporna vrednost u važnom pokušaju TPP da pokuša ekonometrijsko merenje važnosti prava u ekonomiji.

U prethodnim vremenima, austrijska ekonomija i nova institucionalna ekonomija su iz sličnih sumnji u teoriju opšte ravnoteže došle na sličan zaključak da pravo ima ključnu ulogu u privrednom razvoju. Neki od saradnika na TPP citiraju Fridriha fon Hajeka (*Friedrich von Hayek*), eminentnog predstavnika austrijske škole ekonomije, kao referencu za svoju pretpostavku o ekonomskoj superiornosti precedentnog prava nad građanskim pravom (Mahoni *Mahoney*, 2000, LLS, 2007). Takvo pozivanje na njega, međutim, ne doživljava potvrdu pri pažljivijem čitanju Hajekovih spisa. To je zato što u svom uticajnom delu „Pravo, zakonodavstvo i sloboda" (1973), Hajek izričito odbacuje autoritarno tumačenje rimskog prava. On ističe da je rimsko pravo duboko uticalo na sve zemlje zapadnog prava, uključujući i englesko precedentno pravo, i da je Justinijanov zakonik (iz koga i francusko i nemačko pravo u različitoj meri pozajmljuju) zapravo sažetak rimske pravne nauke još iz vremena Seneke i Cicerona i da propisuje pravni postupak veoma sličan kasnijem precedentnom pravu. Iako je Hajek u osnovi davao prednost postupku postepenog stvaranja prava od strane sudija, jeste upozorio da presedani precedentnog prava, ukoliko ih postavljaju i stalno iznova utvrđuju sudije-pozitivisti, ili sudije koji pripadaju određenoj interesnoj grupi, mogu da dovedu do stvaranja „jednosmernog" prava koje ne reaguje na promene u privredi i društvu. Naglašavao je da takvo „jednosmerno" pravo potrebno korigovati zakonodavnim aktima.

Iako su Hajekovi argumenti sročeni tako da pravo i ekonomiju podignu na nivo filozofije nauke kritičkog racionalizma, što se jasno vidi iz njegovog govora na dodeli Nobelove nagrade (Hajek, 1974; Hit, *Heath,* 2009), nova institucionalna ekonomija razvila je škrtiji pristup funkciji prava u ekonomiji. Ronald Koas (*Ronald Coase*) i Daglas Nort (*Douglas North*) dobili su Nobelovu nagradu 1991, odnosno 1993. godine, za svoja istraživanja o tome kako punovažni ugovori (Koas, 1937, 1988), i, opštije gledano, pravni okviri kojima se sprečava korupcija, umanjuje asimetrija informisanosti, obezbeđuje infrastruktura za izvršenje ugovora i rešavanja sporova, itd. (Nort, 1990) može da dovede do smanjenja troškova ekonomskog prometa. Institucionalna ekonomija nije napravila nikakvu bazičnu razliku između anglosaksonskog prava i kontinentalnog prava, ili između prava koje prave sudije i pisanih zakona.

I dok TPP ima svoje snažne tačke u oblasti finansijskih tržišta, mnogo manje se fokusira na temelj ekonomskog prometa, odnosno ugovore. Iako ona uzima da su snažna pravila o izvršenju ugovora važan pokazatelj uporednog kvaliteta pravnih porekla, čini se kao da je ne zanima kako pravo može da olakša zaključivanje ugovora. Prilično upadljivo deluje to što izgleda kao TPP pokušava da zaobiđe teoriju ugovornog prava.

U klasičnog teoriji ugovornog prava, zaključen ugovor u potpunosti određuje prava i obaveze ugovornih strana iz ugovora za sve moguće buduće situacije u realnom životu. Ovaj pojam zaista odražava klasičan zahtev anglosaksonskog prava o potpunoj saglasnosti ugovornih strana o svakom pravu ili obavezi koje mogu postati predmet parnice. Međutim, otkada je Oliver Vilijamson (Williamson) priznao da je bilo nemoguće, ili neefikasno u pogled troškova prometa pisati ugovore koji pokrivaju svaku eventualnost, mikroekonomisti i pravni naučnici tragaju za rešenjima kako za ugovore „od slučaja do slučaja", tako i za tipske ugovore za specifične poslovne odnose.

I dok su mikroekonomisti analizirali cenu prometa i podsticajne efekte ovog problema, američki pravni stručnjaci su usmerili pažnju na to kako podrazumevana pravila koje zakoni sobom nose popunjavaju pravne praznine nepotpunih ugovora. Građanski i trgovački zakonici država građanskog prava obezbeđuju podrazumevana pravila za većinu ekonomski važ-

nih tipova ugovora (prodaja, iznajmljivanje, zapošljavanje, usluge, građevinarstvo, osiguranje, zajmovi,itd). U precedentnopravnim zemljama ona su izuzetak, od kojih su najvažniji kodifikacije o prodaji robe i usluga. (Zakon o prodaji robe Ujedinjenog Kraljevstva i Jedinstveni privredni zakonici SAD). Sudije u državama precedentnog prava obično priznaju samo jasno iznesen tekst ugovora. Osim toga, zahtevaju dokaz potpune saglasnosti o bilo kojem pravu ili obavezi koje bilo koje strana tvrdi da joj se duguje u kasnijim parnicama. Ako je tekst ugovora nejasan ili nepotpun u smislu teorije ugovora, prava i obaveze ugovornih strana biće u toj meri nepotpuni. Ugovor može čak rešenjem proglašen za nevažeći zato što je nedovoljno jasan. Samo retko sudije precedentnog prava pokušavaju da sačuvaju nepotpun ugovor od nesigurnosti tražeći pravila „implicitno sadržana u zakonu", koja mogu eventualno da posluže „podrazumevani uslovi ugovora" (Farnsvort, *Farnsworth*, 2008).

Mi osporavamo da ova značajna razlika u ugovornom pravu ove dve pravne porodice može da dâ pravo TPP da pretpostavi da je precedentno pravo ekonomski superiorno u odnosu na građansko pravo u širem smislu. Čak i ako priznamo da precedentno pravo obezbeđuje superiorno okruženje za finansijska tržišta time što favorizuje veći protok kapitala profesionalnim tržišnim insajderima, građansko pravo može da dobije poene time što će nudi siguran i jednostavan pravni okvir za zaključivanje ugovora u realnom sektoru privrede. Obezbeđivanje podrazumevanih pravila za sve privredno važne tipove ugovora od strane građanskih zakonika kao javnih dobara jednog društva nudi dve ključne ekonomske prednosti. Prva je da su kodifikovana podrazumevana pravila javno dostupna svima i time predupređuje asimetrija u informisanosti do koje redovno dolazi u državama precedentnog prava kada jedna ugovorna strana sastavlja obiman ugovor težeći ka „potpunosti" a druga strana je primorana da ga prihvati. Druga prednost pravno uređenih podrazumevanih pravila je da oni, kao javno dobro, štede ugovornim stranama troškove prometa koji nastaju u pokušajima da se napiše potpun ugovor čak i kod rutinskih poslovnih aktivnosti. Ovo je možda bio neophodan, ako ne i dovoljan uslova (H. Šmigelou, 2006), uslov da države građanskog prava nemačkog pravnog porekla, po sopstvenom priznanju TPP (Mahoni, 2000, LLS, 2007), nadjačaju po ekonomskim performansama države precedentnog prava između 1960. i 2000. godine.

3. Oblasti istraživanja u projektu „Institucionalna konkurencija između zemalja precedentnog prava i građanskog prava u državama u razvoju i tranziciji" na Univerzitetu u Luvanu

Nemački i japanski građanski zakonici predstavljaju posebno zanimljiv materijal za komparativnu funkcionalnu analizu s obzirom da su prošli ispit vremena u uslovima koji su teži u odnosu na one u kojima se tranzicionih zemalja danas nalazi. Oni su obezbeđivali trenutno dostupan institucionalni okvir za oživljavanje privrede dveju država koje su bile teže pogođene u Drugom svetskom ratu nego bilo koja druga država u bilo kom predašnjem ratu (H. Šmigelou i M. Šmigelou, 1989; H. Šmigelou, 2006). Na prvi pogled, čini se da su ovi zakonici bolje osposobljeni da „lecnu"privredni razvoj u tranzicionim i zemljama u razvoju nego što je strategija čekanja da spori proces prava koga stvaraju sudi koje bi emuliralo istoriju precedentnog prava. Podrazumevana pravila nude se ovim zakonicima svim građanima koji inače ne bi imali sredstava za pravnu pomoć neophodnu za pisanje konkretnih odredbi izvučenih iz obimnih zbornika presedana, koje je potrebno konsultovati, kako bi se ugovori načinili bezbednim, po visokoj ceni, radi eventualne parnice pred sudovima precedentnog prava.

Suprotno tome, pod uticajem pokreta za zaštitu potrošača u SAD, privatna autonomija ugovornih strana u građanskim zakonicima Francuske i Nemačke značajno je umanjena zakonodavnim rešenjima Evropske Unije koja zahtevaju od država članica da revidiraju svo-

je građanske zakonike tako da jedan od uslova za punovažnost ugovora o kupoprodaji moraju da budu složene procedure koje poskupljuju troškove prometa kako proizvođačima, tako i potrošačima (Bokur *Boucart,* 2005, Rizenuber *Riesenhuber*, 2007).

Visok nivo zaštite poverilaca i efikasan sistem izvršenja ugovora u Nemačkoj i Japanu je i sama LLSV grupa potvrdila, što je jedna od nekonzistentnosti koja baca sumnju na tačnost jednog šireg spektra njihovih zaključaka. Zaštita poverilaca u kompanijskom pravu Nemačke i Japana je, pokazalo se, postala čak preveliko javno dobro. Na kraju je počela da se kritikuje kao prepreka za osnivanje novih preduzeća te je počela da bude umanjivanja, ili se trenutno umanjuje, u obe ove države (Baum, 2009).

Zaštita imovinskih prava i naplata dugovanja su jedna od glavnih tema o na koje i LLSV i „DB" izveštaj obraćaju pažnju. „Indeks lakoće registracije imovine" (*RPI – Registering Property Index*) je među sedam, od ukupno 10, pokazatelja kod kojih „DB" izveštaj na najvišu lestvicu stavlja države gde na prvi pogled postoji najmanji broj potrebnih dozvola i gde su troškovi registracija najniži. Ipak, uporedna ekonometrijska analiza dva najveća sistema raspolaganja i sticanja vlasništva pokazala je da naizgled jednostavni sistemi upisa imovinskih prava kakvi su u Americi, Engleskoj, i Francuskoj, gde je dovoljno ostaviti u depozit okružne kancelarije za arhiviranje ugovor o kupoprodaji kako bi se steklo vlasništvo nad nepokretnosti, na kraju dovode do mnogo skuplje i mnogo manje sigurne procedure raspolaganja imovinom nego što je to slučaj sa javnim registrom kakav postoji u Australiji, Danskoj, Nemačkoj, ili Španiji, onda kada je pravo vlasništva samog prodavca upitno. To je zbog toga što kancelarije za arhiviranje moraju da prihvate sva potpisana dokumenta bez obzira na njihovu pravnu valjanost i njihov sukob sa nekim prethodno uspostavljenim pravima, javni upis registracije nekog novog prava zahteva prethodno brisanje svih starijih prava koja mu protivreče.

U većini građanskopravnih država gde postoji sistem javnog registra, javni beležnik, ili notar, koji overava prodaju nepokretnosti, ili hipoteku, po zakonu je obavezan da ispita punovažnost ugovora i potvrdi nepostojanje protivrečnih prava pre nego što ugovor podnese registru. U američkom sistemu arhiviranja, ispitivači vlasništva obavezni su da pregledaju sve tapije koje se odnose na konkretnu zemljišnu parcelu a nastala su u prošlosti, kao i da potvrde pravnu valjanost dokumenta koji se arhivira. Ovaj posao je za ispitivače vlasništva unosan, ali rizik od pravne nesigurnosti ostaje na njihovim klijentima. U krizi *subprime* kredita, bili su milioni hipoteka spakovanih u hartije od vrednosti derivirane iz imovine za koje je bilo potrebno ispitati pravo vlasništva kada su zajmoprimci *subprime* kredita postali nesposobni da vraćaju dug. Ernando de Soto (*Hernando de Soto),* peruanski naučnik koji se bavi nedostacima u stvarnom pravu zemalja u razvoju, uporedio je sistem beleženja u SAD sa disfunkcionalnim uslovima u Južnoj Americi (De Soto, 2009). On se pokazao kao velika strukturalna prepreka za brzi izlazak iz krize. Evidentno je da pokazatelj *RPI* mora da se refokusira na uporedne prednosti sistema javnog registra kada razmatra bilo koju državu, koja se , kao SAD, oslanja na finansijske inovacije radi ostvarivanja privrednog razvoja. Samo sistem javnog registra omogućava sekuritizaciju hipoteka i trgovinu njima mogućom, s obzirom da svaki zajmodavac, svaki investitor i svaki imalac hipoteke i sličnih stvarnih prava može da proveri identitet i sadržaj podataka o datoj stvari u bilo kom trenutku u registru. Interesantno je da se novi stvarnopravni zakon Kine odlučio za sistem javnog registra (Rem i Džulijus *Rehm, Julius,* 2009*).*

Zaštita akcionara od korporativnih insajdera bila je u početku još jedna od važnih oblasti u kojoj su LLSV pretpostavili da su države precedentnog prava u prednosti u odnosu na građanskopravne države. Podstaknuti studijama koje su iznele na videlo da su francuska i nemačka akcionarska prava funkcionalno jednaka precedentnopravnim antidirektorskim pravima (Kuls *Cools,* 2005, Brendl *Braendle,* 2005), LLSV grupa je zamenila standard antidi-

rektorskih prava indikatorima kao što su zakoni o hartijama od vrednosti koji regulišu nova pitanja o pravima i kompanijskim zakonima koji sprečavaju insajdersko trgovanje.

I SAD i Ujedinjeno Kraljevstvo su priznale potrebu da reformišu pravila o preuzimanju preduzeća još 1960-ih godina. S obzirom da su različite interesne grupe, koje su odražavale različite ekonomske strukture u te dve države (u SAD industrijski sektor, u UK-u finansijski) podržavale tu reformu, rezultati iste su veoma različiti, tako da u SAD akcionari sada mogu da odlože i spreče preuzimanje, dok je UK reformom praktično svaki pokušaj za tim onemogućen. U različitim kombinacijama, Francuska, Nemačka i Japan usvojili su elemente bilo jedne, bilo druge, ili obe reforme. U ovoj oblasti više ne postoji klasična podela na precedentno pravo i građansko pravo (Baum 2009). Štaviše, proverom uz pomoć logaritma BNP-a po glavi stanovnika ne potvrđuje se superioran kvalitet niti američkog niti britanskog rešenja u poređenju sa korporativnim pravnim režimom građanskopravnih država uzetih u grupi. Kao što je već pomenuto, sama LLSV grupa priznala je da su nemački i japanski prosečni privredni pokazatelji prevazišli američke i britanske od 1960. godine naovamo, odnosno od reformi korporativnog prava u SAD i UK.

Nadmoćne dugoročne privredne performanse Nemačke i Japana mora da su zbog toga i zanimljivije s tačke gledišta LLSV, s obzirom da je finansijski sektor ovih dveju država okarakterisan posrednim finansiranjem korporativnih investicija kroz banke, pre nego neposrednim finansiranjem sa tržišta kapitala (Šmigelou i Šmigelou, 1989). Posredno finansiranje je smatrano kao nazadno od strane generacija ekonomista i stoga nije čudno što LLSV uzimaju model tržišta kapitala koji je prevalentan u SAD i UK kao aksiomatski standard. Međutim, skorije analize finansijskog posredovanja zauzimaju uravnoteženiji stav, nalazeći valjanost u sposobnosti banaka da smanje asimetrije u informisanosti između pružalaca i korisnika kapitala na bolji način nego tržišta kapitala, da „upiju" međuvremenski rizik štednje domaćinstava, i da nadgledaju performanse upravnih organa malih i srednjih preduzeća na način poznat kao „povezano bankarstvo" („*relationship banking*"). Finansijsko posredovanje „stare škole" od strane komercijalnih banaka je naposletku možda bilo i funkcionalnije od svih onih „inovativnih" načina sekuritizacije kojima su vetar u leđa duvale investicione banke iz SAD.

Ipak, kakva god konačna istorijska ocena ovih razlika u finansijskim sistema na kraju bude bila, oni se više ne mogu smatrati da potiču od nekog konkretnog „pravnog porekla". To stoga što je Francuska načinila krupne korake u procesu uklanjanja posrednika, što su MMF i Svetska banke preporučili kao globalan standard. Sekuritizacija, i na aktivnoj i na pasivnoj strani francuskih nefinansijskih privrednih sektora, ukazuje na to da je Francuska započela postupak promene svog finansijskog sistema zasnovanog na pozajmicama banka u sistem zasnovan na tržištu kapitala još od 80-ih godina prošlog veka.

Najlošiji rezultati nakon regresije podataka Francuska i Nemačka dobile su u „Doing Business" izveštaju Svetske banke-IFC iz 2008. godine po pokazatelju „zapošljavanje radnika" (*Employing Workers Indicator),* gde se rangiraju na 144, odnosno 137. mestu (od 178 država). Statistički uticaj ovog indikatora na neponderisani prosek 10 indikatora u Izveštaju umnogome je zaslužan za skromno pozicioniranje Nemačke na 20. mesto, i Francuske na 31, na ukupnoj rang-listi, dok zemlje precedentnog prava koje nude slobodu u zapošljavanju i otpuštanju radnika drži prva četiri mesta lestvice. Kao što je već pomenuto, evaluacija „Doing Business" izveštaja od strane IEG grupe Svetske banke (2008) izdvaja ovaj pokazatelj kao najznačajniji zajednički negativni činilac u rangiranju evropskih građanskopravnih država, čak i kada bi se skandinavske države kategorizovale kao građanskopravne. Ipak, radni propisi nisu deo građanskog zakonika ni jedne od ove dve pomenute države. Oni su posledica posebnih socijalnih propisa koji odražavaju politiku distribuirane pravde i/ili Kejnzijanske pojmove automatskih stabilizatora potražnje u „zrelim" ekonomijama. Izuzev zaostalih pri-

mera doživotnog zapošljavanja i primanja zasnovanih na vremenu provedenog u firmi, u Japanu je tržište rada je mnogo manje rigidno, iako je Japan kategorizovan kao građansko-pravna država. Ovo sugeriše da je tržište rada kategorija koja odaje političku teoriju LLSV grupe i trenutnu ekonomsku analizu Svetske banke, ali to ne radi konzistentno kada je u pitanju institucionalna konkurencija između precedentnog prava i građanskog prava.

Evidentno je da se broj pokazatelja kojima se poredi kvalitet „pravnog porekla" mora povećati. Štaviše, zasebna vrednost svakog od pokazatelja se gubi ako se svi pokazatelji jednostavno uproseče pri rangiranju država u izveštajima Svetske banke. Potrebno je da se ponderišu kako bi se dobili smisleni odgovori na svako od političkih pitanja koje tranzicione i zemlje u razvoju moraju da postave sebi u potrazi za funkcionalnim rešenjima svojih pravnih reformi.

Nivo i raspoređivanje troškova parnice kao i rashoda za pravne savete nisu samo važni za merenje lakoće pristupa pravnim sredstvima već i kao važan uslov za vladavinu prava. Ovi pokazatelji takođe predstavljaju i važan deo ukupnih troškova prometa u smislu institucionalne ekonomije. Ovo je važno pitanje kada se istražuje institucionalna konkurencija među različitim „pravnim poreklima" pravnih saveta koje tranzicione i zemlje u razvoju dobijaju. U svetlu najvidljivijih razlika između UK i SAD, kao i između država Južne Amerike, Nemačke i Japana, referentnih pravila o sudskim troškovima i honorarima za pravne savete, pravljenje proste dihotomije između precedentnog i građanskog pravnog sistema ni u ovom slučaju neće biti od pomoći.

Institucionalna konkurencija između precedentnog i građanskog prava imala bi mogućnost da dovede do fokusiranijeg izbora političkih strategija u tranzicionim i zemljama u razvoju ako bi poređenje njihovih funkcionalnih kvaliteta identifikovalo šta je to što imaju zajedničko, pored onoga što ih čini različitim (Cvajgert i Koc, *Zweigert* i *Kotz,* 1998; Daneman, *Dannemann,* 2006*)*. Zaista, najvažnija odlika u odnosu između građanskog prava i precedentnog prava jeste sve šira uloga zakonodavnog prava u precedentnopravnim državama i rastuća važnost prava kojeg prave sudije u građanskopravnim državama. U modernim društvima kakva su SAD, UK, Francuska, Nemačka i Japan (da navedemo samo neke, odnosno najvažnije države donatore pomoći tranzicionim i zemljama u razvoju), postoji snažna interakcija između zakonodavne i sudske vlasti. Sudske presude popunjavaju praznine u zakonodavstvu ili čak ispravljaju disfukncionalne zakonodavne norme u građanskopravnim državama. Nasuprot tome, pisani zakoni u precedentnopravnim državama obavezuje sudiju na uži način nego što to rade građanskopravni zakonici koji sudijama pružaju dosta mogućnosti da postanu „izvori prava", zahvaljujući brojnim „opštim odredbama" (Daneman, 2006; H. Šmigelou, 2006; H. Šmigelou, 2009). Istraživanje ovih funkcionalnih interakcija između dve, ili čak tri grane iz Monteskjeove podele vlasti, kao i savetodavna mišljenja zasnovana na takvom istraživanju su od krucijalne važnosti za tranzicione i države u razvoju u reformi njihovih pravnih sistema.

IV. Analiza neuspelih i uspešnih „transplantacija" pravnih sistema

Kao što su Berkovic, Pistor i Ričard (*Berkowitz,Pistor,Richard*) (2003) pravilno zaključili, „pravno poreklo" samo po sebi nije dovoljan pokazatelj kvaliteta sistema vladavine. Kao po pravilu, kolonijalni metod „transplantacije" pravnog sistema u jedno društvo nikako nije bio siguran način da se postigne uspešan privredni razvoj. U 19. veku, čitavo precedentno

pravo je kodifikovano kako bi se ubrzala njegova difuzija u celokupnoj Britanskoj imperiji, a ponajviše u Indiji. A ipak, trenutni premijer Indije Manmoan Sing (*Manmohan Singh*), jedan od retkih obrazovanih ekonomista među šefovima vlada na svetu, predstavio je veoma oštru kritiku proteklih razvojnih neuspeha Indije u svom obraćanju povodom pedesetogodišnjice nezavisnosti Indije 2007. godine. Svetska banka je 2006. godine rangirala Indiju, najveću precedentnopravnu državu, na 173. mesto od 178 država kada je u pitanju izvršenje ugovornih obaveza, čime je bačen ozbiljna sumnja na konzistentnost paušalno iznetih pretpostavki o nadmoćnosti precedentnog prava u poređenju sa građanskim pravom.

Paradigma uspeha u istoriji pravnih transplantacija, i to samo ako je „transplantacija" pravi izraz za to, jeste Japan, koji je selektivno iskoristio, nakon mnogo unutrašnjih rasprava, elemente francuskog i nemačkog građanskog prava za sopstvene građanske i trgovinske zakonike 1890-ih godina. Zapravo, sam zakonodavni postupak koji je doveo do usvajanja ovih zakonika u Japanu je visoko preporučljiv za današnje pravne reforme u tranzicionim i zemljama u razvoju. Ovaj postupak je započeo pisanjem celokupnog građanskog i trgovinskog zakonika od strane francuskog pravnog naučnika Emila Gustava Boisonada (*Emile Gustave Boissonade*) i odbacivanjem njegovih nacrta od strane grupe japanskih pravnih stručnjaka koji su prednost davali engleskoj jurisprudenciji. Zatim je došlo do osmogodišnje diskusije među japanskim pravnim stručnjacima i zakonodavcima. Postupak je zatim krenuo novim pravcem nakon povratka brojnih japanskih pravnika sa studija prava u Nemačkoj, gde su imali priliku da prate široku debatu o različitim nacrtima nemačkog građanskog zakonika, koji je stupio na snagu tek 1900. godine. Postupak se završio usvajanjem sopstvenog građanskog i trgovinskog zakonika Japana 1897, odnosno 1899. godine koji su odražavali ona rešenja kojima je japanska stručna javnost davala prednost birajući između različitih funkcionalnih opcija u svakom od poglavlja zakonika (H. Šmigelou, 2006). U današnjem diskursu o politici razvoja, autonomni kvalitet ovog procesa bi se mogao nazvati „vlasništvom", odnosno Japan je sam bio „vlasnik" projekta svoje reforme.

Kina je evidentno takođe pratila sličan obrazac u svom dijalogu sa Zapadnim partnerima o vladavini prava od ranih 1990-ih godina. U projektovanju zakona kao što su zakoni o zaštiti patenta, o ugovorima, i u skorije vreme, čak i o prometu nepokretnostima, ona drži visok nivo „vlasništva" u tome što preduzima inicijativu u organizaciji i vođenju institucionalne konkurencije između rešenja iz precedentnopravnih i građanskopravnih država. Rasprave koje se vode su odužene i obraća se pažnja na detalje. Politička teorija LLSV grupe, tojest pravni dogmatizam u pogledu građanskog prava u Kini čini se da nema neku težinu u diskusijama o zakonodavnom formatu reforme. Ceni se funkcionalna analiza. Odluke se donose sa strateškim pragmatizmom (H. Šmigelou i M. Šmigelou, 1989), i one su spremne za prilagođavanje u budućim fazama razvoja tržišta i pravnoj reformi. Danas, međutim, nivo izvršenja i poštovanja novih kineskih zakona je i dalje neizvesna (Dam, 2006). Ali, s druge strane, postoji šansa za kontinuiranu institucionalnu konkurenciju između funkcionalnih rešenja precedentnopravnog odnosno građanskopravnog porekla. Kako kineska privreda i njen politički sistem evoluiraju, raste potražnja za pravom. Japanska istorija legalizacije i modernizacije može biti od praktične koristi u tom smislu (Hirovatari, *Hirowatari*, 2000). *Mutatis mutandis*, slična situacija prisutna je u Vijetnamu, Laosu, i Kambodži.

U zemljama Istočne Evrope, Rusiji, na Kavkazu, i centralnoj Aziji, početni veliki entuzijazam i prijemčivost prema pomoći u pravnoj transformaciji od strane savetnika iz precedentnopravnih država, a posebno iz SAD, ustupio je mesto žaljenju zbog kašnjenja i neuspeha pravnih reformi, kao i zbog njihovog podrivanja usled korupcije (Blek, Krakman i Tarasova, *Black, Kraakman, Tarassova*, 2000). Berkovic, Pistor i Ričard (2003) zaključili su da bi od ideje transplantacije trebalo odustati u celosti.

Neuspeh većine pokušaja kolonijalne transplantacije prava i obilne američke ponude „šablona“ za pravnu reformu u Rusiji i istočnoj Evropi 1990-ih godina navodi nas na zaključak daje potrebno naći nov metod za korišćenje bilo precedentnog, bilo građanskog prava kao izvore saveta za pravne reforme gde god da se one u svetu sprovode. Činjenice pokazuju da bi metod „transplantacije“ trebalo zameniti onim što bismo mogli da nazovemo „metod diskursa“ kod kojeg bi države donatori stupile u međunarodnu pravnu saradnju sa tranzicionim i zemljama u razvoju, dok bi ove potonje zadržale „vlasništvo“ nad svojim pravnim reformama.

Zemlje u razvoju zaslužuje ne manju pažnju od tranzicionih zemalja. Ovo bi moglo da znači da zapravo sada kolonijalne transplantacije prava postaju predmet reforme. Saveti iz SAD-a koriste se u pravnim reformama južnoameričkih država sa španskom građanskopravnom tradicijom. To je takođe slučaj i sa nemačkim političkim fondacijama. Japan je pomagao Kambodži u sastavljanju novog građanskog zakonika kojim bi se zamenio kolonijalni pravni „transplant“ iz Francuske. Čak i u takvim slučajevima, otvorena institucionalna konkurencija između izvora savetodavnih mišljenja precedentnog i građanskog prava bi mogla da proizvede funkcionalne rezultate.

Analiza pravnih reformi u tranzicionim i zemljama u razvoju moraće da se proširi na ekonomsku korist, društvene probleme i kulturni kontekst. Skoriji kineski pokušaji da svoj dinamični privredni razvoj dopune jednim pravim, celokupnim sistemom socijalne zaštite po evropskom modelu je jedan primer koji demonstrira ovu potrebu (Ženg, *Zheng,* 2008). Drugi primer je rasprava koja se vodi u Mongoliji o tome da li da se dozvoli, ili ne, da zakon o zemljištu podrije tradicionalni nomadski način korišćenja zemljišta parcelizacijom i liberalizacijom prodaje istog (Kurumisava, *Kurumisawa*, 2010).

Dok se funkcionalni kvaliteti precedentnog i građanskog prava vide kao pitanja za same Zapadne države donatore, ekonomske, društvene i kulturne dimenzije pravnih reformi u tranzicionim i zemljama u razvoju zahtevaju suštinski analitički doprinos naučnika i onih koji kreiraju politiku, a potiču upravo iz država koje su u procesu reforme.

V. Poređenje funkcionalnih kvaliteta pravnih institucija unapređenom metodologijom

Da bi se izmerili troškovi prometa i uporedile makroekonomske performanse precedentnopravnih i građanskopravnih država, ekonometrijska i makroekonomska analiza moraće da se primeni na vremenske periode od 200 godina u slučaju francuskog *Code Civile* i od 100 godina u slučaju nemačkog BGB-a i japanskog građanskog zakonika. Za slučajeve skorijih reformi, kao što su reviziji kompanijskog prava u SAD-u i UK-u 60-ih godina prošlog veka, kao i nemačkih i japanskih reformi, koje su usvojile različite elemente američkih i britanskih šablona, vremenski periodi moraju se podesiti u skladu sa konkretnim vremenom njihovog odvijanja.

Komparativna statika grupe LLSV i ekonometrijska metodologija „DB“ izveštaja moraju se zameniti dinamičnom panel analizom kako bi se snimio uticaj pravnih institucija na privredne performanse kroz varijacije u poslovnim ciklusima. Dostupni podaci o privrednim performansama svih 178 država koje obuhvata „DB“ izveštaj moraju se prekontrolisati na pristrasnosti kao što su visoko bogatstvo resursima, migracija, specifični režimi korišćenja zemljišta, finansijsko posredovanje nasuprot finansiranju preko tržišta kapitala, itd. (Busekin, Ngendakurjo, *Boucekkine*, *Ngendakuryo;* H. Šmigelou, M. Šmigelou, u pripremi).

Finansijske krize koje se periodično događaju a potiču iz nedovoljno nadgledanih tržišta kapitala i nepokretnosti u SAD-u i UK-u moraju se analizirati jednako iscrpno kao i rigidnosti na tržištu rada građanskopravnih država sa tačke gledišta institucionalne ekonomije, bez maskiranja šablona koji su prisutni neponderisanim uprosečenjima koji ne objašnjavaju privredne performanse. Bliže rečeno, kriza *subprime* kredita postavlja izazov pred ugovorno pravo, stvarno pravo i izvršno pravo, kao i računovodstvene propise i precedentnog i građanskog prava i podstiče ih da se institucionalno takmiče u pronalaženju najefikasnijeg i najbržeg načina izlaska iz krize.

Oblasti institucionalne konkurencije koji zaslužuju posebnu pažnju u smislu troškova prometa i funkcionalnih uloga za privrednu efikasnost jesu:

- Ugovorno pravo
- Stvarno pravo
- Kompanijsko pravo
- Propisi o tržištu rada
- Finansijska regulativa
- Parnični postupak, upravni postupak
- Propisi koji uređuju pravne profesije
- Sudski troškovi, advokatske tarife i drugi rashodi za pravne usluge
- Uloga rejting agencija i informacije o dužnicima
- Kontrolni režimi spoljne trgovine i spoljnjeg kapitala

VI. Zaključak

Opovrgavanje najsmelijih pretpostavki „teorije o pravnom poreklu“ i neophodna kritika njenih ekonometrijskih metoda ne bi trebalo da nas dovede do zaključka da je ekonomska analiza prava jedan eksternalitet koji bi pravni naučnici trebalo da izbegavaju. Čak nasuprot, institucionalna ekonomija je snažno priznavanje krucijalne uloge koje pravne institucije, funkcionalno sudelujući sa kulturnim kontekstom, igraju u ekonomskoj teoriji i privrednom razvoju. Pravni naučnici, pravni praktičari, i agencije za međunarodnu pravnu saradnju bi trebalo da iskoriste potencijal koji ova interdisciplinarna veza između prava i ekonomije nudi.

Bibliografija:

Baum, Harald (2009), „Different Interests Reflected in Reforms of Take-over Law in the US, UK, Japan and Germany”, *Radionica Institucionalna konukurencija između precedentnog i građanskog prava,* 10. Mart, Katolički univerzitet u Luvanu, http://www.uclouvain.be/269923.html

Berkowitz, Daniel, Katharina Pistor i Jean François Richard (2003), “The Transplant Effect”, *American Journal of Comparative Law*, tom 51, str. 163-203

Black, Bernard, Reinier Kraakman i Anna Tarassova (2000),“Russian Privatization and Corporate Governance: What Went Wrong?”, *Stanford Law Review* tom 52, str. 1790

Boucart, Hélène (2005), *L’agréation de la livraison dans la vente, Essai de théorie générale*,

Université de Poitiers, Collection de la Faculté de droit et des sciences sociales

Boucekkine, Raouf, Fabien Ngendakuriyo, Henrik Schmiegelow i Michèle Schmiegelow (u pripremi), *Contract Rules in Codes and Statutes: Easing Business Across the Cleavages of Legal Origins*, CRIDES, IRES, CECRI Serija zajedničkih radova, br. 3 , Katolički univerzitet u Luvanu

Braendle, Udo C. (2005). „Shareholder Protection in the USA and Germany - On the Fallacy of LLSV" Univerzitet u Mančesteru, maj 2005. Dostupno na SSRN: http://ssrn.com/abstract=728403

Coase, Ronald (1937) „The Nature of the Firm", *Economica* NS4 (1937), str. 386-405 (1988), *The Firm, the Market and the Law*, University of Chicago Press

Cools, Sofie (2005) „The Real Difference between the United States and Continental Europe: Distribution of Powers", *Delaware Journal of Corporate Law*, 2005, str. 697-766

Dam, Kenneth (2006), *The Law-Growth Nexus: the Rule of Law and Economic Development,* Vašington: Brookings Institute

Dannemann, Gerhard (2006), „Comparative Law: Study of Similarities or Differences", Mathias Reimann i Reinhard Zimmermann (ured.), *The Oxford Handbook of Comparative Law*, Oksford (Oxford University Press), str.383-420

Elliott, Victoria (2009), "Taking the Measure of Doing Business Indicators: An Independent Evaluation", *Radionica Institucionalna konukurencija između precedentnog i građanskog prava,* 10. Mart, Katolički univerzitet u Luvanu, http://www.uclouvain.be/269923.html,

Farnsworth, E.Allan,"Comparative Contract Law", Mathias Reimann i Reinhard Zimmermann (ured.), *The Oxford Handbook of Comparative Law*, Oxford University Press: Oksford, str. 899-936

Hayek Friedrich von (1973), *Law, Legislation and Liberty*, Chicago: University of Chicago Press ---, (1974), *Pretense of Knowledge*, govor povodom Nobelove nagrade http://nobelprize.org/nobel_prizes/ economics/laureates/1974/hayek-lecture.html;

Heath, Joseph (2009)« Hayek » in "Methodological Individualism", *Stanford Encyclopedia of Philosophy*, http://plato.stanford.edu/entries/methodologicalindividualism/#2

Hirowatari, Seigo (2000), "Post-war Japan and the law. Mapping discourses of Legalization and Modernization", *Social Science Japan Journal* (Oxford). 3, 2, str. 155-169

Kurumisawa, Yoshiki (2010), "Die Erfassung des Rechtskontexts am Beispiel des Bodesrechts" in Herbert Küpper und Wolfgang Brenn eds. , *Rechtstransfer und internationale rechtliche Zusammenarbeit,*

La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer and Robert Vishny (1999), "The Quality of Government", *Journal of Law, Economics and Organization*, tom 15, str. 222-244

La Porta, Rafael, Florencio Lopez de Silanes, Andrei Shleifer (2007), "The Economic Consequences of Legal Origins", Working Paper 13608, National Bureau of Economic Research, Kembridž, Masačusets, (www.nber.org/papers/w13608)

Mahoney, Paul (2000) *The Common Law and Economic Growth: Hayek Might be Right*, University of Virginia School of Law Working Papers Series, 00-8, januar

Michaels, Ralf (2006), "The Functional Method of Comparative Law", in Mathias Reimann and Reinhard Zimmermann (urednici), *The Oxford Handbook of Comparative Law*, Oxford (Oxford University Press), str.339-382

North Douglass (1990), *Institutions, Institutional Change and Economic Performance*, Cambridge University Press

Parsons, Talcott (1968) *The Structure of Social Action*, New York: The Free Press (1937) tom 1, 11

--- i Neil Smelser (1956), *Economy and Society*, New York: The Free Press

Reinhart, Carmen i Kenneth Rogoff (2008), *This Time is Different: A Panoramic Overview of Eight Centuries of Financial Crises*, NBER Working Paper No 13882, March 2008

--- (2009), "What Other Financial Crises Tell Us : The lesson of history is grim: expect a prolonged slump", Wall Street Journal, 3. februar 2009.

Rehm, Gebhard and Hinrich Julius (2009), "The New Chinese Property Rights Law: An Evaluation from a Continental European Perspective", *Columbia Journal of Asian Law* tom 22, str. 2 -22

Riesenhuber, Karl (2007) "Wandlungen oder Erosion der Privatautonomie?", in: K. Riesenhuber und Yukio Nishitani, (urednici.), *Wandlungen oder Erosion der Privatautonomie? - Deutsch-japanische Perspektiven*, Berlin (de Gruyter), str. 1-15

Robaye, René (1997), "Du 'dominium ex iure Quiritium' à la propriété du Code civil des Français", *Revue Internationale des Droits de l'Antiquité*, tom 44, str. 311-332.

Roe, Marc (2006), *Legal Origins and Modern Stock Markets*, *Harvard Law and Economics Discussion Paper No. 563*

Schmiegelow, Michèle i Henrik Schmiegelow (1989), *Strategic Pragmatism: Japanese Lessons in the Use of Economic Theory*, Njujork: Praeger, str. 150-160

Schmiegelow, Michèle, ed. (1997) *Democracy in Asia,* Njujork: St. Martin's Press

Schmiegelow, Henrik (2006), "Why Legal Transformation Assistance from Germany and Japan to Former East Bloc Countries? ", *Zeitschrift für japanisches Recht*, tom11, No. 22, str. 5-38

--- (2009), "Institutional Competition between Common Law and Civil Law", Keynote Presentation at the Joint Symposium Legal Technical Assistance to Developing Countries in Asia: Institutional Difference and Competition between Common Law and Civil Law of the Japan Federation of Bar Associations, The American Bar Association and the Bundesrechtsanwaltskammer, 22. jun 2009. Tokijo

Schmiegelow Michèle (2008), "Common Law et droit civil aux prises dans la transformation des anciens pays de l'Est", *Mémoires de l'Académie des Sciences, Arts et Lettres d'Angers*

Shiller, Robert (2008) *The Subprime Solution: How Today's Financial Crisis Happened, and What to Do About It*, Prinston: Princeton University Press

Shleifer, Andrei, i Robert W. Vishny (1997), "The Limits of Arbitrage", *The Journal of Finance*, tom 52, br. 1. (mar., 1997), str. 35-55.

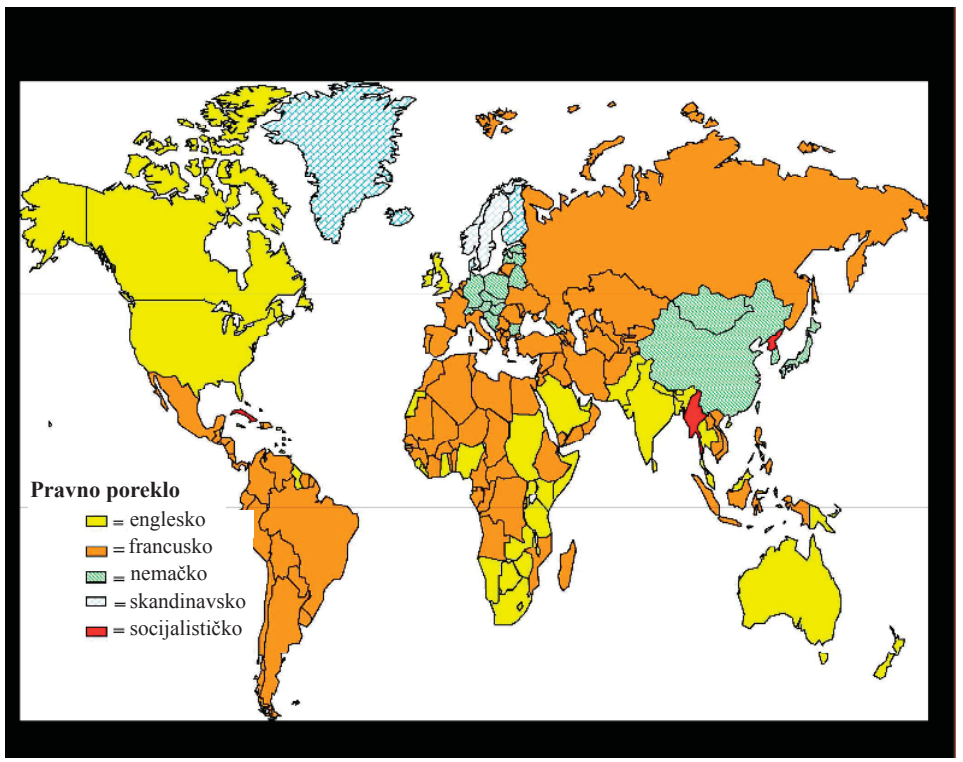
Svetska banka IFC (2008) *Doing Business* -- (2009) "Revisions to the EWI Indicator" http://www.doingbusiness.org/ documents/EWI_revisions.pdf

Svetska banka IEG (2008), *Doing Business: An Independent Evaluation - Taking the Measure of World Bank-IFC Doing Business Indicators*

Zhen Bingwen (2008), "Social Security Fund Governance and Legislation: What China Can Learn from the European Union", rad prezentovan na Trećem visokom okruglom stolu Projekta EU i Kine o saradnji u reformama, 23-25. 09. 2008, Peking

Zweigert Konrad i Heinz Kötz (1998), *An Introduction to Comparative Law*(translated by Tony Weir), 3. izdanje, Clarendon House

Aneks 1. Mapa sveta po pravnom poreklu prema grupi LLSV (2007)



II
RECENT DEVELOPMENTS IN THE LAW OF OBLIGATIONS

Prof. dr.sc. *Tatjana Josipović* *

CHALLENGES TO CIVIL LAW HARMONIZATION BY WAY OF DIRECTIVES

1. Introduction

Directives are the most common and most important instrument in the harmonization of national civil laws with the law of the European Union.[1] Because of their flexibility in regards to selection of methods and forms of implementation, the directives are considered the most adequate means for the civil law harmonization.[2] The common civil law elements are established in member states by way of implementation of directives into the national private laws.[3] Then, most frequently, the directives define important, key elements of certain civil law concepts so that a certain degree of their alignment is achieved with their implementation into the national legal systems, which is necessary for the efficient functioning of the internal market in the European Union. Hence, the directives are especially important harmonization instrument in those civil law fields in which other more binding laws, which are directly enforced in the area of all member states, cannot be enacted (e.g. regulations) because of the principle of subsidiarity and the principle of proportionality (Article 5/4,3, Treaty on European Union/TEU)[4]. Considering the limited powers of the EU (Article 5/1 TEU), there are no capabilities in a large number of cases to regulate certain domains of the civil law by other instruments. In most cases, the directives related to the field of private law are enacted on the basis of the Articles 114. and 115. of the Treaty on the Functioning of the European Union (TFEU) as a means for achieving approximation and harmonization of national legal systems so as to establish and have the functioning internal market.

Member states are free to select within their national legal system a means for implementation of directives, i.e. to determine on their own how to achieve given objectives of the directive within their legal system. Member states determine only the method and form of the directive implementation, which enables them to achieve the directive objectives in accordance with their national administrative and legal system, distribution of competencies, and organizational structure. Also, member states determine on their own a method for achiev-

---

* Original text is in local language.

[1] A directive, a legal act of the Union, shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Article 288/3 of the Treaty on the Functioning of the European Union – consolidated version (OJC 2010, 83, 47).

[2] Prechal, S.: Directives in EC Law, Oxford, 2006. p. 3; Schwarze,J.: EU-Kommentar, Baden-Baden 2000. (quote as Schwarze/Kommentar), p. 2081.

[3] Müller-Graff, P. Ch: EEC Directives as a Means of Private Law Unification, Towards a European Civil Code, Hague, 2004, p. 78.

[4] The Treaty on European Union/TEU – consolidated version (OJC 2010, 83,13).

ing the given effect.[5] It is possible that some member states will not need to enact any special measures for the implementation of the directive since its objectives are already efficiently achieved within their legal system. On the other hand, some member states will need to take appropriate measures as well as certain legislative actions, whereupon member states are free to choose the type of the law for to do so; whether they will enact a special law or they will amend and supplement the existing law (one or more than one), whether they will only enact an appropriate by-law, carry out some economic or social policy measure, and alike. Member states are also free to decide whether to recognize a higher level of protection for persons for whom the implementation has created certain rights than the protection specified within the directive, whether to extend the scope of enforceability of the directive to other legal relations, otherwise outside of the scope of the directive, so as to achieve consistency in its civil laws. The directives frequently provide possibilities to member states to opt for only one of the possible measures within the directive, and sometimes even to exclude a certain group of addressees from the scope of the enforceability of the directive or its enforceability to certain domains.

To what extent member states can resort to these options depends primarily on how much detailed are in the directive the objectives that need to be achieved with its implementation,[6] the way the domain of its enforceability is defined within the directive, whether this is the directive with the goal to ensure on the EU level only the minimum degree of protection in certain legal field (minimum harmonization directives), or whether this is the directive with the effects that can be achieved only if all member states ensure in their area, in the same degree and in substantially the same manner, (however with different methods and different means) that the effects of the directive are achieved (maximum harmonization directives). In which way the implementation of directives affects the consistency of civil laws of member states, the interpretation of civil law norms, and processes of practical application of the harmonized provisions of the civil law, it will depend on all these factors.

2. Functionally directed harmonization of the civil law

The main objective that needs to be achieved with harmonization by way of directives is to eliminate the differences in national civil law systems of member states that obstruct the establishment and functioning of the internal market. Therefore, the powers of the Union to harmonize by way of directives are exclusively functionally defined, and the Union can exercise them only to the extent required for the functioning of the market. Although the civil law of member states contains a special role within the Union law to exercise requirements for

---

[5] Yet, regardless of the fact that member states are free to choose the form and method for the implementation of the directive, when selecting the means of implementation, member states must select the form and method of implementation which will completely and unconditionally achieve expected effects of the directive, not only on the normative, but also on the administrative level and particularly on the level of achieving the directive objectives in concrete practical cases. To achieve the directive objectives in the national legal systems of member states means, in fact, to ensure all legal, administrative, judicial, financial, and other requirements, necessary for efficient practical accomplishing of the directive objectives. Calliess.Ch.,Ruffert,M.: Kommentar zu EU-Vertrag und EG-Vertrag, Luchterhand, 2007. (quote as: Calliess.Ch. i dr/ Kommentar), p. 2135; Prechal,S.: Directives in EC Law, p. 52; Prokopf,K. H.: Das gemeinschaftlichrechtliche Rechtsinstrument der Richtilinie, Berlin, 2006, p. 102; Herrmann,Ch: Richtlinienumsetzung durch die Rechtsprechung, Berlin, 2003, p. 27.

[6] Prechal,S.: Directives in EC Law, p. 44

functioning of the internal market,[7] the founding treaties do not even contain any special and explicit provisions which could be the basis for the Union to have general authority for harmonization of the civil law. The authorities of the Union in harmonization of the civil law by way of directives are derived primarily from the TFEU provisions, which generally authorize the Union to take measures, required for smooth functioning of the internal market, smooth exercising of market freedoms and market competition(Articles 114, 115, 49, 56, 101,102 TFEU), and also for exercising of certain Union policies that are important for the internal market development, such as: consumer protection policy (Article 169/2.TFEU), movement policy (Articles 90, 100 TFEU), and alike (quote Articles). In order to achieve these objectives, if it is required and justified to harmonize also certain domains of national civil laws of member states, the Union will have authorities to do so. However, even then the Union will have authority to enact directives so as to harmonize only those domains of civil law which are important basis for market development, free movement of goods, services, and capital, such as: some aspects of indemnity law, contract law, debt insurance, and alike. The civil law domains that are not of primary importance for the functioning of the internal market (e.g. inheritance law) usually are not subject to harmonization by way of directives. Separate regulations are most frequently enacted for these civil law domains which only regulate colliding norms so as to resolve conflicting laws in disputes with an international element, but with the goal to provide an unobstructed freedom of movement of persons in the area of the European Union.

Because of the limited powers of the Union, the civil law harmonization is thus characterized by the functional approach to selecting the civil law domains that will be harmonized. This approach is primarily defined by the objectives of the European market integration, which is required in order to eliminate any obstacles to market development and competition. This results in the so-called **selective and segmental harmonization** of only some civil law fields. Most commonly, the harmonization is conducted only within the scope of certain civil law concepts (e.g. liability of a seller for material defects of the goods, liability of the manufacturer for defective product) or even only in regards to some aspects of certain civil law concepts (e.g. special obligations of sellers in certain consumer contracts, impact of the unfair clauses on validity of consumer contracts, right of withdrawal from consumer contracts, etc.). In general, the directives are not enacted so as to fully harmonize certain civil law fields (e.g. contract law or indemnity law).

3. Models of civil law harmonization by way of directives

The directives, which are the basis for harmonization of the national civil laws of member states in dependence on the objectives that the Union would like to achieve by a certain directive, often differently define obligations of member states in terms of their implementation into the national legal system, individual and territorial domain of the directive applica-

[7] Civil law norms as well as other private law norms are the foundation for exercising private autonomy and contracting freedom which are the foundation for market economy and achievement of market freedoms. In a certain sense, they are constitutive elements of the market. Basedow,J.: A common contract Law for the common Market, Common Market Law Review, 1996, 1178; Schmid, Ch.: Legitimacy Conditions for a European Civil Code, Maastricht Journal of European and Comparative Law, 3/2001, p. 281; Rutgers,J.W.: Free Movements and Contract law, European Review for Contract Law, 3/2008, p. 475; Georgiades,A.: Europäische Privatrechtsvereinheinlichung und nationale Rechtskulturen, Festschrift für Claus Wilhelm Canaris, München 2007, Band II, p. 604.

bility, possibility of choice for member states to have more options for its implementation, permissibility to regulate by national regulations, and a higher degree of protection than the protection stipulated by the directive. Therefore, the harmonization by way of directives differs in a few criteria.

In dependence on the extent, the intensity of harmonization, i.e. on the fact whether member states are able to deviate from the directive provisions in terms of stipulating more strict or different regulations in the legal field which is the subject of harmonization, we differentiate the **maximum harmonization and minimum harmonization**. With the maximum harmonization directives, member states are not permitted any flexibility, that is, any possibility to deviate from the provisions of the directive which is the basis for the harmonization.[8] In this case, the explicit provision in the directive excludes directly, or its content in entirety excludes indirectly, any possibility to deviate in implementation from the content of all or only some of its provisions. The harmonization is actually carried out by the implementation of substantially near-identical provisions of the directive into the national legislation. At the same time, it is not even necessary for all provisions of the directive to be the maximum harmonization provisions. It is possible that only some provisions in the directive are defined as maximum harmonization provisions; whereas, for other provisions of the directive, member states have better capabilities of adjustment to their national laws (the so called, targeted maximum harmonization). Conversely, with the minimum harmonization directives, member states have certain flexibility when regulating the legal domain that is being harmonized and can deviate, within certain limits, from the directive provisions (e.g. to regulate better legal protection to which the directive pertains from the protection prescribed as a minimum by the directive). Member states are obligated by the implementation of the directive to ensure, primarily, at least a minimum level of harmonization (e.g. minimum protection), which is required under the directive.[9] However, based on explicit provisions of the directive, member states are authorized to have even higher standards of legal protection for the issues for which they are permitted to prescribe them, than the standard prescribed by the directive as a minimum. Then it is possible also for the directive to determine for member states a selection between several possible alternatives to regulate a certain issue in the harmonization process (alternative harmonization), when selection of each of these alternatives ensures the minimum regulation of legal relations in accordance with the objectives that the directive aims to achieve.[10]

The effects of the maximum, that is, minimum harmonization by way of directives differ significantly not only in regards to their effects to the integration of the private law on the

---

[8] Slot,J,P.: Harmonisation, European law Review, 1996 p. 382; Van Gervan,W.: Hamonization of Private Law: Do we need it?, McDonnell,A (Ed): A Review of Forty Years of Community Law, Legal Developments in the European Communities and the European Union, Hague, 2005.,p. 230; Mak,V.: Review of the Consumer Acquis: Towards Maximum Harmonization? ERLP, 1/2009, p. 59.

[9] Weatherill,S.: Maximum or Minimum Harmonisation - What Kind of „Europe" Do We Want?, Boele-Woelki, K. (ed): The Future of European Contract Law, essays in honour of Ewoud Hondius Alphen aan den Rijn, 2007, p. 133; Kurcz,B.: Kurcz,B.: Hamonisation by means of Directives – never – ending story? EBLR, 2001, p. 296

As a rule, directives contain separate clauses (*explicit minimum harmonisation clauses*) which provide the possibility for introducing the higher level in the field of alignment on the national level. However, the case law of the Court entails that it is not always necessary to have such a clause in the directive so as to consider a measure the minimum harmonization measure, but it is derived from the content, i.e. context of the directive (*implicite miminum harmonisation clausses*). Dougan,M.: Minimum Hamonization and the Internal Market, CMLR, 2000, 856; Kurcz,B.: o.c. p. 292.

[10] Van Gervan,W.: Hamonization of Private Law, p. 230; Kurcz,B.: o.c. p. 296

Union level, but also in regards to the national legal systems. The maximum harmonization, in fact, results in standardization, unification of a certain legal domain on the Union level. When the maximum harmonization conducts the alignment by way of directives, the national laws in the field of applicability of the directive practically do not differ any longer. Although the national provisions of the civil law are still enforced, substantially the same rules apply in all member states to regulating the legal domain to which the directive is related. However, when the minimum harmonization is carried out, only a minimum of the common standard is achieved in the legal regulation of a certain civil law domain or just some of its segments. The national legal systems of the member states still, nonetheless, more or less, mutually differ. How great these differences will be depends on whether member states have used the possibilities within the directive to extend protection to a certain field or to differently regulate a certain legal issue, and also to which extent they have deviated from the provisions of the directive. Namely, it is possible for some member states to decide to comply only with the minimum standards of protection stipulated by the directive, while other member states may decide to increase that protection to a certain degree, extend it, and alike. The minimum harmonization by way of directives, thus, does not result in thorough alignment of the national laws. This particularly pertains to the cases when the minimum harmonization is conducted on the grounds of the directives that provide the possibility for member states to select some of given alternatives within the directive, or to opt for its individual field of applicability within the scope of the directive. All this again leads to the fact that legal systems which are harmonized on grounds of the minimum harmonization laws mutually differ.[11]

Depending on the scope and content of harmonization, we differentiate the **full and piecemeal harmonization**. The harmonization is full when the directive covers all possible aspects of some legal concept or legal domain. Harmonization by way of directives in the civil law domain is, nonetheless, most commonly a piecemeal one. It is piecemeal harmonization when the directive includes only one or more aspects from some complex legal field or it covers only specific groups of products or services or the harmonization is individually limited to only certain groups of market stakeholders.[12] Piecemeal harmonization may cover only some aspect of a certain legal concept; it may pertain to only some aspects for achieving some activities, only to legal relations in cross-border movement of goods or services, and alike.[13] If piecemeal harmonization is conducted only in regards to specifics of only one type of goods, activities, services, to only one legal concept (e.g. one consumer contract), this is the so-called **vertical harmonization.** When, however, harmonization covers a group of products, services, activities that share some common features, a group of legal concepts with common features (e.g. all consumer contracts), this is the so-called **horizontal harmonization.**[14] Piecemeal harmonization also depends on whether the directive leaves an option

---

[11] Hence, the minimum harmonization by way of directives is frequently combined in practice with the application of the regulation on mutual recognition or with the rule of applying the country of origin. It is possible, for example, for member states to introduce a higher degree of protection for domestic products, and to allow by mutual recognition the clause on the import of lower quality goods from other member states. This, however, may result in reverse discrimination. Dougan,M.: o.c., p. 867.

[12] Mak,V.: o.c., p. 59; Kurcz,B.: o.c., p. 294, 295.

[13] The piecemeal harmonization, which aligns only some aspects of some legal concept, does not exclude the possibility for the new harmonization measures to subsequently harmonize other aspects of that legal concept, to extend the field of application of the harmonization measure to individual or material sense. This is the so-called "progressive harmonization".

[14] Ihns,A.: Entwicklung und Grundlagen der europäischen Rechtsangleichung, Frankfurt am Main, 2005, p. 72; Kurcz,B.: o.c., p. 294.

for member states to conduct harmonization in a certain legal field only in the part pertaining to cross-border establishment of certain legal relations, cross-border movement of certain goods, services, carrying out of some activities or to extend harmonization to legal relations pertaining to the goods, services, business activities that are based on the domestic market (the so-called **optional harmonization**).[15] Yet, it is possible that the directive stipulates that member states ought to provide to the market stakeholders the possibility of selection of a legal regime, i.e. the choice between the harmonized legal regulation of some legal concept that was the subject of harmonization and the national legal regulation that was not covered by harmonization (the so-called **facultative harmonization).** Contrary to optional harmonization, when member states make decision in the directive implementation whether the harmonization should cover only cross-border legal relations or also should cover the national ones, with the facultative harmonization, the market stakeholders make the choice between the enforcement of the harmonized legal norms and national law norms that were not covered by harmonization.[16]

4. The impact of harmonization by way of directives on the civil law of member states

4.1. The impact of minimum and maximum harmonization

The impact of harmonization by way of directives on the national civil laws mostly depends on the intensity of harmonization, i.e. whether the harmonization is carried out with the maximum or minimum harmonization directives. This determines whether member states are enabled in certain cases to deviate from the standard of the civil rights protection which they are bound to ensure by way of the directive implementation to persons to whom the individual domain of the directive application pertains. As previously stated, maximum harmonization contributes to a higher degree of harmonization of the national private laws since member states cannot regulate certain legal issues within the directive differently, cannot stipulate higher degree of protection, different content of a certain legal concept, and alike.[17] Hence, the impact of maximum harmonization on the national legal systems is much greater than when the minimum harmonization is carried out. This is particularly prominent when observing the ways the harmonization affects further development of national civil laws.

When implementing minimum harmonization directives into the national legal system, member states have an option to stipulate a higher degree of protection in their national leg-

---

[15] The option to harmonize only cross-border aspects of movement results in parallelism in legal regulation of substantially the same relations, depending on whether they are exercised across the border or only on the territory of the member state. This may lead to reverse discrimination of market stakeholders if the cross-border relations are regulated more liberally by the harmonization. The piecemeal harmonization covering only cross-border relations in the market may result in applying different regulations to cross-border and national relations, i.e. in applying more strict rules to the national relations that could lead to reverse discrimination of national market stakeholders. Ihns,A.: o.c., p. 70; Ludwigs,M.: Rechtsangleichung nach Articles 94,95 EG-Vertrag, Baden-Baden, 2004, p. 110; Kurcz,B.: o.c., p. 295.

[16] Ludwigs,M.: Rechtsangleichung..., p. 110; Van Gervan,W.: Hamonization of Private Law, p. 230.

[17] Ihns,A.: o.c., p. 70; Bock,Y.: Rechtsangleichung und Regulierung im Binnenmarkt, Baden-Baden, 2005, p. 56; See Rott,P.: Minimum Harmonization for the Completion of the Internal Market? The Example of Consumer Sales Law, Common Market Law Review, 40, 2003, p. 1130

islation than the one required under the directive since the directives do not determine the upper limit of protection. The minimum harmonization, thus, recognizes different national needs of member states for protection of certain interests, their different attitude to protection of certain social values, and in general, different understanding of social justice.[18] Moreover, member states have greater freedom to develop, in accordance with their needs, not only the civil law domain covered by minimum harmonization, but also other complementary civil law domains.[19] When defining the upper limit for protection, the member states are clearly limited by the provisions of the Union's primary law on protection and on exercising market freedoms at the internal market, and also by general principles of protection of human rights and liberties.[20] The upper limit of protection that could be ensured then by the national legislation is actually defined by the limits which are defined by the regulations of the Union's primary law on exercising market freedoms, i.e. by the limits within which the increased degree of protection could be justified by some of the reasons because of which the exceptions could be defined within the national legislation from the enforceability of regulations on market freedoms,[21] i.e. the exceptions founded on exceptionally justified reasons (mandatory requirements) pursuant to the case law of the EU Court.[22]

In the course of implementation of the maximum harmonization directives, the member states cannot adjust the directive provisions to their national law, their social and cultural specifics, and economic circumstances. The member states cannot determine a higher degree and other standards of protection other than those defined by the directive. Moreover, the member states cannot even retain in their national civil laws previously enacted regulations which provide in the cases to which the maximum harmonization directive is related, a higher degree of protection or different protection than the one stipulated by the directive.[23],[24] In some cases, this will mean that the implementation of the maximum harmonization directive will even reduce the degree of protection of certain civil rights in comparison with the degree of protection existent on the level of national legislation prior to the directive implementation,[25] because member states are obligated to amend their national legislation so as to adjust it to the requirements of the directive.

---

[18] Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, EUI Working papers LAW, 2008/14, p. 40.

[19] Cafaggi,F.: Which Governance for European Private Law?, EUI Working Papers LAW 2007/26, p. 29.

[20] Cecco,F.: Room to move? Minimum harmonization and fundamental rights, CMLR 2006, p. 13; Rott,P.:o.c., p. 1110, 1118; Unberath,H.,Johnston,A.: The double-headed approach of the ECJ concerning consumer protection, CMLR, 2007, p. 1257.

[21] For example: Articles 45/3, 51, 52, 62, 64, 65. TFEU

[22] On concept "of specially justified reasons": Craig.De Burca: EU Law, Oxford, 2008, p. 705-717.

For more on concept of "mandatory requirements": Craig.De Burca: EU Law, Oxford, 2008, p. 705-717.

[23] Micklitz,H.W.,Reich,N.: Crónica de una muerte anunciada: The Commission proposal for a „Directive on consumer rights", 479; Mak,V.: o.c., p. 59,61; Unberath,H.,Johnston,A.: o.c., p. 1272; Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, 40; Cafaggi,F.: Which Governance for European Private Law?, p. 29.

[24] Commission / France (C-52/00, ECR 2002 p. I-3827), Commission / Greece (C-154/00, ECR 2002 p. I-3879), González Sánchez (C-183/00, ECR 2002 p. I-3901)

[25] Mak,V.: o.c., p. 61

The differences between the maximum and minimum harmonization of the civil law have particularly important impact also on actions of member states after the harmonization was carried out. The maximum i.e. minimum harmonization has a significant impact on both further normative activities of member states in the domain of already conducted alignment, but also on enforceability of implementing regulations and their interpretation in practice. Having conducted the alignment (regardless of its intensity thereof), member states are obligated, on the grounds of Article 4/3 TEU, to refrain from measures in their national legal systems which could complicate the accomplishment of objectives which were the reasons for implementing the harmonization. After conducting the maximum harmonization, this obligation will mean for member states that they are limited to enact, as long as the directive, which was the grounds for that harmonization implementation, is in force, any measures in the harmonized domain, and that actually they cannot amend anything in the legal domain covered by the maximum harmonization. Essentially, in the civil law domain where the maximum harmonization was implemented, the legal system, in a certain manner, stagnates since afterwards, there are no more possibilities for amendments.[26] With minimum harmonization, however, member states have authority to amend their national legislation, even after the directive was implemented, in the issues which permit them by the directive to deviate from the minimum harmonization. It is certain that they can do this within the directive-defined framework, but they are limited in terms of not being allowed to go beyond the given minimum specified by the directive.

The implementation of the maximum i.e. minimum harmonization directives also affects the possibilities for interpretation of implementing regulations in the case law, and particularly the interpretation of other segments of the national civil law, enforceable to the domain to which the directive pertains. When interpreting them, the courts need to take into account the intensity of harmonization since it will define the boundaries, i.e. the degree of their flexibility in interpretation of the national civil law in accordance with the objectives of the directive. On the other hand, the role of the EU Court in the cases pertaining to the aforementioned issue (Article 267. TFEU) is different and depends on whether this is the maximum or minimum harmonization directive. When the maximum harmonization directives in the civil law domain are concerned, it is to be expected that the EU Court's role in interpretation of these directives would be much greater since the national courts will be more frequently faced with the issues of interpreting certain directive provisions, the content of which could not be deviated from during the implementation. This is important not only for enforcement of the national regulations implementing such a directive, but also for interpretation of other national regulations in compliance with the directive. When the minimum harmonization directives are concerned, however, the EU Court is more frequently requested to interpret the directive provisions in order to ascertain whether a member state, by implementing such a directive pursuant to the Union primary law, has regulated a higher degree of protection in certain civil law domain, i.e. how to interpret the content of minimum protection that needs to be ensured by the directive implementation.

---

[26] In a certain way, this leads towards a specific redistribution of competencies between member states and the Union in regulation of a certain legal domain. In the legal domain where maximum harmonization was implemented, the regulatory competences for regulation of that domain are actually in that content, which was covered by the maximum harmonization directive, and were transferred to the Union. Weatherill,S.: Maximum or Minimum Harmonisation - What Kind of „Europe" Do We Want?, Boele-Woelki, K. (ed): The Future of European Contract Law, essays in honour of Ewoud Hondius Alphen aan den Rijn, 2007, p. 145.

In the field of harmonization of the civil law and the private law, in general, thus far, the minimum harmonization directives have been mainly enacted, which enable member states to have better flexibility in both the implementation of the directive and also in subsequent development of their national civil laws.[27] This enables member states to develop autonomously their civil private law within the framework defined by the Union primary law, even in already harmonized civil law fields (obviously, accepting the minimum levels of protection that have to be ensured by the directive implementation). However, the minimum harmonization by way of directives in the civil law domain appears to be an insufficiently efficient instrument in the current practice for elimination of differences in national civil laws. Moreover, it turns out that the differences in the use of the minimum harmonization clauses in the directives have led to new differences between national legislations which have caused new complications at the internal market, diminished the trust of consumers, and led to undermined competition.[28] Hence, the new trend is lately noticeable for the minimum harmonization directives to be replaced with maximum harmonization directives in the civil law domain (particularly in the consumer contracts field).[29] The enactment of these directives will

---

[27] For example, a number of directives on consumer contracts contain the minimum harmonization clause (the so-called minimum clause) which is the basis for the member states to extend the degree of protection of consumers, compare with e.g. Article 8. *Directive 85/577*/EEC on protection of consumers in contracts concluded outside of business premises, Article 15. Directive 87/102/EEC on consumer credit, Article 8. Directive 90/314/EEC on package travel arrangements, Article 8. Directive 93/13/EEC on unfair terms in consumer contracts, Article 11. Directive 94/47/EC on timeshare, Article 7. Directive 98/27/EC on court/administrative injunctions for protection of consumer interests, Article 8/2 Directive 1999/44/EC on certain aspects of sale of mass consumption goods and accompanying warranties.

To what extent some member states have used the possibility in the implementation to ensure a higher degree of consumer protection on the grounds of minimum harmonization clause: Schulte-Nölke,H.; Twigg-Flesner,Ch, Ebers,M. (Eds): EC Consumer Law Compendium, München, 2008 (and at the website: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp), p. 11, 15, 18, 21, 23, 25, 28, 30, 33, 36, 40, 42, 45, 47, 50, 52, 54, 57, 61, 63, 66, 68, 72, 75, 77.

[28] Compare with e.g. the study conducted on the ways for the implementation of the directives on consumer contracts, which were all the minimum harmonization directives, published in Schulte-Nölke,H.; Twigg-Flesner,Ch, Ebers,M. (Eds): EC Consumer Law Compendium. The study shows that significant differences exist in the implementing national regulations of member states in regards to the deadlines for the consumer to withdraw from the contract, in definitions of the terms "consumer", "seller", and alike. The differences also exist in the manner of implementation, but also in the possibilities for the use of the minimum harmonization clause, options in the directives, and others.

Compare items 3.2., 4.5. Green Paper on the Review of the Consumer Acquis COM (2006) 744 final of 08.02.2007 (http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf)

[29] Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, 24; Unberath,H.,Johnston,A.: o.c., p. 1254; Mak,V.: o.c., p. 58;

Compare with e.g. items 1,2,3. of the Preamble to Directive 2008/122/EC on timeshare, items 1-9. Directive 2008/48/EC on consumer credit, Directive 2005/29/EC on unfair business practices, Directive 2002/65/EC on the distance contracting of consumer financial services.

Compare with e.g., the proposal for the Directive on consumers rights COM(2008) 614 final, 2008/0196(COD) of 8.10.2008 (http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf) On the Directive on consumers rights: Micklitz,H.W.,Reich,N.: Crónica de una muerte anunciada: The Commission proposal for a „Directive on consumer rights", p. 471-519; Zypries,B.: Der Vorschlag für eine Richtlinie über Verbraucherrechte, ZEuP, 2/2009, p. 225-229; Effer-Uhe,D,O,Watson,J.M.: Der Entwurf einer horizontalen Richtlinie über Rechte der Verbraucher, GPR, 1/09, p. 7-15; Jud,B., Wendehorst,Ch: Proposal for a Directive on Consumer Rights – an Academic Position Paper, GPR, 2/09

undoubtedly affect the future development of the civil law in the fields where full harmonization has been conducted, and particularly the possibilities of national legislators to respond to very dynamic changes in the civil law. Namely, in the civil law fields, where maximum harmonization was implemented, every initiative for further changes actually rest with the Union, so the further development of these domains also depends on capabilities of the Union entities to respond promptly to changes and development.

4.2. Impact of functionally directed harmonization on the civil law

The functional approach to civil law harmonization by way of directives frequently leads to fragmentation of national civil laws. This particularly occurs in the cases when certain directives are implemented by enacting separate laws that regulate only the matters covered by the directives. Jurisprudence of the civil law, thus, becomes quite selective and complex. Quite frequently, along with the general regulations in certain fields of the civil law, there is also a series of separate laws with "more separate" laws related to them, which regulate certain issues of the directives.[30] Their mutual relationship is very complex. In practice, it is sometime very difficult to determine which separate laws are being implemented, which of the separate laws have precedence to other separate law, which one is "more separate" than the other, which law is enforced to which aspects of certain legal relations.

Since harmonization by way of directives is conducted with the goal to protect a certain category of stakeholders at the market, to protect disadvantageous party to the contract in certain types of contracts, to protect contracting parties from specific breaches of contractual obligations, and alike, the implementation of directives frequently leads to overlapping laws of the same or similar legal relations on different levels. All member states already have in their civil codes or in other general civil law regulations (laws of obligations, laws on property, and alike) on general level, more or less regulated protection of values that are specifically protected by the directives as well. This protection on the level of the general regulations of civil law is usually achieved by enforcing the general principles of the civil law (e.g. interdiction of legal abuse, principle of good faith and fairness, principle of equal rights of the parties, principle of the performance degree, obligation of cooperation, and alike) that are elaborated in different ways in a number of civil law provisions on liability for violation of contractual obligations, on contract validity, on liability for damages, protection of some subjective civil rights, and so forth. After the implementation of the directives, most of these values are also protected by the enforcement of a separate regulation, with which the directive was implemented. Thus, the implementation of directives establishes very frequently several different systems of legal protection of the same values. This is best exemplified by the implementation of directives on consumer contracts and the so-called anti-discrimination directives. These directives regulate very concrete forms of protection of the disadvantageous party to the contract (a consumer, an employee, a service recipient) in certain consumer contracts, protection from discrimination in labor contracts, and contracts for services. In most civil law systems, this protection can also be achieved by the implementation of general provisions of the law of obligations in regards to the principles of the obligations rights, contract interpretation, contracts being null and void when concluded contrary to the Consti-

[30] For example, in addition to the common law that regulates the obligations and contract law, there is also a separate law that regulates certain type of the contract, and also a separate law that regulates consumer protection in that type of the contract.

tution, and principle of good faith and fairness, and alike. Nevertheless, the implementation of directives develops a separate system of laws on consumer protection, on ban on discrimination, on protection of workers, protection of parties to some contracts (e.g. commercial representatives), and others, which also result in protection of the same values. In separate laws, provisions on that protection are, indeed, more elaborate, concrete, and detailed than those in general provisions of the obligations law, so it is certain that these separate systems of protection, generated by the direct implementation of the directives, ensure better efficiency and protection.[31]

4.3. Impact of harmonization on content of the civil law

The implementation of directives in the fields of the civil law amends or extends the content of regulation of certain fields of the civil law. Very frequently, the directives introduce into national legal systems the new civil law concepts which are often only partially regulated on the level of the directive itself.[32] The implementation of the new legal concepts and fragmentary implementation of only some aspects of certain private law concepts into the national laws adversely affects the system of the national civil laws.[33] Problems occur, e.g., because a legal concept i.e. some aspects of a certain legal concept, which were regulated by the directive, cannot be always fully integrated by way of implementation into the existing system of the national civil law.[34] This happens sometimes because such a legal concept does not exist at all, and sometimes because its regulation significantly deviates from the principle which is the foundation of the national legal system (e.g. because this is the legal concept tak-

---

[31] In some cases, concretization of certain terms in the course of directive implementation undoubtedly contributes to simpler and better application of regulations of the common civil law. For example, the implementation of the Directive 93/13/EEZ on unfair clauses in consumer contracts requires that the national legislation should incorporate its annex which lists by examples unfair clauses in consumer contracts. These provisions undoubtedly can contribute also to interpretation of general provisions of the contract law on actions of contractual parties, pursuant to principles of good faith and fairness, to evaluation of validity of certain general conditions of business operations in commercial contracts, and alike.

[32] Thus, for example, the new Directive 2008/122/EC on timeshare regulates only some aspects of the contracts on timesharing and some other contracts with the purpose of time-limited use of real property (the contract form, pre-contract notification obligation, right to withdraw from the contract, and other)

[33] Rittner,F.:o.c., p. 853; Wilhelmsson,T: Private Law in the EU: Harmonised or Fragmented Europeanization?, European Review of Private Law, 1/2002, p.82; Basedow,J.: Codification of Private Law in the European Union: the making od a Hybrid, European Review of private law, 1/2001. p. 38; Blaurock,U.. Europäisches Privatrecht, Juristien Zeitung, 6/1994, p. 272; Schulte-Nölke,H.: Schulte-Nölke,H.,Schulze,R.: Europäische Rechtsangleichung und nationale Privatrechte - Einführung u Schulte-Nölke,H.,Schulze,R. (Hrsg): Europäische Rechtsangleichung und nationale Privatrechte. Baden-Baden, 1999, o.c., p. 15; Timmermans,Ch.W.A.: Timmermans,Ch.W.A.: Zur Entwicklung des europäischen Zivilrecht, Zeitschrift für Europäisches Privatrecht, 1/1999., p. 3; López Rodrígez,A.M.: o.c., p.229; Smits,J.: The making of European private law, Antwerpen-Oxford-New York, 2002. p. 11; Gebauer,M.: Grundfragen der Europäisierung des Privatrechts, Heidelberg, 1998, p. 94,109; Micklitz,H.W.: Review of Academic Approaches to the European Contract Law Codification Project, Andenas,M. i dr (ed): Lieber Amicorum Guido Alpa - Private Law Beyond the National Systems, London, 2007, 703; Smits,J.: The Making of European Private Law, p. 90; Roth,W.H.: Transposing „Pointillist" EC Guidelines into Systematic National Codes - Problems and Consequences, European Review of Private Law, 6/2002, p. 767-769.

[34] Collins,H.: The European Civil Code, Cambridge, 2008, p. 44

en over from the legal background which is different from the national legal system to which that concept is being implemented).[35] [36]

The implementation of the directives that harmonize the civil law also leads in some cases to establishing of the different balance between the mandatory (cogent) and discretionary provisions in certain civil law fields in order to have better protection of the disadvantageous party in civil law relations. In a large number of cases, the directives request from the member states to introduce certain cogent norms into legal fields that are traditionally regulated by discretionary norms (e.g. contract law) in order to establish protection of certain categories of market stakeholders (e.g. a consumer, an employee).[37] This type of approach frequently requests the special regulation of civil law effects of the actions contrary to mandatory, cogent norms, but also brings to focus the question of court actions in the issues that are derived from these legal relations.[38]

In the field of civil law, such a trend is most noticeable when implementing the directives in the domain of the law of obligations, i.e. contracts, since this law is the most common subject of harmonization. The implementation of directives that protects consumers in the contractual relations, or protect the parties from all aspects of discrimination, has significantly affected the changes to the content of the obligations law of member states or at least, the establishing of the different balance when providing and exercising the protection of certain values. Thus, for example, implementation of the directive affects the insisting on some values in general contract law, such as better protection of social values by the contract law (e.g. protection of the disadvantageous party to the contract/consumer, employee, better protection of personal data, better protection from discrimination, better protection of lawful expectations of consumers by contract and indemnity laws). On the other hand, the implementation affects the significant concretization of the principle of good faith and fairness (e.g. when applying unfair clauses in consumer contracts, with pre-contractual liability for damages, when auditing the contract content), and also concretization of protection of fundamental con-

---

[35] Some authors mention "the unexpected effects" of the Union law - „surprise effects" „Jack-in-the-Box effects of the EC law". It is pointed out that the implementation of the Union law into the national systems has introduced the element of vagueness and unpredictability. Traditional legal methods, ingrained into the national private laws, frequently cannot predict the ways the implementation will affect the functioning and enforceability of the national law and its potential inapplicability due to precedence of the Union law. Wilhelmsson,T: Private Law in the EU..., .,p. 79.

[36] Thus, for example, the continental European legal systems have much more problems with the implementation of directives which introduce legal concepts, developed in the common law systems. Generally, these are legal concepts that are regulated based on principles that require much more adjustments so as to have them implemented in the continental European legal systems. Thereby, for example, the Directive on financial arrangements contains a series of legal concepts on lien on rights, settlement of debts to creditors, and others, which were derived from the Anglo-American law. Its implementation into the continental European legal systems has indicated a significant deviation from the traditional laws on lien on rights.

[37] Micklitz,H.W.: Persepktiven eines Europäischen Privatrechts, Zeitschrift für Europäisches Privatrecht, 1999, s 721,722.

[38] Loos,M.B.M.: The Influence of European Consumer Law on General Contract Law and the Need for Sponaneous Harmonization, European Review of Private Law 3/2007, 519,520.

In this way, e.g. the issue occurred in the case law of the EU Court in several cases whether the national courts should *ex officio* take into account whether provisions in consumer contracts are unfair pursuant to the Directive 93/13/EEC on unfair provisions in consumer contracts. Océano Grupo Editorial and Salvat Editores (C-240/98 to C-244/98, ECR 2000 p. I-4941); Cofidis (C-473/00, ECR 2002 p. I-10875); Mostaza Claro (C-168/05, ECR 2006 p. I-10421); Asturcom Telecomunicaciones (C-40/08); Pannon GSM (C-243/08); Martín Martín (C-227/08).

stitutional human rights in the contract law (e.g. by explicit injunctions against discrimination in private law relationships related to employment, movement of goods, service-providing and -receiving). The implementation also affects better transparency of contractual relations (e.g. by special regulation of pre-contractual obligation to provide information, obligation to provide information in the course of contractual period, liability for failure to comply with the obligation to provide information) and better protection of the disadvantageous party to be free to make decisions (e.g. the right of a consumer to withdraw from the contract). The implementation frequently establishes the higher level of liability of the parties to the contract in negotiations and in carrying out the contractual obligations (e.g. pre-contract liability for damages, liability for defects of sold products), and also better protection of contractual parties (e.g. protection of creditors in the cases of default, liability for product defects).

All of the above not only leads to the changed relationship between the mandatory and discretionary norms to prescribe a larger number of mandatory provisions in order to protect the disadvantageous party by way of directives, but also affects the limitations of contractual autonomy for the sake of protection of the disadvantageous contractual party and assurance of the equality of the parties (injunction against the waiver of rights, better control of contract content) and different interpretation of traditional principles of the contract law (the principle of *pacta sunt servanda* („agreements must be kept") in the light of the consumer's right to withdraw from contract). Some completely new elements are introduced into the contract law, such as the effect of contractual relations on the third parties (the impact of withdrawal from the contract on the bound contracts with the third parties). The implementation of directives in the field of civil law is frequently accompanied with the implementation of special procedural regulations on protection of civil rights, which are regulated by the directive, such as: collective protection of the disadvantageous contractual party (class action for protection of consumers, for protection from discrimination), separate rules on burden of proof, and the effect of the court rulings on the third parties. And lastly, when implementing the directive in the civil law domain, in dealing with the violation of certain civil law relations against which only civil law sanctions are traditionally stipulated (termination of contract, liability for damages, and alike), member states very often commit themselves to introducing special public law sanctions against the violation of the rights of the disadvantageous contractual party (e.g. tortious liability of a seller for failure to meet the obligations in the consumer contract or for refusal to enter into a contract, tortious liability of a service provider or an employer for discrimination, and alike)

The changes to the national civil law that result from the implementation of the directives influence the subsequent enforcement of the national regulations which implemented the directive. After the implementation of the directives, the most important question for practical achievement of their objectives is the actual practical application of implementing measures to the case law. Very frequently, the directives in the civil law field do not contain detailed and concrete definitions of pertinent concepts, but the directive refers only to different legal standards that are defined by the directive, either in very general terms or not at all.[39],[40] Having implemented such a directive, problems can occur in practice in the interpre-

---

[39] Unberath,H.,Johnston,A.: o.c., p. 1266; Rott,P.: o.c., p. 1110; Loos,M.B.M.: o.c., p. 520; Cafaggi,F.: Which Governance for European Private Law?, 18.

[40] Thus, for example, the directives mention terms, such as: the principle of good faith and fairness, unfair contractual provisions (Directive 93/13/EEC on unfair terms in consumer contracts), unfair business practices, important influence on economic behavior of consumers, professional considerateness (Directive 2005/29/EC on unfair business practices), disadvantageous treatment, equal opportunities, comparative situations *(*Directive 2000/43*/EC* on implementation of the principle of equal treatment of persons irrespective of their racial or ethnic origin), and alike.

tation of some of its provisions i.e. provisions of implementing regulations when these regulations invoke legal standards of the directive. It is also possible for problems to occur in practice, because two or more implementing regulations, which have incorporated different directives into the national legislation, could be enforced to the same civil law relations.[41] In these cases, consistent interpretation of certain provisions of the directive is undoubtedly substantiated by the interpretation of the EU Court in the proceedings deliberating the previous issue, which was initiated by national courts (Article 267. UFEU TFEU). Nevertheless, despite of the fact that the EU Court contributes to uniform interpretation of the directive provisions, the case law of national courts decides in a large number of cases how to interpret certain concepts of the directive, to what extent the directive objectives are achieved on national level, but also how much this all leads to new differences in providing protection to some civil rights on the Union level.[42] Finally, the differences in the ways of achieving protection for the same civil rights on the grounds of implementing regulations can be significantly affected by the differences in procedural regulations. These differences can result in the situation that all member states cannot achieve the objectives in the same manner and these objectives are supposed to be achieved by the alignment of the substantive civil law.

On the other hand, sometimes the enforcement of implementing regulations in practice requires pertinent application of other national regulations which have not incorporated the directive directly. That is, e.g., the case of partial harmonization, i.e. when directive does not require normative alignment of all aspects of legal relations that result from certain legal concept (e.g. the directive regulates only certain aspects of a certain consumer contract).[43] Then, the new regulation in the implementing law is applicable to the domain to which the directive pertains and which is covered by the implementing law. In other aspects of the same civil law relations that are not regulated by the implementing regulation, the national law of the member state is applied, along with the primary law of the Union which will have precedence in enforcement if the unaligned national law of the member state is contrary to the primary law of the Union. Then, the fragmentary and selective approach to normative alignment has put before national courts, and other authorities that enforce the implementing regulation, very demanding tasks: from ascertaining if the case falls under the directive implementation domain, through ascertaining which national laws are subsidiarily enforced, along with the implementing regulation, to interpreting the national law in compliance with the directive objectives. In the end, it is possible that application of national implementing regulations leads to completely different effects in practice to achieving the objectives of the directive because of different interpreting possibilities of the national law to be accordant to the directive objectives, different regulation of judicial and other procedures which decide on the application of the implementing regulation, differences in the legal protection standards, and other.

---

[41] It is, namely, possible to have situations that the consumer contract, concluded by the parties in dispute, could be subject in regards to its content, venue and method of execution to different directives, i.e. implementing regulations, with which they were incorporated into the national legislation. For example, because of the content of the contract, the regulation should be applied that covers the consumer contract on credits and which implemented the Directive on consumer credit, but considering the venue of contracting, the regulation should be applied on contracting outside of business premises and which implemented the Directive on consumer contracting outside of business premises. Heininger (C-481/99, ECR 2001 p. I-9945)

[42] Cafaggi,F.: Which Governance for European Private Law?, 18.

[43] Basedow,J.: Conflict of Laws and the Harmonization of Substantive Private Law in the European Union, Andenas,M. i dr (ed): Lieber Amicorum Guido Alpa - Private Law Beyond the National Systems, London, 2007, p. 183.

5. Extended harmonization of the civil law as response to fragmentary harmonization

The harmonization of the civil law by way of directives is significantly reflected on the existing national civil laws of member states. On one hand, under the influence of directives, the civil law is modernized and adjusted to market requirements, but also becomes more susceptible to providing specific civil law protection to less protected market stakeholders (consumers, employees, and alike). On the other hand, the fragmentary harmonization disrupts the existing system of civil law norms, multiplies protection of the same civil rights, and introduces the new legal concepts that cannot easily be integrated into the existing civil law regime. Therefore, the question inescapably imposes itself on the ways how to establish an optimum relationship between the harmonization process of the civil law with the Union law and autonomous development of the national civil laws in the harmonization process by way of directives. In this context, the most important question is what to do, even after the directive implementation into the national civil laws, to preserve its system and integrity. In some cases in order to achieve this goal, more comprehensive reform of some segments of the national civil laws is required so as to mutually harmonize the regulation, which has implemented the directive, and the rest of the civil law legislation.

To preserve or to establish the new civil law system also requires in some cases an appropriate amendment and adjustment of other complementary fields of the civil law that are relevant to regulating of legal relations to which the directive pertains. All of this can lead to changes to some traditional principles, which are the grounds for the regulation of certain segments of the national civil laws, to the change of the role that some civil law domains used to have in the national legislations, to new regulation of some legal concepts, to incorporation of new values into civil laws, which are recognized on the European level for their special economic or social importance in regulating the private law relations. It is also possible to have the changes of the hierarchical relations between certain parts of the national civil law, and even the changes in importance of certain segments of the civil law in the national legal system.[44] On the other hand, the need may arise to introduce the new forms of protection of private rights if the implementation into the legal system brings about new private law concepts or the existing private laws are given different content, and also to extend the individual field of enforcement of the directive so as to avoid reverse discrimination, and so forth.[45] These processes eventually lead to certain Europeanization of the overall civil law system since other segments of the civil law are adjusted to European standards in a certain

---

[44] This trend is most obvious in consumer contract law which is being developed under the influence of directives on consumer contracts. Regardless of the fact whether these directives were implemented by special regulations or were incorporated into already existing regulations on consumer protection or civil codes, the provisions on consumer contracts always have precedence in enforceability to general provisions of the contract law, which are only subsidiarily enforced. Considering that most contracts are concluded in the market between consumers and sellers, the consumer contract law in developed market relations can be much more significant than the common contract law.

[45] Thus, for example, normative harmonization of consumer protection in consumer contracts also requires normative harmonization of protection of their rights by introducing class actions, e.g., the directive 2009/22/EC on court/administrative injunctions for the protection of consumer interests. The implementation of anti-discriminatory directives also requires special regulation for exercising the protection in case of the violation of equal treatment rights, and alike.

manner (the so-called spin-off effect directive) by the autonomous decision of the national legislators.[46]

On the other hand, it is possible that national legislators autonomously decide to extend the domain of the directive enforceability to other persons and/or other similar legal relations so as to preserve the consistency of the national civil laws (e.g. to extend the enforceability of provisions of the directive on the liability of a seller for material defects or consumer goods sale to all sales contracts). Whether the national legislators will opt for this so-called **autonomous or extended harmonization** of the national civil law depends exclusively on their discretionary decision.[47] The provisions of founding treaties on obligations, entailed by the implementation of directives (Article 4/3 TEU, Article 288/3 TFEU), are not binding them to do so. From the standpoint of the Union, it is only important for all member states to carry out in their national legislations all the measures, necessary to ensure achievement of the directive objections in their area (Article 288/3. TFEU) i.e. to eliminate in this way the obstacles to cross-border market freedom, access to market, competition, and alike. From the standpoint of exercising the obligations in regards to implementation of directives, the simplest pragmatic approach is sufficient to implement the directive by the separate law, which will more or less incorporate its content and will not intervene in any way into other fields of the national private law. Considering that this law has precedence to other national laws that could be applied to legal relations covered by the directive, this in itself is sufficient to establish the system on the Union level which achieves the directive objective in the whole of its area (e.g. elimination of concrete obstructions to exercising some market freedom, elimination of market competition, and others). However, such an approach undoubtedly does not contribute to preservation of consistency and integrity of national civil laws of member states, particularly in those cases that have for the subject of normative harmonization the complex private law relations, and their founding, implementation, and protection are still subject to other segments of the national civil law.

The decision whether to conduct, concurrently with the implementation of the directive or subsequently, the reform of the whole segment of the civil law field, to which the directive pertains, so as to preserve its consistency and integrity is exclusively made autonomously and exclusively on the national level. Certainly, then, the national legislators are faced with a series of important doctrinal issues on the ways how to conduct such a spontaneous (autonomous) alignment - from the issue of up to which degree of generalization and abstraction to regulate legal relations to which the directive pertain, and the ways to specify the individual field of enforceability of these norms, to normative-technical issues related to whether to conduct the implementation by enacting new regulations or by intervening (amending and supplementing) already existing regulations. A whole series of other very serious questions emerges, such as: whether to develop parallel systems of norms, of which some will be applicable only to civil law relations with international element, while others to only national civil law relations; whether to generalize the system of protection prescribed for certain types of persons by different directives (e.g. by establishing the same standards of protection for all consumer contracts) or opt for more simple approach which regulates different protection of consumers for each individual consumer contract in accordance with each individual directive; whether to extend the protection provided on the grounds of the directive implementation to certain group of per-

---

[46] Blaurock,U.: o.c., p. 274, Micklitz,H.W.: Persepktiven eines Europäischen Privatrechts, p. 255; Werro,F.. o.c., p. 36,37,42; Weatherill,S.: Why Object to the Harmonization of Private Law by the EC?, European Review of Private Law, 5/2004, 651, 652; Cafaggi,F.: Which Governance for European Private Law?, 14; Loos,M.B.M.: o.c., p. 523.

[47] Loos,M.B.M.: oc., p. 524.

sons in certain legal relations (e.g. consumer protection in legal relations with sellers) to other stakeholders at the market (e.g. protection of sellers in their mutual legal relations or protection of consumers in their mutual legal relations); whether to generalize legal regulation prescribed by the directive for certain types of contracts so as to make it applicable to all contractual relations; the ways to establish an optimum relation between the public-law and private-law regulation of certain legal concepts which need to be incorporated into the national legal system by way of the directive implementation; the ways to establish an optimum balance between the substantial and colliding norms of the directives; to what extent and in which manner to adjust the procedural law to legal regulation of the substantive law, the amendment of which is required by the implementation of the directive. [48] [49]

***

When implementing directives in the field of civil law, national legislators are faced with a series of dilemmas. One of the greatest certainly is whether to preserve, and if affirmative, how to preserve the „classical", „traditional" approach to civil law regulation in the course of implementation of the directive – the approach favoring the regulation of civil law relations on abstract and general level, and which brings the exceptions to the general regulation to a minimum level and only if they are absolutely necessary because of the specifics of certain civil law relations. This is very important strategic question for further development of national civil law systems of member states, which should not be decided on an *ad hoc* basis in each individual case of the directive implementation. The discussion on this issue should be conducted systematically so as to investigate and identify all the possible implications of different approaches to the implementation of the directives, necessary to take the position on an optimum means for harmonization of the civil law with the EU law.

---

[48] Roth,W.H.; Transposing „Pointillist" EC Guidelines into Systematic National Codes, p. 770-774; Smits,J.M.: European Private Law: A plea for..., p. 94.

[49] An example for the autonomous/extended harmonization of the national private law under the influence of normative harmonization of certain private law segments on the Union level is a thorough reform of the German law of obligations, which was conducted on the grounds of Schuldrechtsmodernisierungsgesetz, which came into force on 1.1.2002. It conducted the reform of the German law of obligations, which was regulated by the 1900 Civil Code, in order to achieve a comprehensive system of the law of obligations, which would also incorporate the provisions of a number of directives on consumer protection. All these directives (except the Directive no. 1999/44 on certain aspects of the sale of consumer goods and warranties) had already been implemented into the German legal system by separate laws. In order to incorporate the regulations on consumer protection into the general system of the law of obligations, the Civil Code was amended and supplemented by both the provisions on consumer contracts and the directives. This reinstituted the comprehensive system of law of obligations, which was fragmented, until then, by a number of separate laws on incorporating certain consumer directives. Accordingly, some provisions on consumers were placed in the general part of the BGB (definition of a consumer/Par.13, of a seller/Par14, right to recall consumer contracts/Par. 355-359, unfair provisions in contracts/Par 305-310), while the consumer contracts were regulated within individual provisions. Schulze,R.,Schulte-Nölke,H.: Schuldrechtsreform und Gemeinschaftsrecht u Schulze,R.,Schulte-Nölke,H (Hrsg): Die Schuldrechtsreform vor dem Hintergrung des Gemeinschaftsrechts, Tübingen, 2001, p. 7, 15; Nölke,H.: EC Private Law and the German Civil Code u Schulze,R.,Ajani,G. (Hrsg): Gemeinsame Prinzipien des Europäischen Privatrechts, Baden-Baden, 2003. p. 217-226; Arndt,H.W.. Europarecht, Heidelberg, 2003,, p. 203-205; Schulke-Nölke,H., Twigg-Flesner,Ch., Ebers,M. (Eds).: EC Consumer Law Compendium 30-31; Rösler,H.: Europeanisation of Private Law Through Directives – Determining Factors and Modalities of Implementation, European Journal of Law Reform, 3/2010, p. 317.

The similar process of "Europeanization" of the civil law was conducted during the enactment of the Dutch Civil Code into which 20 directives from the private law domain were implemented. Smits,J.M.: European Private Law: A plea for..., p. 93,94; Loos,M.B.M.: o.c., p. 525

Prof. *Branko Morait,* Ph.D.*
Faculty of Law, University of
Banja Luka and Forum for Civil Law of
Southeast Europe

VIOLATIONS OF PERSONAL RIGHTS AS A REQUIREMENT FOR RESPONSIBILITY FOR COMPENSATION OF NON-MATERIAL DAMAGE

Abstract: *The subject of this paper is a research of violation of personal rights as a requirement for responsibility for compensation of non-material damage. From the aspect of the comparative law, there is a tendency to affirm the objective concept of non-material damage as the violation of personal rights.*

Key words: *non-material damage, personal goods, personal rights, legal persons, court protection*

The readiness for gathering of law practitioners from former Yugoslav republics in the Forum for Civil Law of Southeast Europe under the GTZ patronage with a desire to review the achievements in the process of legal reform and move forward in the eternal quest for a just law, has been made possible in the field of obligations by reception of Law of Obligations. As academic, Professor Perović remarked, thirty years afterwards, „the state has disintegrated but the Law has survived." (...) „Is such a thing possible? „The explanation for such phenomenon of vitality of codification has been found in the fact that it „continued to live in all former republics of Yugoslavia, presently autonomous, independent and sovereign states, frequently with some innovation but with essential identicalness.."[1]

The Law of Obligations, which came into force on 1 October 1978 [2] in the field of extra contractual liability, defines by virtue of Article 155 the damages to property as impairment of someone's property and prevention of its growth. It has defined non-material damage as inflicting physical or mental pain or fear. In that way it has established so-called subjective concept of non-material damage. In order to complete the picture and view the concept of non-material damage in its entirety, it is also necessary to refer to the provision of Article 200 of ZOO/78 which sets forth cash compensation for non-material damage. According to this provision, cash compensation, as the basic form of indemnization, cannot be requested for each case of suffered physical pain, mental pain and for suffered fear, but only for such pains and fear, which originate from the personal goods and values of physical person, quoted in the provision. Such personal goods and such human values, defined by this Law, include: decrease of vital activity, defacement, violation of reputation, honor, freedom or personal

---

* Original text is in local language.

[1] Slobodan K.Perović, „Trideset godina posle", Preface for the eighteenth issue for Law of Obligations with register of concepts, Official Gazette of RS, Belgrade, 2009.

[2] Official Gazette of SFRY, No. 29/78, 39/85, 45/89 and 57/89 (hereinafter: ZOO/78)

rights, death of a close person and fear. Besides, as a special case of satisfaction i.e. recognition of the right to cash compensation due to suffered mental pain, in terms of the provision of Article 202. of ZOO/78 shall belong to a person who was solicited to indictable sexual intercourse or punishable indecency by deception, by force or abuse of some relation of subordination or dependency, as well as to a person who was subject to some other act against personal dignity and ethics. Therefore, the comments state that ZOO has adopted a subjective-objective concept of non-material damage, because not every suffered pain and fear shall represent the basis for acquiring cash indemnization. The guiding idea of editors of ZOO/78 is a compromise between past denial of right to compensation of non-material damage, as an undesired phenomenon of commercialization of personal goods and human values and, on the other side, the attempt of encouraging court practice to, in the cases set forth by the law, may adjudicate cash indemnization for violation of human personality. That was the legislator's response to past hesitation of court practice in many and varied cases of requests by injured persons for adjudicating cash compensation for non-material damage, by citizens, but increasingly by legal persons as well.

An opinion frequently found in literature is that ZOO/78 made it possible for cash compensation for non-material damage to be adjudicated in all important cases, and that formulations of this Law are broad, thus including most causes of appearance of legally recognized forms of non-material damage. Excluded are other cases, which are not deemed relevant from the legal point of view; however, subjective opinion of interested parties hold them as the basis for adjudicating cash compensation for non-material damage, although past court practice and later the editors of ZOO/78, who relied on it, excluded them from legal presumptions, because they did not deem them relevant for causing sufficiently serious non-material damage.[3]

The criteria for establishing non-material damage that would justify adjudicating cash compensation for suffered physical and mental pain and for suffered fear are stated in the provision of Article 200, paragraphs 1. and 2. ZOO/78. The circumstances that justify adjudicating cash compensation are intensity of pain and its duration i.e. intensity of fear and its duration. Additional circumstances that guide the court in determining the amount of compensation, beside justifiability of compensation, include: significance of injured good, purpose of compensation and „caution", in that adjudicating compensation does not support aims which are not compatible with its nature and social purpose.

Beside the mentioned limitations, that the court should have been guided by in respect of persons entitled to compensation for non-material damage arising from death or serious disability of a close person (provision of Article 201 ZOO/78), as well as possibility of inheritance or assignment which was recognized only if the claim was established by absolute decision or written agreement (provision of Article 201 of ZOO/78), the existing solutions of ZOO/78 (provisions of Articles 157 and 199) envisaging non-cash sanctions for suffered non-material damage due to violation of personal rights do not differentiate between requests

---

[3] The following are mentioned as such: „mental pains due to forced abortion, violation of parental feelings due to replacement of their child for other people's child, temporary separation of parents from child, violation of affections due to destruction of a thing, failure to fulfill promise to conclude a marriage, rape, termination of education, moving to an inappropriate apartment, temporary inability to use a car, illegal acting on job placement decisions, illegal lay-offs, unused annual leave, missed trip or outing, non-participation in meetings, etc..."

– quoted according to Dr. Obren Stanković: damage compensation, Enciklopedija imovinskog prava i prava udruženog rada, Book II, NIU „Službeni list SFRJ", Belgrade, 1978., p. 307-316

originated from physical or legal persons, because a legal person can also request termination of an act that insults its personality, resulting in the passing of a judgment, withdrawal of statement, publication of correction or something else, thus achieving the purpose which is otherwise achieved by means of compensation in the Law of Obligations. On the other hand, regarding implementation of the provision of Article 200 of ZOO/78, a legal person could, hypothetically, exert title to cash compensation for non-material damage, if it proved that due to violation of personal rights it suffered mental pain of legally relevant intensity and duration, which would be absurd. [4]

By this regulation ZOO/78 pointed out the dilemma of finding an adequate sanction for the violation of a person's right, by promoting action against allowing the act of violation against a person in the provision of Article 157 as an appropriate form of non-cash satisfaction i.e. the passing of a judgment or correction in the case of violation of personal rights or withdrawal of statement by which the violation was committed or something else, resulting in achieving the same purpose as would have been achieved by indemnizaiton (Article 199 of ZOO/78). Additionally, as a means of discouraging the violation of personal rights of another, the provision of Article 157, paragraph 2 of ZOO/78 also envisages private punishment – payment of certain amount of money in favor of the person whose personal goods have been infringed.

According to the subjective non-material damage compensation system found in the solutions of ZOO/78, an understanding was developed in legal public that in such cases it is desirable to adjudicate a non-cash measure for protecting a person's right, while cash compensation is an exception that should be restrictively interpreted and applied. It seems to have been overlooked that a precondition for non-material damage, for the suffering of pains and fear, is previous violation of personal goods i.e. personal rights. This can be easily checked by comparing personal goods and human values that can be subject to violation: right to life, body and spiritual integrity, health, honor, name and private life. The solutions of ZOO/78 also hold personal rights in the background and at the foundation of liability for compensation of non-material damage, which consisted of legally relevant physical or mental pains or fear. Other personal rights were the subject of protection provided that their violation resulted in legally relevant state of physical and mental pains and fear only. The fact that other personal rights were violated, as well as personal rights listed in the provision of Article 200 of ZOO/78, did not lead, by itself, to the establishment of obligation for indemnization. The liability requirements were: illegality and damage.

How far the solutions of ZOO/78 were ahead of its time is best seen in the fact that Draft Law on Compensation of Damages was prepared in Austria in 2005. In addition to the basic, previously protected personal right to physical and mental integrity set out in Paragraph 1325 ABGB, Paragraph 1316 of the Draft, for the first time ever includes a list of cases in which compensation for pain and suffering are adjudicated, such as violation of right to privacy, compensation for pain and suffering to close relatives in the case of death or serious body injury, violation of right to sexual integrity by sexual harassment, violation of right to sexual orientation, gender-based discrimination, ethnic origin, religion or disability, suffered mortal fear or fear due to serious injury. In determining the gravity, the focus is shifted from gravity of guilt to the importance of injured good and the scope and duration of injury. [5]

---

[4] Novi zakon o obveznim odnosima-najznačajnije izmjene-novi instituti, Inženjerski biro d.d., Zagreb, June 2005, Petar Klarić, Naknada neimovinske štete, page 29.

[5] Aleksandra Vučić-Milovanović, Professor at Faculty of Law in Vienna: Novine kod instituta naknade bolnine u austrijskom pravu, Zbornik radova-Aktuelna pitanja gradjanske kodifikacije, Niš, 2008. p. 116.

II Legal reform of personal rights' protection in the South-East Europe

This account may be divided according to the protected objects i.e. according to the reform of personal protection of natural entities and personal protection of legal entities, and according to the legal areas in which legal solutions in the field of obligation and legal protection of personal rights ensued or will ensue.

The work on preparing a new Civil Code started in the **Republic of Serbia**. At the eighth session of the Serbian Civil Code Preparation Commission, held 27 July 2007, a Commission member Snežana Andrejević, Judge of the Supreme Court of Serbia, was entrusted with preparing the entire court practice (from years 1976 to 2006), which is relevant for deciding on solutions for the future law. At the ninth session of the same Commission the report Court Practice – Positions on Compensation of Non-material Damage in the Past and Today was presented.[6] The report is based on Conclusions of Consultations among the representatives of the Federal Court, Supreme courts of the Republics and Autonomous Provinces and the Supreme Military Court of 15 and 16 October, 1986, „On legally recognized i.e. legally unrecognized non-material damage", „On non-material damage which was incurred and future damage", „On possibility of cumulatively imposing several sanctions for the same non-material damage", „On physical pains", „On fear", „On mental pain because of defacement", „On mental pain resulting from decrease of vital activity", as well as other conclusions and tentative opinions in relation to certain forms of non-material damage.[7] From contents of this well-laid out report no conclusions seem to have been suggested in the direction of reforming the existing legal solutions of ZOO/78, which have been clarified, supported and interpreted by the highest court instances and authorities of that time for the purpose of adequate implementation of legal provisions by courts.

The mentioned report, which is of our interest, contains a conclusion of the above Consultations „On legally recognized i.e. legally unrecognized non-material damage", of which Paragraph 2 goes as follows: „Cash compensation may be adjudicated to an injured party for violation of non-material personal rights only when the consequences of such injury have been manifested in one of the forms of non-material damage. Even when some of the forms of non-material damage were incurred, cash compensation may be adjudicated to the injured party only when intensity and duration of pain and fear and other circumstances of the case justify it, in order for the injured party to regain its derranged mental balance."[8]

As an example of a different position, the report author refers to the late Professor Cigoje who holds that, as the author understands, damage is not only pains and fear resulting from injury, but it can also be a violation of personal rights without establishing existence of pain.[9] The report author concludes that ZOO/78 identifies legally recognized forms of non-material damage by listing them, rather than by providing examples.[10] The report, which should serve for preparing potentially different solutions for the future Civil Code of Serbia, did not open an issue of de lege ferenda, so the position of the Commission on this issue cannot be established.

---

[6] Work on the Serbian Civil Code Preparation, Pravni život, 11/2007, p. 25, 25

[7] Court practice - Positions on compensation of non-material damage in the past and today, prepared by Snežana Andrejević, Judge of Supreme Court of Serbia, Pravni život, 11/2009, p. 177-211

[8] Ibid., p. 177

[9] Ibid., page 178

[10] Ibid.

In the **Republic of Croatia**, the provision of Article 19 of the Law of Obligations[11] defines „personal rights" that enjoy protection. By this solution they are protected approximately equally, in proportion to their characteristics. Personal rights under ZOO/05 are taken to mean: right to life and body and mental health, reputation, honor, dignity, privacy of personal and family life, freedom etc. „Legal person" is entitled to protection of all above personal rights, except those related to the biological essence of a physical person. „Legal person", in particular, has the right to reputation and good fame, honor, and name i.e. firm, business secret, economic freedom, etc.

The **Republic of Macedonia**, following example of the Republic of Croatia, redefined non-material damage as violation of personal rights by Law on modifications and amendments to the Law of Obligations[12]. By the provision of Article 9-a protection of personal rights was included among the basic principles. The provision of Paragraph (1) therein sets forth that each physical and legal person, beside protection of property rights, is entitled to protection of its personal rights pursuant to the law. Paragraph (2) of the same Article lists the following personal rights: right to life, physical and mental health, honor, reputation, dignity, personal name, privacy of personal and family life, freedom, intellectual products and other personal rights. Paragraph (3) sets forth that legal persons have all the above personal rights, except those related to the biological essence of physical persons, particularly right to good fame and reputation, name i.e. firm, business secret, freedom of entrepreneurship and other personal rights of such persons. The legal concept of damage is redefined, rendering damage an impairment of someone's property (ordinary damage) and prevention of its growth (lost profit), but also violation of personal rights.[13] Following the example of solutions in OZ of the Republic of Slovenia, the request to stop violation of personal rights is amended with request to remove consequences inflicted by such harmful action.[14] The standardization of compensation for non-material damage resulting from violation of personal rights excludes the term of „cash compensation" and replaces it with the term „fair cash compensation", which is adjudicated if justified by gravity of injury and circumstances of the case.[15] The benchmark for court decisions on request for a fair cash compensation resulting from violation of personal rights shall be intensity and duration of injury that caused physical pain, mental pain and fear, while consideration shall be taken for the compensation not to be contrary to its nature and social purpose.[16] Violation of right to reputation and other personal rights of legal person represent a basis for adjudicating fair cash compensation, permitted by circumstances of case and gravity of injury.[17] The implementation of rules of another law governing these issues is also envisaged.[18] There is an interesting new provision[19] introducing maturity and amount of fair cash compensation. The fair cash compensation payment

---

[11] „Narodne novine" , No. 35/05 (hereinafter: ZOO/05)

[12] „Službeni vesnik na Republika Makedonija", No. 84/ 2008.

[13] Article 142 of ZOO RM modified and amended in 2008 by provision of Article 41. of Law on modifications and amendments of Law of Obligations

[14] Article 144 of ZOO RM modified by provision of Article 43 of Law on modifications and amendments of Law of Obligations of 2008.

[15] Article 189. Paragraph (1) of ZOO RM

[16] Article 189. Paragraph (2) of ZOO RM

[17] Article 189. Paragraph (3) of ZOO RM

[18] Article 189. Paragraph (4) of ZOO RM

[19] Article 192 of ZOO RM

obligation is due on the day of adoption of first instance judgment, determining the amount of such compensation. The court may take into account the period of time between occurrence of damage and adoption of first instance judgment, if this is justified by the period of waiting for satisfaction and other circumstances.[20]

Protection of personality of a legal entity is also established by provision of Article 183 of the Law of Obligations of the **Republic of Slovenia**.[21] According to this legal provision, for violation of reputation or good fame a just cash compensation shall be adjudicated by court against a legal person regardless of the incurred damage to property, even if there is no damage, if it is established that this is justified by the circumstances of the case. Regarding protection of physical persons, the provision of Article 179 of OZ is the taken over provision of Article 200 of ZOO/78.

The **Republic of Montenegro** adopted the new Law of Obligations[22] and preserved in it Paragraphs 1 and 2 of Article 200 of ZOO/78, but changed Paragraph 3 according to which the court shall adjudicate fair cash compensation to a legal person for the violation of reputation and personal rights thereof, if gravity of violation and case circumstances justify so, regardless of property indemnization.

In **Bosnia and Herzegovina** (Federation of Bosnia and Herzegovina/Republic of Srpska), following the example of promoting the objective concept of compensation for non-material damage implemented in ZOO/05, the provisions of Art. 174 – 175, 178, 234, and 238 of the working version of ZOO of Bosnia and Herzegovina/09 were modified and amended. Following the example of ZOO/05 of the Republic of Croatia, the provision regarding the concept of damage was redefined, in that beside property damage, violation of personal rights was defined as non-material damage. The listed personal rights are right to life, physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, freedom etc. A legal person possesses all the mentioned personal rights except those related to the biological essence of a physical person, and particularly right to reputation and good fame, honor, name i.e. firm, business secret, economic freedom, etc. The request regarding the violation of personal rights is broadened to removal of consequences, following example of the Law of Obligations of the Republic of Slovenia. Fair cash compensation was established with respect to compensation for non-material damage, as is the case of ZOO/05 RH and ZOO RM/08. The right to inheritance and assignment of claim for compensation of non-material damage is established only in the event that injured party has submitted a written request or petition.

III Preliminary appraisal of the legal reform of personal rights' protection

Regarding the reform of human rights' protection, ZOO/05 was first in the region to put personal rights i.e. their violation as a precondition for non-material damage cash compensation obligation. Not only that injury of a person's right is understood as an illegal act but the injury itself is qualified as the caused damage. The provision of Article 1046 of ZOO/05 redefines the general concept of damage, qualifying it as impairment of property and prevention

---

[20] See more: Gale Galev, Jadranka Dabovik-Anastasovska, Obligaciono pravo, Skopje, 2009, p. 651.

[21] Uradni list Republike Slovenije, No. 83/01, 28/06, 32/04, 40/07

[22] „Službeni list Crne Gore", No. 47/08 of 7 August 2008

of its growth and as violation of personal rights (non-property damage). That is why the commentators of ZOO/05 called this concept of non-property damage an objective one, because instead of the definition provided by ZOO/78, according to which non-material damage is taken to mean inflicting physical or mental pain to someone, ZOO/05 defines the non-property damage as violation of a right of am person (personal right). The commentators of ZOO/05 label such modifications abandoning the mixed, subjective-objective concept of ZOO/78 and accepting the objective concept of non-property damage, according to which the injury of personal rights in itself is deemed non-property damage. So, instead of two preconditions of liability originating from the ZOO/78 definition of non-material damage – illegality of act and inflicted damage, it seems that the ZOO/05 integrates both preconditions, since violation of a person's right is sufficient for deeming a damage as inflicted. Is such redefinition i.e. identification of two preconditions of liability for damage a defect or advantage of the offered objective concept of non-property damage referred to in ZOO/05? The answer must be looked for in the area of damage compensation. Even according to past regulations, the compensation of non-material damage was qualified as fair one and it was not deemed to be the equivalent of a committed injury. Personal injuries could not be compensated by a certain amount of money, but it was deemed that an adjudicated amount of money was the property satisfaction for the suffered non-material damage. This hypothesis is supported by provision of Article 1100 of ZOO/05 titled: „fair cash compensation". Fair cash compensation shall be adjudicated for violation of personal rights if the court finds that gravity of violation and circumstances so justify, regardless of compensation of property damage, even in the event when such damage was not inflicted. In Paragraph 2 of Article 1100, in making a decision on the amount of fair cash compensation, the prominent criterion shall be content of non-material damage as defined by ZOO/78, i.e. the court shall take into consideration the intensity and duration of physical i.e. mental pains and fear, as well as the criteria for measuring the amount of compensation found in ZOO/78 i.e. the objective to be achieved by compensation, while caution shall be taken not to help the aims contrary to the nature of adjudication and social purpose.

If we compare solutions of subjective and objective concepts of non-material – non-property damage, we can make a preliminary conclusion that their divergence is not as big as it seems at first sight. The reason for this is that title to indemnization i.e. causing damage as the source of obligation for cash indemnization has its „innate" limitations, that is, range. Damage must occur for an obligation to exist. An obligation cannot be formed on presumption or fiction that damage has occurred. If cash compensation cannot be equivalent to the damage committed, which proved to be true on a myriad of occasions, then compensation of non-material damage can be understood only as a fair compensation. The indemnization obligation exists in this case only as an instrument for justification of money transfer for satisfaction i.e. fair compensation, but this is not damage compensation according to the usual understanding, which exists in the field of property liability. Therefore, both the subjective and the objective concept of damage compensation converge as the construction of liability for violation of personal rights and personal goods.

Consistency of the objective concept of non-property damage promoted by ZOO/05 supports the recognition of a right to fair cash compensation for the purpose of remedy for non-property damage for violation of reputation and other personal rights of a legal person. The court shall adjudicate such compensation to a legal person by implementing provision of Paragraph 3 of Article 1100 of ZOO/05, if it estimates that gravity of violation and case circumstances so justify, regardless of compensation of property damage, even when it does not exist. This is, in the field of comprehensive protection of legal persons, a significant advantage in relation to the subjective concept as court practice could not accept, for instance, that

for violation of good business reputation cash compensation could be adjudicated in terms of the provision of Article 200 of ZOO/78. According to the position of the reviewing court,[23] the compensation for non-material damage can be recognized only for such non-material damage as is recognized by law and not for any non-material damage. A violation of good business reputation by itself cannot lead to cash compensation for non-material damage because, according to the opinion of the reviewing court, non-material damage is a subjective category. Thus, according to the correct interpretation of court practice in line with ZOO/78, which could not have been above the law, a compensation for non-material damage requested by a legal person (company) does not enjoy court protection, as the forms of non-material damage (suffered pains, fear etc.) can be adjudicated only to physical persons.

The objective concept of compensation for non-property damage of ZOO/05 has its limitations in terms of defining the personal rights. The personal rights have its object, and that object is personal good. Personal goods nowadays include not only those which belong to a human as a biological being (life, body, health), but also those that are in modern age recognized as the integral elements of human person (freedom, honor, name, intimate and family life, fame, image, private letters etc.)[24]. Personal rights have absolute effect, they act erga omnes, they are out of transactions and cannot be subject of execution, they cannot be inherited, they can be protected after death of the title holder and some of them cannot be violated after the death of the title holder. Postmortal protection of some personal rights, like: honor, name, private documents, intimate life and similar are inherited.[25]

Dilemmas are possible among supporters of the objective concept as the provision of Article 19 of ZOO/05 concerning the defining and listing the rights of a person does it specifically, not by providing examples. The issue remains open as to the manner in which the existing catalogue of rights will be filled out, since this catalogue is open and in addition to the listed personal rights, other personal rights can be subject of legal protection. There is a question if the court practice is free to estimate by itself, without set legal criteria, which right will be recognized as a personal right and which right will not be recognized as such? In which general definition or in which catalogue of rights will the court practice find solutions for its assessments and/or qualifications of particular personal rights and their eligibility for court protection? Such questions are also asked for a reason, namely, the issue is relativized through equalization of personal rights with constitutional rights and human rights i.e. natural rights.[26] As we have already pointed out, personal rights are subjective absolute rights and the legal nature of internationally recognized human or constitutional rights has not been qualified in this manner to date. As some authors stress, the listing of personal rights, no matter how exhausting, is not final. The list of personal rights is also open and it is filled depending on development of cultural and legal awareness of a society.[27] Other authors point out that rights

---

[23] From decision of Supreme Court of Serbia, Prev. 127/97 of 26 March 1997, quoted according to M. Vrhovšek, V. Kozar, Nematerijalna šteta zbog narušavanja ugleda pravnog lica, Pravna riječ, Banja Luka, 2009., p. 54.

[24] S. Krneta, Lična prava, odrednica u enciklopediji imovinskog prava i prava udruženog rada, Book I, Beograd 1978, page 910.

[25] Ibid.

[26] I. Babić, Obligaciono pravo, opšti deo, „Službeni glasnik“, Beograd-Sremska Kamenica, 2009., p. 255.

[27] P. Klarić, quoted, page 31 (quotes the classification of Swiss author Tercier, who is classifying personal rights in three groups: 1. rights of individuality in physical sense, 2. rights of individuality in affective sense and 3. rights of individuality in social sense.

of individuality are „in the stage of development", so their recognition by legal system happens only when their content and limits are checked and established in court practice.[28]

The principle of obligation law that damage, as precondition of civil legal liability for damage compensation must be proved, has been preserved also in the field of implementation of objective concept of non-property damage. However, according to this principle, there is an essential difference regarding the subjective concept of non-material damage according to which the injured party had to prove pains and fear of legally relevant intensity and duration, which originate from the forms of non-material damage encompassed by legal definition. In the process of proving such facts, the role of assessors as a means of proof in court had a very significant role. According to the new regulation of ZOO/05, the injured party had to prove that harmful act has violated some of his/her personal rights, contained either in the legal definition of personal rights or, if excluded from the definition, are recognized by court practice. If the injured party, physical or legal person, requests fair cash compensation, they should prove the gravity of injury and legally required circumstances that allow adjudicating such damage compensation.

ZOO/05 introduced significant changes of other provisions relating to the field of non-property damage. Thus, the provision of Article 1101 prescribes that in case of death or particularly serious disability, the right to fair compensation is recognized to members of immediate family, without taking into consideration their mental pains, as set forth in the provision of Article 201, Paragraph 1 of ZOO/78. The right to fair cash compensation is recognized also to parents in case of loss of conceived but unborn child (Article 1101 Paragraph 3 of ZOO/05). Another significant provision is that of Article 103, according to which obligation of fair cash compensation becomes due on the day of submitting the written request or petition, unless the damage was incurred afterwards. [29] Article 1105, Paragraph 1 has the same purpose, namely that claim of compensation of non-property damage is transferred to successors only if the injured party had submitted a written request or petition.

A significant change also happened in the field of contractual liability for damage. According to the provision of Article 346, Paragraph 1 of ZOO/05, creditor is entitled to compensation of ordinary damage and lost profit, as well as fair compensation of non-property damage, which the debtor had to foresee at the time of contract conclusion as a possible consequence of contract violation, considering the facts that were familiar to him or had to be familiar to him.

According to the opinion of commentators of ZOO/05, by establishing a contractual liability relating to non-property damage this law rejected the dogma of exclusive property value of performance, accepted contract as an instrument of mediation between non-property goods and human needs, and secured unity of liability of non-property damage, and thereby joined the major number of countries, which recognize such liability and modern tendencies of the European contractual law from Lando principles.[30] Further, ZOO/05 commentators add that, although this regulation does not mention particularly the pre-contractual liability for non-property damage, the acceptance of contractual liability for non-property damage also means acceptance of such pre-contractual liability.[31]

---

[28] Krneta S., quoted.., page 908.

[29] Maturity of compensation of non-material damage is regulated in different manners, starting from the moment of damage occurrence ZOO/78, ZOO BiH(FBiH/RS), submittal of written request or petition ZOO/05 RH, to the day of passing the first instance judgment ZOO/08 RM

[30] Klarić, P., quoted, page 33. and 34.

[31] Ibid., 35.

ZOO/05 has somewhat changed provision on action for failure to act i.e. request for terminating the violation of personal rights belonging to each natural and legal person, and removal of consequences caused by it, resulting in the provision of Article 1048 to encompass two actions for violation of personal rights – action for failure to act and action for removal of consequences of action which violates a personal right. Such solution has been already established by provision of Article 134, Paragraph 1 of OZ. [32]

IV Conclusion

The paths of developing the definition of non-material damage and adjudicating compensation proper, as in other transitional processes, are characterized by moving the pendulum of changes along the maximal amplitude, from one extreme to another. The idea of non-material damage as apparently inflicting legally relevant pains or fears to the injured party moved to position that injury of a personal right is sufficient for adjudicating compensation. The question is if all the possibilities provided by the subjective concept of ZOO/78 are exhausted and if its radical rejection is necessary and justified. It appears from the above presentation that court practice, according to ZOO/78, has been unanimous in restrictively interpreting provisions on compensation of non-material damage because of appearance of legally relevant physical and mental pains and fear. The reasons for such position of court practice, after coming into force of ZOO/78, are explained by itself in their conclusions, positions and decisions, which are known to our legal public. However, the question is why the court practice, which before ZOO/78 came into force, made path by its decisions for the adopted legal solutions, stopped doing that and became extremely restrictive i.e. conservative? Perhaps a dogma was created that the maximum was reached and that the legislator had integrated all the best solutions from this field so there was no more need for finding new solutions but it was necessary only to implement the law persistently enough. It seems that all participants in this discussion are right and any option can be successfully defended! The events in the Austrian law are interesting. According to the Austrian General Civil Code of 1811, Paragraph 1325, recognizes right to damages for pain and suffering, but not as a rule but as an exception and only for the pains caused by physical injury. The modern Austrian law deems this provision to be out of date, rigid and insufficient. Therefore, for a long time in the Austrian legal science and particularly in court practice it has been interpreted extensively, so, thanks to the court practice, mental trauma is also under this provision. This means that the court practice used the extensive interpretation and overcame shortcomings i.e. lack of modernity of the legal norm. That is why they say that the contemporary Austrian law on compensation of non-property damage, developed out of the norm of Paragraph 1325 ABGB, is a court law.[33] Such development of court practice in Austria reaches up to adjudicating damages for pain and suffering even in the cases when there are no pains, because injured person cannot feel them, so in justified cases the intensity of pain is not relevant and the damages for pain and suffering are adjudicated because of destruction of personality and they encompass any form of the so-called diminish-

---

[32] Lampe, Rok., Uređenje prava ličnosti Zakonom o obligacionim odnosima, Zbornik referata, „Bilans tranzicije“, Maribor – Belgrade, 2004., p. 361.

[33] Aleksandra Vučić-Milovanović, Professor of Faculty of Law in Vienna, Novine kod instituta naknade bolnine u austrijskom pravu, Zbornik radova-Aktuelna pitanja gradjanske kodifikacije-,Niš,2008, p.116.

ing (injury) of a person.[34] If the scientific reasons justified preserving of subjective concept of non-material damage of ZOO/78, we feel that the court practice should be liberated in the direction of more extensive interpretation of forms of non-material damage, which deserve compensation by introducing a provision following the example of provisions of Article. 47 c) Compensation of moral damage, Article 49.3 Violation of personal interest and Article 42 II Establishment of damage, of the Swiss Law of Obligations.[35]

We must conclude that in revised laws on obligations in the territory of former Yugoslavia, the reform of non-material damage and its compensation are going in the direction of accepting the objective concept of non-material damage.

Summary

The Law of Obligations has won recognition for cash compensation for the itemized list of personal goods when their violation has caused pains and fear of particular intensity and duration. This has promoted an objective-subjective concept of compensation for non-material damage. The idea of objective concept which deems violation of personal rights as the requirement for adjudicating cash compensation for non-material damage and does not make appearance of pains or fear of particular intensity the requirement for adjudicating of compensation has recently won recognition within regional frameworks. This paper is dedicated to re-examination of such solutions and comparison with solutions of Yugoslav Law of Obligations.

[34] Ibid., p. 117.

[35] Swiss Law of Obligations of 30 March 1911 with amendments made up to 1 January 1976 (Article 1 to 551) with preface by Professor Mihailo Konstantinović, Ph.D., Institute for Comparative Law, Series E-No. 57, „Savremena administracija", Belgrade, 1976, Article 47.c) Compensation of moral damage.- A judge may, in regard to special circumstances, adjudicate to a person that did not suffer a physical injury, or in case of death of that person, to the members of his/her family, a fair compensation on behalf of moral damage (satisfaction). Article 49.3 Violation of personal interest.- A person, who has suffered damage to his personal interests may request, in case of guilt of wrong-doer, the damage compensation, and beside that, a sum of money on behalf of compensation of moral damage, when this is justified considering particular gravity of suffered damage and guilt of the wrong-doer. Instead of this compensation or beside it, judge may adjudicate other sort of indemnity. Article 42 II Establishment of damage-Burden of proving damage is borne by the person who is demanding the compensation. When the amount of damage cannot be exactly determined, the judge shall determine a fair one considering the regular course of things and the measures undertaken by injured party.

Prof. *Ardian Nuni*, PhD & *Evgjeni Bashari*, LLM *

TORT LIABILITY AND EC DIRECTIVES

1. Introduction

Harmonization of the private laws of Member States has for a long time been at the center of European Community's (EC) work. While in the field of contract law some concrete achievements have been reached, stressing, above all, the Common Frame of Reference,[1] harmonization of tort law and the corresponding civil-procedure regulations is still open to debate, and the process is likely to continue for quite some time.[2]

The differences that do exist in the historical, political, economic backgrounds of the Member States, which have led to dissimilarities in their legal systems, even though many of them belong to the Civil Law tradition, play a significant role in the attempts to harmonize their tort laws. Although the basic principle of liability for harm caused by wilful misconduct or negligence is common to all, it is the practical applications that differ considerably from one system to another.[3]

The efforts for harmonization can be divided into two main categories, on the one hand those made by EU Institutions, through the enactment of legal acts, regulations, directives, recommendations, and on the other hand, the attempts made by scholars' research groups, such as the *European Group on Tort Law*[4] and the *Study Group on a European Civil Code,* which aim to enact „Soft" European Tort Law. In addition, some projects are being developed, with the focus not on the definitive solution, but on ways that will foster the dialogue between European legal cultures, e.g. *Ius Commune Casebook for the Common Law of*

---

* Original text is in English.

[1] The Common Frame of Reference is a long-term project which aims at providing the European Legislators (Commission, Council and European Parliament) with a „toolbox" or a handbook to be used for the revision of existing and the preparation of new legislation in the area of contract law. This toolbox could contain the fundamental principles of contract law, definitions of key concepts and model provisions. Detailed information can be found at <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm>, last visited on 19 April 2010.

[2] Marcos Francisco and Sanchez Graells Albert, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?,* European Review of Private Law 3-2008 [469-488], Kluwer Law International BV, at 472.

[3] *Id*. at 471.

[4] European Group of Tort Law has drafted a collection of Principles of European Tort Law similar to the Principles of European Contract Law drafted by the European Contract Law Commission („Lando Commission"), with the aim to identify the common principles of European Tort Laws, in order to reach harmonisation at a higher level based on the common ground that underlies all the legal systems concerned with respect to the law of tort. Moreover, the findings arising from these principles will already have an important academic, as well as practical value in itself since they will teach the academic and practitioner the fundamental questions underlying the law of tort in a particular country as well. They can be found at the official website of the European Group of Tort Law <http://civil.udg.edu/tort/>.

Europe project, *Common Core of European Private Law* project.[5] Furthermore, there are the projects of the Institute for European Tort Law and the Center of European Private Law which aim to analyze the present *acquis communautaire* regarding its concepts on tort law.[6]

The *acquis communautaire,* at the present*,* does not have a complete and independent, self-contained body of tort law, which usually exists in national laws, but isolated provisions can be found at various levels of community law,[7] which can be categorized into primary and secondary community law.

Liability under *primary community law* can be: liability of the community itself under Article 288 ECT[8], which is a „closed" system, since community law governs the criteria for and the consequences of liability; liability of its Member States, as developed by the European Court of Justice (ECJ) in the „*Francovich*" ruling, which is an „open" system, where community case law solely determines the preconditions for liability, while the law of the Member States supplements the remedies available.[9]

Meanwhile, liability under *secondary community law* is settled in several regulations[10] and directives, which are in whole or in part devoted to issues of tort, but due to the isolation of the individual provisions and diversity of the subject matter, it is difficult to distinguish a consistent approach.[11]

The statutory measures taken in the secondary community law have been criticized due to the „soft" approach in the attempt to create a European substantive tort law, since for the most part they have taken the form of directives. The latter are considered flexible, as are the national authorities of the Member States in selecting the means of their implementation, frequently with great difficulties in the process due to the tendency of national legislators to

---

[5] Infantino Marta, *Making European Tort Law: The Game and Players*, Universty of Trieste, International University College of Turin, at 3, available at <http://ssrn.com/abstract =1452804>, last visited on 12 April 2010.

[6] Kellner Markus, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, at 134.

[7] M. Wissink, *Overview, in EC Tort Law, no.15/9 et seq*, in the Kellner Markus, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, at 135.

[8] Article 288 ECT states „*The contractual liability of the Community shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties. The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of employment applicable to them*".

[9] *Id*.

[10] EC Regulation No. 864/2007 of 11 July 2007, on the law applicable to non-contractual obligations" (Rome II), which aims to resolve the conflict of laws in situations of non-contractual obligations in civil and commercial matters, and its Chapter II specially regulates Torts/Delicts, prescribing in Article 4/1 „*unless otherwise provided in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur*".

[11] Kellner Markus, *Tort Law of the European Community?: A Plea for an Overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, at 136.

replicate the traditional features of their legal systems in any newly enacted legal document.[12]

In addition, issues have arisen regarding the terminology used in the directives, which due to the lack of common vocabulary and a standard capable of summarizing the different notions within the legal concepts and rules, in the light of national legal contexts, have led to different interpretations, and in turn to a non-uniform application of the provisions.

Despite all the difficulties in this ongoing process of establishing a European tort law, in some fields, as in the EU institution liability, product liability, environmental damages, motor vehicle insurance liability, an approximation of national legislations has been achieved, which will be the focus of this paper. A general overview of the main EU directives regulating, directly or indirectly, some aspects of tort liability issues will be presented, stressing out the current situation, the problems in the implementation process, and offering a new perspective on the matter.

2. The EC Directives Relating to Tort Law

2.1. Product Liability Directive[13]

With the aim to overcome the divergences, which may endanger competition and affect the movement of goods within the common market, and to provide consumers with better protection in cases of damage to their land or property by a defective product, the EEC adopted on 25 July 1985 the Council Directive on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (The Product Liability Directive/PLD).[14] The so-called corner stone of the European Tort Law represents the first legal act, issued by EEC, now EC, in the long standing efforts of Europeanization of tort laws of the Member States.

The PLD treats cases of personal injury, death, or damages to private property of consumers which have been caused solely by a defectiveness in a product. While for personal injury and death there is no limitation foreseen in the provisions of the Directive on the amount of damages that the guilty party should pay, there is a threshold of 500 EUC for property, and the property should be of a type ordinarily intended for personal use or consumption, and should have been used by the injured person mainly for his own private use or consumption.[15]

There have been long discussions on whether the PLD represents a full harmonization of the product liability laws of the Member States, obliging the latter to bring their laws into conformity with the requirements of the directive, or it only puts into operation an alternative system of consumer protection in terms of product liability, establishing a minimum standard of protection, by allowing national laws to provide better protection to consumers.

---

[12] Infantino Marta, *Making European Tort Law: The Game and Players*, Universty of Trieste, International University College of Turin, at 10, available at <http://ssrn.com/abstract =1452804>, last visited on 12 April 2010.

[13] Council Directive 85/374/EEC, *On the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products*, published in O.J OJ L 210 of 07 August 1995, available at <http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm>, last visited on 23 April 2010.

[14] *Id.* Recital 1.

[15] *Id*. Article 8.

Based on the terminology of the directive, one may think that it does not provide for a full harmonization of the national laws. In its first recital the PLD states „As regards the **approximation** of the laws of Member States…", which may give rise to a different interpretation, regarding the term approximation versus harmonization. In addition, there are several optional provisions stipulated in the directive, allowing the Member States to either reject or enforce them in the national laws. Thus, each Member State may decide to allow or not the defense claim of a producer regarding the state of scientific and technical knowledge at the time when he put the product into circulation, which could have prevented them from discovering the defect.[16]

Furthermore, each Member State may depart from the principle of unlimited liability by providing a limit to the total liability of the producer for damage ending in death or personal injury caused by identical items with the same defect, provided that this limit is established at a level sufficiently high to guarantee adequate protection of the consumer and the correct functioning of the common market, i.e. the limitation should not be less than 70milion ECU.[17]

Even Article 13 of the PLD gives the idea of the existence of a parallel system, stating that it will not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability, or a special liability-related system existing at the moment when this directive is enacted.

In the attempt to resolve the debate of the minimum standard, and the double system of consumer protection in terms of product liability, the ECJ (European Court of Justice) in 2000, in the case Commission versus France[18], established that Article 13 does not mean that a Member State can maintain a general system of product liability different from that provided for by the directive. The ECJ supported the interpretation of the directive as an instrument of maximum harmonization, by allowing the co-existence of product liability systems only for some types of products „based on other grounds, such as fault or a warranty in respect of latent defects, or in case of special liability systems relating to specific types of products.[19]

Nevertheless, the European Commission (the Commission) in its third report on the Product Liability Directive, based on the Lovells study, accepted the point of view that the prospect of „total harmonization" of product liability laws „*is not only unrealistic but also unnecessary in view of the limited impact (if any) that its absence would have on the internal market"*.[20] Thus, the position of the Commission, on the unrealistic nature of total harmonization, is somehow in contradiction with the ECJ advocating a maximum harmonization, no existence of a parallel system, and the condition that the standard of protection stipulated by the directive is not a minimum standard but the standard to be followed.

Regarding the liability of the producer, the PLD is based on the principle of strict liability, meaning that the producer will be held liable, without fault, if the consumer proves that the damage is caused by a defective product. The burden of proof is put on the consum-

---

[16] *Id*. Article 15/b.

[17] *Id*.Article 16.

[18] Fairgrieve Duncan and Howells Geraint, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report of the European Product Liability Directive*, The Modern Law Review (2007)70(6) 962-978, at 965.

[19] *Id*.

[20] Hibbert Mathew and Lenze Stefan, *Feature- European Commission's Third Report on the Product Liability Directive*, Lib02/D2MJH/2033797.1, electronically available at 2, <http://ca.linexlegal.com/CONTENT/685/40271.pdf>, last visited on 15 April 2010.

er who should prove the damage, the defect and the causal relationship of the defect and damage.[21] Since in the producer-consumer relation the latter is considered to be the weak part, in need of protection, laying the burden of proof on them is considered an unfairly disadvantage. As the Commission states in its third report, courts of a number of Member States have been prepared to infer the existence of fault from the fact that the product is defective, which operates as a reversal of the burden of proof, with the requirement for the defendant to present evidence that he is not at fault, notwithstanding the defective condition of the product.[22]

In addition, the PLD foresees several and joint liability in cases when two or more persons are liable for the same damage, giving the possibility to the injured person to claim compensation for the damage from both or any one of them.[23]

A producer will be held liable if a defect in a product has been proven. The concept of „defect" is not defined in the directive, which states that „a product is defective when it does not provide the safety *which a person rightfully expects"*.[24] Apart from some circumstances that should be taken into account, there is no clear definition on what this standard implies. This situation has given rise to different interpretations by the national courts of Member States, so that the United Kingdom introduced the subjective criterion for „consumer expectation", while the test was declared objective by the EU institutions.[25] Other instances have adopted a more generous attitude toward the claimants, such as French courts, which apply the criteria of liability of a professional who has supplied a defective product, without the need to establish the exact origin of the defectiveness in the product, and do not bind the consumer to prove, which is almost impossible for them, that no external causes have played a part in the defectiveness of the product.[26] A similar approach has been adopted by a court in Italy, and a similar tendency is detected in Austria where in one case the court found the producer liable for the defectiveness of a coffee machine, despite the inability to identify precisely what went wrong.[27]

The liability of the producer can be reduced or disallowed when, with regard to all the circumstances, it can be proven that the damage is caused both by the defect and the fault of the injured person, or any person the injured person is responsible for.[28] Nevertheless, the producer cannot limit his liability, or exempt himself from liability by contractual exemption clauses.[29]

Under Article 9 of the PLD the injured person can claim compensation only for damages due to death or personal injury, or for damages to private property, leaving the claims for non-pecuniary damages under the national laws.

---

[21] See. Note 12, at Article 4.

[22] See. Note 19, at 4.

[23] See. Note 12, at Article 5.

[24] *Id*. Article 6

[25] Case C-300/95, Commission vs. United Kingdom, 1997 E.C.R. 1-2649, in Infantino Marta, *Making European Tort Law: The Game and Players*, University of Trieste, International University College of Turin, at 10, available at <http://ssrn.com/abstract =1452804>, last visited on 12 April 2010.

[26] See. Note 17, at 969.

[27] *Id*.

[28] See. Note 12, at Article 8/2.

[29] *Id*. Article 12.

The PLD stipulates the time limit regarding the recovery of damages, within 3 years from the date in which the plaintiff became aware, or should have reasonably become aware, of the damage, the existence of the defect and the identity of the producer.[30]

2.2. General Product Safety Directive[31]

In the situation when horizontal legislations of the Members States impose different standards to operators on the way they market safety products, and in view of the goal of the EC to achieve a better protection of the health and safety of consumers, it was deemed necessary to adopt the General Product Safety Directive (GPSD), which will introduce general product safety requirements, obligations to producers and distributors, a fast information exchange system, and the practice of taking measures at Community level.[32]

The provisions are applied according to Article 2/a „*to products intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, which are supplied or made available, whether for a consideration or not, in the course of a commercial activity, either new, used or reconditioned*". Even though the term „services" is not within the definition of „product", it is generally accepted that those items supplied or made available in the context of services involving their use: e.g. gym equipment, trolleys used at supermarkets, will fall within the definition.

In addition, the scope of the GPSD does not include products intended for professional use, on condition that if these products are subsequently transferred to the consumer market, they will have to meet the safety requirements, due to the risks they can pose to consumers, their health and safety.[33]

A product will be presumed safe if it fulfills the requirements established, in the absence of Community rules, in the national regulations governing the safety of the product in question, and if it conforms to the specific rules of national law of the Member State on whose territory it is marketed, in the case when those national rules are in conformity with Articles 28 and 30 of the Treaty, and lay down the health and safety requirements which the product must satisfy.[34]

Furthermore, a product will be deemed safe if it is in conformity with European standards, which is estimated by the competent authority according to Article 4 of the GPSD, or alternatively with the national standards which reflect the relevant European standards, Commission recommendations setting guidelines on product safety assessment, product safety codes laying down the rules of good practice applicable to the product in question, the state of the art and technology, and reasonable consumer expectations concerning their safety.[35]

The regime of safety foreseen by the GPSD enables the national enforcement authority to take the measures laid down in its provisions, including the obligation of the producers to recall the product from the market and to destroy it.[36]

---

[30] *Id*. Article 10.

[31] Directive of the European Parliament and of the Council 2001/95/EC, On general product safety, published in OJ 15 January 2002 L11/4, available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0095:EN:NOT>, last visited on 16 April 2010.

[32] *Id*. Recital 4-5.

[33] *Id*. Recital 10.

[34] *Id*. Article 3.

[35] *Id*. Article 3/2.

[36] *Id.*. Article 8/1/f(ii).

This measure should be used as a last resort, when the actions undertaken by the producers and distributors in the fulfillment of their obligations are unsatisfactory or insufficient. Due to the relevance of this measure, and the costs, financial and non-financial, incurred by the producers and distributers, the decision of the competent authority should be well reasoned, and the Member State should notify the Commission on the reasons for this decision, so that the latter, while assessing whether it is in conformity with Community Law, will inform the other Member States.[37] The whole procedure of the enactment of measures and their implementation is left to be regulated at the national level.

Even though the provisions of the GPSD do not expressly provide for the liability of producers and distributors in case of infringements, or injuries caused due to lack of safety requirements, one can conclude that claims can be brought under tort law based on the GPSD. On the one hand, there are producers and distributors, who can bring claims before national courts[38], for compensations, in cases when the national authorities have infringed the GPSD provisions. That may be the case when the latter have adopted a measure not in conformity with the principle of precaution[39], especially regarding measures of high importance such as the withdrawal and destruction of a product, and the producers can file a claim for the damages incurred. Such a situation is not regulated by the GPSD and the national courts are expected to handle such proceedings and prescribe damages in conformity with national regulations, and with national implementation instruments.

Thus, the United Kingdom's Regulation implementing GPSD provides for a right of compensation for loss or damage suffered through the wrongful issue of suspension notice, withdrawal or recall, where the product was in fact not a dangerous product.[40] The statutory provisions on liability for national authorities are formulated in a very broad sense, including the liability for any loss or damage suffered by reason of the notice or recall, without proving the guilt of the national authorities.[41]

On the other hand, there is the issue of consumers' claims in cases when the product does not comply with GSPD requirements. Although Article 17 states that „ *This Directive shall be without prejudice to the application of Directive 85/374/EEC*", problems may still arise when producers and distributors resort to provisions of GSPD as a defense against claims lodged by consumers regarding product liability. As for Article 7/d of Directive 85/374/EEC, producers can refer to that article in their defense and establish that the product complies with the stipulated standards, proving there is no liability for a defective product. What will be interpreted as the stipulated standards, and whether the GSPD standards will be deemed to fall within the meaning of this term has been the subject of discussions and different approaches on the part of national courts.

---

[37] *Id*. Article 11.

[38] Based on Article 18/2 of the GPSD the Member States are required to ensure that any measure taken by the competent authorities involving restrictions on the placing of a product on the market or requiring its withdrawal or recall can be challenged before the competent courts.

[39] According to Article 8/2 of the GPSD „…. *When the authorities of Member States take measures such as those provided for in paragraph 1, in particular those referred to in (d) to (f), they shall act in accordance with the Treaty, and in particular Articles 28 and 30 thereof, in such a way as to implement the measures in a manner proportional to the seriousness of the risk, and taking due account of the precautionary principle*".

[40] Duncan Fairgrieve and Geraint Howlles, *General Product Safety- a Revolution Through Reform?*, Modern Law Review, Vol. 69, No. 1, pp. 59-69, January 2006, at 67.

[41] *Id*. at 68.

As one commentator has observed: „ *This defense would be available to producers who have fully complied with all the applicable safety regulations governing the placing of their products on the market, and who would hold the view that if particular safety aspects of their product comply with the relevant safety regulations, such a product cannot be considered „defective"…. In a product liability case under the Directive the court cannot impose on a producer a standard of safety higher than that prescribed by the applicable safety regulations*".[42]

Despite that, the Member States have adopted different approaches to the defence of producers „in compliance with regulatory rules". In the implementation provisions in France, text has been added emphasising that that a defect may be found even when the relevant product complies with the safety standards.[43] In U.K, in the case *Tesco Stores Ltd vs. Pollard*, the Court of Appeal overruled a district court's decision finding that the manufacturer and own-brander of a dishwater powder bottle were liable for personal injury to a 13 months old child, who had been able to remove the safety cap. The court applied the British Standard, reasoning that the public were entitled to expect only that the safety cap would be more difficult to open that an ordinary screw top.[44] On the other hand, in Germany, the District Court of Düsseldorf found that the violation of safety standards could constitute conclusive evidence of a product's defectiveness.

2.3. The Motor Insurance Directives[45]

The European Commission (EC) has adopted several directives in the field of motor vehicles, with the goal to establish an entire set of regulations providing for better protection and compensation for injuries and property damages to the victims in motor vehicle accidents occurring within their Member States or in the territory of any other Member State.[46]

By adopting the first three directives, the EC established the necessary framework for a single market – it introduced the obligation that all motor vehicles in the Community must be covered by insurance against third-party liability (compulsory motor insurance) and fixed the minimum amount for such insurance coverage; the insurance certificate was introduced in the whole Community, guaranteeing the free movement of motor vehicles, whereby the need

---

[42] M. Hibbert and S. Lenze, *European Commission's third report on the Product Liability Directive' (2006) European Product Liability Review 6*, in D. Fairgrieve and G. Howells, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report of the European Product Liability Directive*, The Modern Law Review (2007)70(6) 962-978, at 972.

[43] See. Note 17, at 972.

[44] *Id.* at 973.

[45] The EC adopted five directives in the field of motor insurance: Directive 72/166/ EEC, published in OJ L 103 of 02.05.1972 (First Directive); Directive 84/5/EEC published in OJ L 008 of 11.01.1984 (Second Directive); Directive 90/232/ EEC published in OJ L 129 of 19.05.1990 (Third Directive); Directive 2000/26/EC published in OJ L 181 of 20.07.2000 (Fourth Directive); Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles (Fifth Motor Insurance Directive), available at:
<http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, last visited on 17 April 2010.

[46] *Summary of the European Legislation, in Motor vehicles liability insurance***,** available at <http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, last visited on 17 April 2010.

for border checks on insurance was abolished. Victims of accidents (including those caused by unidentified or uninsured vehicles) were provided with better protection through the establishment of government compensation bodies in all Member States.[47]

Furthermore, the EC stipulates in the fourth directive the following: all passengers in the vehicle (including the driver's family) are covered by compulsory insurance; a mechanism for the rapid settlement of claims if the accident takes place outside the victim's Member State of residence („visiting victims") is envisaged, enabling the compensation of local victims of accidents caused by vehicles from another Member State; injured parties in accidents enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability; in order to facilitate the victim's contact with the insurance company, the latter must appoint a representative in each Member State, who will be responsible for handling and settling claims arising from an accident.

The fifth directive[48] amends a part of the previous directive and aims mainly to modernize and improve the protection of victims by compulsory insurance, as well as to enhance convergence as regards the interpretation and application of the Directives by Member States, and to provide solutions to the most frequent problems. In addition, the threshold for compulsory insurance has been raised to EUR 1,000,000 per victim in case of personal injury, or EUR 5,000,000 per claim, regardless of the number of victims, and to EUR 1,000,000 per claim in case of property damages, regardless of the number of victims, whereas these amounts shall be revised every five years to take account of changes in the European Index of Consumer Prices.[49]

A special category includes pedestrians and cyclists as motor vehicle insurance covers personal injuries suffered by them and by other non-motorized users of the roads.[50] Injured parties are granted the right to access information, by setting up information centers that will be required to provide any person, who has suffered injury or damage to property, with the information needed to allow them to claim compensation for the loss or injury sustained, i.e. the registration plate and insurance policy details of the vehicle involved in the accident.[51]

2.4. Directive Relating to Compensation to Crime Victims[52]

Aiming to realize one of its main goals, i.e. the free movement of persons and services, and in accordance with the ECJ decision on the *Cowan* case in respect of which the protection of a person from harm in the territory of a Member State should be the same as that of nationals and persons residing there, which is a prerequisite for the freedom of movement, the EC adopted the Directive relating to compensation to crime victims (DCCV).[53]

---

[47] *Remarks on the motor insurance,* available at: <www.tsrsb.org.tr/NR/rdonlyres/.../MOTORINSURANCE.doc>, last visited on 18 April 2010.

[48] *Id.*

[49] See note 44, Recital 10 and Article 1 of the Fifth Motor Insurance Directive.

[50] *Id*. Article 1/a.

[51] *Summary of the European Legislation, in Motor vehicles liability insurance*, available at <http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, last visited on 18 April 2010.

[52] Council Directive 2004/80/EC of 29 April 2004, relating to compensation to crime victims, published in OJ L 261, 6.8.2004, p. 15-1*8* available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0080:EN:NOT>, last visited on 17 April 2010.

[53] *Id*. Recitals 1 and 2.

The DCCV establishes a system of cooperation between Member States to assist crime victims in the process of claiming compensation for the injuries suffered regardless of where in the EC the crime was committed. The system should enable easy access from the initiation of procedure until the evaluation of the claim and allowance of compensation. Each Member State should establish an assisting authority to help the victim in regard to all necessary information, application forms, supporting documents, general guidelines and should refer the entire file to the deciding authority of the Member State where the crime was committed.[54] The deciding authority, if deemed necessary, may decide to hear the applicant, in accordance with regulations of its Member State, in cooperation with the assisting authority and on a voluntary basis, without the possibility of coercive measures being imposed by the deciding authority.[55]

Since it will often not be possible to charge compensation on the offender due to the lack of necessary measures to execute the judgment on damages or due to the impossibility to identify and prosecute the offender, the compensation will be paid by the competent authority of the Member State.[56] The rules on granting compensation shall operate on the basis of Member States' compensation schemes, but all Member States shall ensure that their national rules provide for the existence of compensation schemes that are fair and appropriate.[57]

The DCCV establishes a minimum standard of protection and compensation for victims of criminal offences, allowing Member States to introduce or maintain more favorable provisions for the benefit of victims or any other persons affected by the offence.[58]

2.5. Environmental Liability Directive [59]

The Environmental Liability Directive (ELD) establishes a common framework for liability with a view to preventing and remedying damage to animals, plants, natural habitats and water resources, as well as damage affecting land. The liability scheme applies to certain specified occupational activities and to other activities in cases where the operator is at fault or negligent.[60]

The ELD provides for two schemes of liability. Under the first scheme, liability applies to dangerous or potentially dangerous occupational activities listed in Annex III, under which the operator may be held responsible even if he is not at fault. The second scheme applies to all occupational activities, other than those listed in Annex III to the Directive, but only where there is damage or imminent threat of damage to species or natural habitats protected by the Community legislation, under which the operator will be held liable only if he is at fault or negligent.[61]

---

[54] *Id*. Articles 4-5.

[55] *Id*. Article 9.

[56] *Id*. Article 2.

[57] *Id*. Article 12.

[58] *Id*. Article 17/a.

[59] Directive 2004/35/EC of the European Parliament and of the Council Directive of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, published in OJ L 143 of 30.4.2004, available at:
<http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm>, last visited on 15 April 2010.

[60] *Summaries of the EU Legislation on Environmental Liability Directive*, available at: <http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm>, last visited on 19 April 2010.

[61] *Id*.

The core principle of the Directive is the „polluter pays", according to which the operator whose activity caused environmental damage or imminent threat of damage is to be held financially liable, whereby the operator is encouraged to adopt measures and develop practice to minimize such risks.[62]

Apart from competent authorities in Member States that should take the appropriate measures to prevent or remedy damage or the imminent threat of damage, the Directive gives the possibility to natural and legal persons that have sufficient interest in environmental decision-making relating to compensation of damages, or alternatively, that are affected or may be affected by damage, and that claim violation of some of their rights, provided this is stipulated by the administrative regulations of Member States, to bring claims before the competent authorities to take appropriate measures. In addition, they should have access to court or other independent and impartial public bodies competent to decide on acts, decisions or competent authority's failure to act.[63]

Apart from the possibility to require from competent authorities to act in cases of damage or imminent threat of damage, none of the provisions establishes the right of natural or legal persons to claim compensation for any personal or property injury. Many aspects are left to the national legislation and courts to decide in line with their substantive and procedural rules.

2.6. Unfair Commercial Practices Directive [64]

Although it does not represent itself as a „tort Directive" and its ambit is confined to business-to-consumer practices, some Member States decided to implement the Unfair Commercial Practices Directive (UCPD), partially as variation of their tort liability rules. The Directive is highly important as it creates a pan-European floor to remedying so-called economic torts.[65]

The main goal of the UCPD, in view of the Community's objectives to abolish any obstacles to the free movement of goods, services and people, is the approximation of laws, regulations and administrative procedures of Member States in the field of unfair commercial practices to better protect consumers' economic interests.[66] Unfair commercial practices are considered all those practices that are misleading or aggressive as defined in the UCPD.

In the process of assessing whether a practice is to be considered unfair, account is taken of an average consumer, who is reasonably well informed and reasonably observant and circumspect, considering all social, cultural, and linguistic factors. In addition, for particular

---

[62] See note 58, Recital 2.

[63] *Id*. Article 12.

[64] Directive 2005/29/EC of the European Parliament and of the Council – the Unfair Commercial Practices Directive, published in OJ L149/22 – L149/39, available at:
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>, last visited on 17 April 2010.

[65] W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (editor), *European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing 2008, p. 133-149, at 8; available at:
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152788>, last visited on 23 April 2010.

[66] W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (editor), *European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing 2008, p. 133-149, at 8; available at:
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152788>, last visited on 23 April 2010.

groups of consumers who are vulnerable to unfair practice or the underlying product because of their mental or physical infirmity, age or credulity, in a way that the trader could reasonably expect, the benchmark for assessment is the average member of such group of consumers.[67]

In order to achieve the main goal of the UCPD – the protection of consumers' economic interests, Member States shall provide necessary legal remedies for persons and organizations that have a legitimate interest to initiate proceedings against unfair commercial practices, either before a court or an administrative authority that should be competent to decide upon complaints or initiate appropriate legal proceedings. National courts or administrative authorities should have the power to request from traders to produce evidence as to the accuracy of factual claims they have made, and to apply effective, proportionate and dissuasive penalties for infringements of the provisions of the Directive[68].

3. Conclusion

Tort liability under the EC directives is still an open issue that will need further intervention in order to create a complete body of legislative acts that will overcome differences in the national laws, with the final goal of harmonizing the tort legislation of Member States at the European level.

The general overview of the main existing directives in this field has shown that a part of the issues relating to tort liability is left to the jurisdiction of national legal systems and their courts. In addition, Member States, in the process of implementing directives, have taken positions that are more aligned with their legal traditions and are sometimes reluctant to change the previously adopted standards.

Problems relating to the uniform application of provisions exist even in case of the Product Liability Directive, which is the cornerstone of the whole field, deals directly with liability in case of tort and represents the first initiative in the harmonization process.

Therefore, issues have arisen regardless of whether, based on the linguistic interpretation of its provisions, the Directive aims at full harmonization or only approximation of national legislation in the field of product liability, or what will be understood under the term „defect", and will the strict liability principle apply also in cases when the producer proves, under the defense clause, that he was in compliance with all the regulatory provisions, or that the technology at the time when the product was launched in the market was such that it was not possible to foresee the defectiveness.

Furthermore, the PLD raises the questions on what will be the standard of consumer protection when consumers are under national laws entitled to better protection, should there be a double standard or only that provided by its provisions. The Commission and the ECJ have taken different approaches – the former in its third review report stresses that „full harmonization is unrealistic…", while the latter in its case law establishes that the Directive is fully harmonized and that there is only one approach to harmonization with regulatory rules. While some of them, in cases of product liability, accept the producer's defense of acting in line with product safety requirements, others take a different position believing a product may be considered defective regardless of whether it complies with regulatory standards, wherefore the producer is liable for damages.

---

[67] *Id*. Article 5.

[68] *Id*. Recitals 21-22.

The Motor Vehicles Directive establishes the necessary legal framework at the European level to facilitate compensation for injuries suffered by victims of accidents, wherever the accident occurs in the Member States' territory. This is a system that is being improved over the years by virtue of five directives, by abolishing border checks on insurance policies, establishing government compensation bodies in all Member States, prescribing the insurers' obligation to appoint a permanent representative in each Member State to assist the victims in the process of claiming compensation, and by raising the threshold for compulsory insurance for personal injuries or property damages. Although the implementation of provisions and decision making on claims is left to the competent national authorities, appropriate harmonization and a uniform system of protection have been established at the community level.

Similarly, victims of crime, regardless of their location in the territory of Member States, may be entitled to the same protection as residents and nationals of the state concerned and may claim compensation for personal injuries incurred. Member States are required to set up competent centers for assistance that will provide victims of criminal offences with all necessary information – from the initiation of proceedings until the issuance of the decision. Nevertheless, a standardized compensation scheme does not exist and the proceedings are therefore left to the jurisdiction of competent national authorities that have the right to apply their own scheme when that proves more favorable for the injured party or another person affected by the criminal offence.

Bibliography

I. Directives of the European Parliament and of the Council

1. Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, published in EU OJ L 210.
2. Directive 2001/95/EC of the European Parliament and of the Council on general product safety, published in EU OJ L11/4, 15.01.2002.
3. Directive 72/166/EEC, published in OJ L 103 of 02.05.1972 (First Directive); Directive 84/5/EEC published in OJ L 008 of 11.01.1984 (Second Directive); Directive 90/232/EEC published in OJ L 129 of 19.05.1990 (Third Directive); Directive 2000/26/EC published in OJ L 181 of 20.07.2000 (Fourth Directive); Directive 2005/14/EC of the European Parliament and of the Council of 11 May 2005 amending the PLD and supplementing Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles (Fifth Motor Insurance Directive).
4. Council Directive 2004/80/EC relating to compensation to crime victims, published in *OJ L 261, 6.8.2004, p. 15–18.*
5. Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, published in OJ L 143 of 30.4.2004.
6. Directive 2005/29/EC of the European Parliament and of the Council – the Unfair Commercial Practices Directive, published in OJ L149/22 – L149/39.

II. Legal Articles

1. W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (editor), *European Private Law Beyond the Common Frame of Reference – Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing 2008, p.133-149.
2. Fairgrieve Duncan and Howlles Geraint, *General Product Safety – a Revolution Through Reform?*, Modern Law Review, Vol. 69, No. 1, pp. 59-69, January 2006, at 67.
3. Marta Infantino, *Making European Tort Law: The Game and Players*, Universty of Trieste, International University College of Turin.
4. Mathew Hibbert and Stefan Lenze, *Feature – European Commission's Third Report on the Product Liability Directive*, Lib02/D2MJH/2033797.1.
5. Duncan Fairgrieve and Geraint Howells, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report on the European Product Liability Directive*, The Modern Law Review (2007)70(6) 962-978.
6. Markus Kellner, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, at 136.
7. Francisco Marcos and Albert Sanchez Graells, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?,* European Review of Private Law 3-2008 [469-488], Kluwer Law International BV, at 472.

Dr *Miodrag V. Orlić*,* University Professor

DELICTUAL LIABILITY BASED ON FAULT IN SERBIAN LAW

(Development to 1978 and beyond)

Part I. General remarks regarding the development of Law of Obligations in Serbia

A. Introduction

1. At the crossroads of legal influences after World War II, after the failed attempts to revise the Serbian Civil Code[1] during the second half of the 19th century[2] and the first years into the 20th century[3], followed by the disappointment with the Outline of the Civil Code for

---

* Original text is in local language.

[1] The Serbian Civil Code was adopted on 25 March 1844 and remained in effect for more than one hundred years. After the first attempts to prepare the draft modeled after the French Civil Code, which failed, the work on the Civil Code was taken over by Jovan Hadžič, a Ph.D. lawyer at the University of Budapest, who developed the draft following the Austrian law. Serbian Civil Code was for the most part an abridged version of the Austrian Civil Code of 1811 (in the area of Real Property and Obligations Law) while in the area of Family and Inheritance Law it relied on the earlier customs which until that time were effect in Serbia. For more details see: Istorija nastajanja građanskog zakonodavstva u Srbiji (The History of the Civil Legislation Development in Serbia) (hereinafter: Istorija) in the book: Rad na izradi Građanskog zakonika Republike Srbije (The Serbian Civil Code Development Activities), Belgrade, November 2007, p. 31 and the like.

[2] The idea of the need of a thorough reform of the Serbian Civil Code first started to mature in the second half of the 19th century. The Minister of Justice (S. Veljković) initiated the revision work of the Code and entrusted this task to Nikola Krstić, a judge of the Court of Cassation. The initiative did not yield results, since the State Council decided against any comprehensive reform, proposing only modifications to the basic legal texts in line with the amendments, additions and explanations made until that time. Compare: Istorija, p. 53-54.

[3] A new initiative for the reform of the Civil Code came at the beginning of the 20th century from Dragoljub Aranđelović, Professor of the Faculty of Law in Belgrade. The starting point in his observations was that the changes of the Civil Code were needed due to its weaknesses and poor quality. In his further considerations, Aranđelović first ruled out the possibility of Serbia undertaking to develop an original Code, rather he opted for modeling after one of the European civil codes, which would serve as a basis for the new Serbian Code. After analyzing the strengths and weaknesses of the French, German and the General property code for Montenegro and the Austrian Civil Code, he opted for the latter. In his opinion, this would enable the preservation of continuity as the legal reality of Serbia would be following the track that it had been on since 1844, only that the track would now be smooth and free of obstacles that resulted from its poor and abridged version. As this initiative failed to bring about much enthusiasm, the Government of the Kingdom of Serbia in 1908 made a decision to undertake the reform of the Civil Code. The Commission that was established for this purpose, decided to use the German Civil Code as the basis for its work. But this attempt also failed to produce any results. It can only be assumed that the work was interrupted due to the Balkan Wars and the World War One. See: History, p. 54-58.

the Kingdom of Yugoslavia[4] and generally after the experience with the Austrian law[5] the conviction grew among Serbian legal experts that there was a need to search for original solutions in developing the Civil Code.[6] Ideas about independent paths of development were manifest especially in legal theory, first of all at the Law Faculty in Belgrade and the Institute for Comparative Law, but they were also visible in the decisions of higher courts. In the period of the legal vacuum, the courts were, by the nature of things were relieved of the duty to act *ratione auctoritatis (legis)* and were invited to look for the best and fairest equitable solutions *auctoritate rationis*. In doing this, they observed not only examples from other regions

---

[4] The creation of the state of Serbs, Croats, and Slovenes after World War One marked only the political unity of Yugoslavia. In terms of legislation, strong differences remained. Especially in the area of civil law. Therefore, it was reasonable to say that in spite of there being one state there were six wide legal regions. In the period between the two world wars there were efforts to harmonize the legislation. Predosnova Građanskog zakonika za Kraljevinu Jugoslaviju (The Outline for the Civil Code of the Kingdom of Yugoslavia) is the final expression of the efforts to adopt one Civil Code for the whole state. The text of the Outline was published in 1934 in Belgrade, but it was never promulgated as a law.

[5] While the older generation of lawyers including Živojin Perić, Dragoljub Aranđelković, Đorđe Nestorović, and the younger Lazar Marković, were inclined to the Austrian law, the new generation of lawyers, including Čeda Marković, Mihailo Konstantinović and Božidar Marković, refused any idea of the Outline made after the Austrian Civil Code model, including the Austrian law, remaining in effect in Yugoslavia, including Serbia. Their approach was that the basis for the new Yugoslav Civil Code should be the Property Code for Montenegro, an excellent achievement by Valtazar Bogošić, not the Austrian law. Compare: Mihailo Konstantinović, , Jugoslovenski građanski zakonik – Austrijski ili Crnogorski Zakonik (The Yugoslav Civil Code - The Austrian or the Montenegrin Code), Pravni zbornik Podgorica volume 2-3/33, p. 69 *at al.*; Božidar S. Marković, Reforma našeg Građanskog zakonodavstva, (The Reform of Our Civil Legislation) Belgrade, 1939, passim.

[6] Opting against the idea of taking the Austrian Civil Code as the basis of the new legislation in the Kingdom of Yugoslavia, M. Konstantinović expressed his views as early as 1933 in the above mentioned article: The Yugoslav Civil Code, regarding the character of the future Code: „In drafting the Code, one should primarily consider the *ideas, traditions, and needs of the environment* for which it is developed (p. 70); „Adoption of the Austrian civil code is *a mistake in both national and political terms: Yugoslavia should have a Yugoslav Code suited to the needs of the Yugoslavs.* It should be an instrument of developing the Yugoslav identity". (p. 74); „The question is simple and it comes down to whether we want Yugoslavia to be an imitation of Austria, or a country of its own spirit and identity" (p. 74). After considering the advantages and disadvantages of the Austrian Civil Code in the second part from the legal theory standpoint, the author came up with the following conclusion: „The Austrian Civil Code is not suited for our country, neither from the national and political, nor from the scientific and legal standpoints., as well as from the perspective of jurisprudence, its adoption would have harmful consequences". (p. 77).

Another young lawyer of the time wrote in a similar tone. Since he held that the spirit of the Austrian law is contrary to the mentality of our democratic men and the needs of our country (p. 27), B. S. Marković proposed that the future Civil Code be developed using the method that Valtazar Bogišić used in developing the Montenegrin GPC. „This means that the materials to include would comprise the entire legal tradition, spoken and written, presently practised in our county, and *systematically structured after the principles of modern theory into a comprehensive code.* Thus, the future code would certainly include a great portion of the Austrian law, the part which is suitable to our present needs and understanding and which has already been customary in much of our territory. It would also have to include a good portion of well codified national institutes from the General Property Code. And finally, it would include our remaining, greatly valued and interesting custom law which, although neglected by the state, is still alive among the citizens, since it *suits their real needs and meets their ideas of justice,* the traditional law whose vitality and diversity has been very much discovered for all of us by Sreten Vukosavljević". B. S. Marković, Reforma našeg građanskog zakonodavstva, Belgrade, 1939, p. 41-42.

within Yugoslavia but also outside it.[7] Hence, the efforts to follow one's own path did not in any way exclude observing the developments in other foreign sources of law, but now the method of their application was different. Instead of the full transposition of one of the legal systems, or accepting one foreign law as a prevailing model, the new approach consisted of first laying down the general legal principles, those that could have been identified as accepted in the legal awareness of the Serbian society, and then, based on the materials from case law and the selected elements from major legal systems, draft laws in the area of civil law would be prepared. It is for this reason that our Law of Obligations is not a fully independent product, but being a synthesis made up of diverse components it is certainly an original work of its kind.

2. In order to understand the method used in developing the new Serbian (and Yugoslav) Law of obligations, it is worthwhile saying a few words about the personality of its spiritual author, and then about the method used in its development.

In contrast to many of his colleagues, professors of law, M. Konstantinović[8] was not lured by the desire to develop a Civil Law system in the form of a university textbook. He was preoccupied with the idea of creating a law as the noblest aim of the legal profession. In March 1941, he noted in his journal: „At 8 o'clock I met with Milivoje Marković and spoke with him about the drafting of a new Civil Code. We agreed to develop an original piece of work – he, Begović, B. Marković, and I."[9] The idea about the Code was incessantly on his mind even on the eve of the impending disaster. It is also worth pointing out the date of this note: March 4, 1941. In less than a month a state *coup* was to follow, and not long after by capitulation of the army, collapse of the state, and emigration of the government. And what were the thoughts of Minister Konstantinović at that moment of general collapse? He invit-

---

[7] The Law of 20 October 1946 declared, among other, that the laws and regulations promulgated before World War Two became null and void (including the Serbian Civil Code). Yet, in the absence of new laws, the content of the pre-war laws did not lose all of its legal significance, and the courts could apply them in the form of the so-called *„legal rules"*. The conditions for acting accordingly included: 1. that there were no new laws in a certain area, 2. that the legal rules were not contradicting the Constitution of the Federation, republic constitutions, and other positive regulations, and 3. that they were not contradictory to the principles of the Constitution. In such a situation, the courts could, but were not obliged to, implement the pre-war law, which left the courts great discretion, by means of court decisions, *to create law.*

[8] Mihailo Konstantinović was born in Čačak on 10 March 1897. He started his education in Serbia, and completed the last two yeas of grammar school in France. He graduated from the Law Faculty of the University in Lion in 1920, and received his Ph.D. in 1923 after defending his thesis Le „periculum rei venditae" en droit romain. First honorary and then full-time professor in Subotica, then in Belgrade, he was a minister without portfolio in the Government led by Dragiša Cvetković. After returning from emigration in 1945, he was a professor and head of department of Civil Law at the Faculty of Law in Belgrade for a long period. Apart from his book Obligaciono pravo, ("The Law of Obligations"), compiled from the notes from his lectures, which had several repeated publications, he was also the author of numerous studies and articles and, last but not least, the author of drafts of a whole series of laws. The Framework Marriage Law, the Framework Law on Parents/Children Relations, the Framework Law on Fostering, the Law on Adoption, the Law on Statutory Limitations of Claims, the Law on Inheritance, the Law of Obligations – they all came from his writings. Thus, these drafts covered marriage and family law, inheritance, obligations and partly trade laws (on commercial contracts) and insurance law. Of course, the laws as initially adopted later were subject to additions and amendments, first in the former republics and, after the disintegration, in the new independent states. However, even after all the changes in the above areas of civil legislation one can see the ideas implanted by Konstantinović without much effort. Compare: Božidar S. Marković: Mihailo Konstantinović, the codifier of Yugoslav law, Pravni život, Volume 7-8/1990, p. 1157 etc.

[9] Konstantinović, Politika sporazuma, beleške, 1939-1941, Londonske beleške 1944-1945, , (The Policy of Agreement), Agencija "Mir", Novi Sad, p. 306-307 ,.

ed his professor colleague, to arrange the beginning of their work on drafting the Civil Code, and they agreed that it should be an original Code (not a copy of other models) and they selected their colleagues, professors, who shared similar views regarding the concept of the Code with whom they would be able to cooperate. But, is it not a futile task to draft a Code on the brink of war, and when it is almost certain that the state for which they would develop the law is about to collapse? According to Konstantinović, the program of building a state was simple: roads, grammar schools, laws. Especially the latter: laws and the most important among them, the Civil Code since it represents the basis of the organization of a society and the basis for a state to build upon. Therefore, if it happened that a country would collapse, the Code is necessary because, when the state was to be re-created, if it was to be long-lasting, it would have to rely on a well-structured legal system.

3. In the state which was to be rebuilt after the war, Konstantinović would no longer be a minister, but he would succeed in achieving his ambition of developing the Civil Code. True, the Code would not be produced as a whole in one piece, nor all of its parts promulgated at the same time, they would not be complete, nor would the country for which it was developed and for which he, as a true Yugoslav, drafted these laws survive. Still, the legislation in the area of private law today in terms of its internal structure, harmony of components, consistency of legal instruments and conceptions, unity of style and language already today constitutes a considerable part of the matter contained in civil codes and makes one spiritual whole, although it is not bound within the covers of one book. And for this reason the republics which withdrew from the former Yugoslavia will retain it practically in its entirety, as an extremely important intellectual legacy.

B. Relying on case law

4. Konstantinović, like Valtazar Bogišić before him, thought that great codifications should be an expression of the legal awareness of a certain social community for which they are promulgated[10]. Codes are created from the fundations of the existing law. That is why the drafting of a law should be preceded by long and careful consideration and study of the existing body of law. As much as they agreed about the method, the two editors had before them a different challenge: while for Bogišić the body of the existing law for the development of the Montenegrin General Property Code was contained in the legal tradition, Konstantinović found his in case law. In his opinion, over a long period of time and hundreds and thousands of adjudicated cases, a community's understanding of the right and the wrong in a specific situation gradually crystallized. That is why over the long course of his teaching career he paid considerable attention to the study of case law. The General Department of Civil Law at the Faculty of Law in Belgrade, which he headed since his return to the Serbia's capital, was

[10] Konstantinović had great respect for the work of Valtazar Bogišić, and in the study dedicated to the author of the Montenegrin General Property Code this is his view of the relation between the statute law and the law that lived with the community. "In the area of legislative policy, the first duty imposed upon the legislator is to study thoroughly the existing instruments of traditional law; only then can he usefully approach the study of possible and necessary changes. Without this, good intentions may not yield beneficial consequences. That is why Bogišić carefully studied the traditional law of Montenegro before venturing into the General Property Code development. It is for this reason exactly that he did not codify family and inheritance law, leaving them still in the realm of traditional law; these areas of legal life required a more detailed study". Konstantinović, Ideje Valtazara Bogišića o narodnom i zakonskom pravu (The Ideas of Valtazar Bogišić on Traditional and Codified Law) Sociološki pregled, knjiga 1, Belgrade 1939, p. 274.

a kind of laboratory in which careful and critical consideration was given to the deliberations of courts and especially the reasons on which such deliberations were based.[11]

5. When the time came to review the draft laws, Konstantinović used the same approach of relying on court decisions, case law, which he previously used in his scientific study of law. This is what he said of this process when providing rationale for the draft Law of Obligations and Contracts: (hereinafter: Skica).

„In developing the draft Law of Obligations, the guiding idea in the selection of materials and criteria for resolving certain issues was the needs of our practice. We were constantly aware of the fact that the code should contain rules for legal channelling of trade in goods and services. That is why the main body of the material was taken from our practice and our case law. This material was processed and transposed into the provisions of the draft law". In some cases, the draft deviated from existing practice. This was mostly true of cases where the practice, willingly or unwillingly adhered to the earlier legal rules which have been abandoned in both legislation and in theory and replaced by other rules.[12]

Case law provided the gradual harmonization of court practice in our country. Even after the liberation some thought that courts still needed to apply in each area only those legal rules that had previously been in effect in that respective area. Professor Konstantinović opposed this approach. He emphasized the fact that courts' ability to use the legal rules of the pre-war period as soft law, can be used for a higher purpose, in order to create a comprehensive legal system in the country.[13]

In his opinion „the weakening of the power of legal rules and constitutional aspiring for a unified legal system allow the judge to take into consideration not only the legal rules applicable in his area of practice, but of the legal rules applicable in other areas. It is not exaggerated to say that, in cases where legal rules applied in different areas are contradictory, he may choose the one that best suits our needs."[14]

6. Furthermore, case law was a flexible method of creating law. It enabled new trends and developments to surface even before they had been integrated in legal texts. It also made it possible for us to consider and compare different solutions and look for the ones that best suited our new law.

Of course, that was not at all an easy task. In thousands of court decisions there were many that strayed and there were errors. Professor Konstantinović's merit is in finding a strong anchor in this diverse and fluid legal material. This anchor was general legal principles which he used

---

[11] Compare: "Thus, over a period of decades, there has not been a single significant court decision that escaped his attention and his critical observation. Hundreds of papers read at the General Department of Private Law at the Faculty of Law in Belgrade had exactly this purpose – to analyze and evaluate court decisions and their rationale in a manner which was unique at our faculty and which brought together numerous legal experts who were coming to make use of this unique method used by Professor Konstantinović for years. And after each such paper in his post-graduate and doctoral courses – there followed excellent in-depth theoretical presentations on relevant issues that the court decision in question referred to, thus rendering such paper a specific generalization and theoretical consideration, invariably critical in character, of our legal practice expressed through court decisions." Borislav T. Blagojević, Predgovor, u knjizi M. Konstantinović, Obligacije i ugovori, Skica za Zakonik o obligacijama i ugovorima, (Foreward, in the book M. Konstantinović, Obligations and Contracts, the Draft for the Code of Obligations and Contracts) p. 5-6.

[12] Blagojević, op.cit p. 7.

[13] Konstantinović, Stara "Pravna pravila" i jedinstvo prava, Anali Pravnog fakulteta u Beogradu (The Old „Legal Rules" and the Unity of Law 4/1957, p. 434 - 435.

[14] Konstantinović, op. cit, p. 435.

as criteria against which he examined the opinions expressed through case law. This is what he did when, criticizing certain parts of the rationale for a decision by the Supreme Court of Serbia, he noted that its „doctrine is otherwise consistent with the fundamentals of our law.[15]

He did the same when, for instance, he disagreed with the opinion of the court, as in this case: „What makes this verdict special is that it underlines that the fiancée who terminated the engagement through his/her own fault thus causing damage to the other fiancée or his/her parents can not be held liable for such damage by neither special regulations nor general rules... This implies that one of the major principles of our law is not applied in this area". And then comes the key statement: „The Serbian Civil Code has ceased to exist as a law, but the principle of liability for caused damage has not ceased to apply".[16]

Thus, the practice of court and case law were increasingly harmonized with the principles of our law. Thanks to such court practice new legal rules were gradually developed which were more adapted to our needs.

C. Relying on new developments in comparative law

7. For a Code to be reputable in every respect, it is not sufficient for it to express the legal understanding of the community in which it was developed. Namely, it often happens that results of such understanding are not on a par with the development in other counties. It is necessary, therefore, for a code to meet the second key requirement of quality, meaning that its editors should monitor the developments of comparative law and take into account solutions from the latest codes.

Like Bogišić before him, Professor Konstantinović was aware of this need and he pointed it out on a number of occasions even before embarking upon the drafting of the Code. In the Skica his relying on the results of the comparative law was explicitly stated as the source of the proposed solutions and expressed as follows:

„Our legal practice is not the only source of material that was used in the drafting of this Skica. In recent legislations and, generally speaking, in comparative law certain issues in this area are solved in a manner which is better suited to the needs of practical life than in our old legal rules. It is for this reason that this Skica includes a number of such borrowed solutions from comparative legislation. Some of these are, therefore, taken over in the same form as the original, whenever this seemed to provide a clear and accurate formula. In this respect *it should be noted that the goal was not to achieve originality in every respect and at any cost.* The key goal of this work was to formulate, after studying the whole material, the rules governing the field of obligations in a manner that would best suit our circumstances. And for this reason, if some law provided a rule which proved to be an adequate instrument for achieving its purpose in practice, we did not hesitate to accept and enter it in the text of the Skica, whenever we decided that the solution contained therein suited our needs".[17]

---

[15] Konstantinović, Priroda ugovorne kazne – smanjenje od strane suda, Anali Pravnog fakulteta u Beogradu (The Nature of Contractual Damages – Reductions by the Court) 2/1953, p. 215.

[16] Konstantinović, Pravna dejstva veridbe, Anali Pravnog fakulteta u Beogradu, (Legal Effects of Engagement), 3/1954, p. 326.

[17] Konstantinović, Skica za zakonik o obligacijama i ugovorima, (The Draft for the Code of Obligations and Contracts, hereinafter Skica), p. 7. Compare: „On the other hand, having in mind the reality of our legal life, Professor Konstantinović based his work on modern theories in the area of law of obligations, and on comparative studies of the key civil codes of certain countries. In this way, reflecting the reality of our legal life, this work by Professor Konstantinović also contains the latest developments in present legal theory and in the existing legislations, thus certainly serving, in its entirety, as a model for drafting a law of obligations and containing modern rules of law of obligations. Such works, however, are very rare, especially when prepared by a single man". Blagojević, Predgovor, p. 6

But, that is not all. The author of the Skica did not stop at considering and analyzing legislative solutions, he also studied the theoretical research and case law as well and introduced what he learned in the proposed text. The only criterion was that such solutions suited the commercial needs of our country.[18]

8. Regarding the contents of such rules, lawyers from European countries will recognize some typical concepts and institutions from their own legal systems in many solutions of the Skica. Thus, French lawyers will be familiar with the basic rule of liability for own actions (subjective delictual liability)[19] the manner in which the notion of fault is defined,[20] the rule of the cause of contract,[21] the rules concerning the creditors exercising of debtor's rights,[22] court penalties[23] etc.

9. German lawyers will find in the text of the Skica numerous institutions and concepts of the German law, including: the rule of simultaneous performance of obligations arising from **sinalagmatic** contracts (*zug um zug*) and objections regarding default,[24] partial default,[25] deterioration of the other party's wealth position,[26] failure to perform,[27] additional time in case of termination due to default (Nachfrist),[28] usurious contract,[29] conversion[30] and taking over of debt,[31] sale not violating lease agreement (Kauf bricht nicht Miete),[32] reach of compensation in the event of death,[33] persons entitled to compensation in case of sustenance rights' loss[34], what is covered by compensation in case of bodily injury and health deterioration[35], and many others.

10. The Italian Civil Code could have inspired the author of the Skica to present, in one part of the code, the rules of civil and commercial contract law (although the Swiss Law of Obligations could served for this purpose as well), and to include the rules relevant to termination and amendment of contract due to changed circumstances[36] as well as the rules governing transfer of contract.[37]

11. The system laid down in the Skica is profoundly different from the law contained in the Serbian Civil Code and in its source, the Austrian Civil Code. Still, there are traces of

---

[18] Konstantinović, op. cit. p. 8.

[19] Skica, Article 123, p. 1; the French Civil Code (hereinafter CC) Article 1382.

[20] Skica, Article 127; Mazeand - Tunc, Traité de la responsabilité civile, T. I, 6 ème édition, p. 504 n◦ 439.

[21] Skica, Article 31-32; CC, Article 1108, 1131-1133.

[22] Skica, Article 226; CC Article 2266.

[23] Skica, Article 242; the institute *les astreintes* resulted from case law in French practice.

[24] Skica, Article 90; the German Civil Code (hereinafter BGB) § 320 и § 322.

[25] Skica, Article 91; BGB § 320, p. 2

[26] Skica, Article 92; BGB § 321.

[27] Skica, Article 205 and 106; BGB § 323-325.

[28] Skica, Article 96; BGB § 326.

[29] Skica, Article 208; BGB § 138, p. 2.

[30] Skica, Article 83; BGB § 140.

[31] Skica, Article 371-375; BGB §§ 415-417.

[32] Skica, Article 550 BGB, § 571.

[33] Skica, Article 155; BGB, § 844, p. 1.

[34] Skica, Article 156; BGB, § 844, p. 2.

[35] Skica, Article 157; BGB, §§ 842 and 843.

[36] Skica, Article 103-104; the Italian Civil Code (hereinafter CCJ), Article 1467-1469.

[37] Skica, Article 112-114; CCJ, Article 1406-1410.

rules contained in the Austrian law, but frequently modified under the influence of modern legal theory. Examples of this include: the general rule governing possible termination due to default,[38] the rule of liability for just reasons[39] and the rules of assignment.[40]

12. The influence of Common Law and of British legal terminology, partly through the Hague, Uniform Law on Formation of Contracts for the Sale of Goods, and the Convention on the Uniform Law on the Sale of Goods[41] and partly also direct, is reflected in the rules regarding the termination due to default, which differentiates between cases when default within deadlines is considered major breach of contract from non-major ones,[42] in the rule debtor's contractual liability which is limited to compensation of foreseeable damage,[43] and in adopting the standard of a reasonable and prudent man[44] as a benchmark for assessing fault in the area of delictual liability.

13. Last but not least, significant influence of the Swiss law can be noted. The Skica, like the Swiss Code of Obligations, includes not only the rules of civil law but commercial rules of contract as well.[45] Apart from general rules applicable to all, there are special rules applicable to commercial contracts. Anyway, the mere fact that in both cases the subject of obligations law is presented in a special code, separately from other laws, is an indication of their external similarity. But, apart from these characteristics, the influence of the Swiss law can also be noted in the edited parts of the Skica. A series of rules regarding entry into contract,[46] or certain provisions on setting the compensation according to what is equitable,[47] or reducing the compensation for damages caused,[48] as well as the rules concerning the statute of limitations,[49] is regulated in the same or a very similar manner as in the Swiss Code of

---

[38] Skica, Article 93; the Austrian Civil Code (hereinafter ABGB), § 913.

[39] Skica, Article 134; ABGB § 1310.

[40] Skica, Article 1042-1054; ABGB §§ 1400-1404.

[41] Compare: „We should note transposition of provisions from two international conventions, resulting from the diplomatic conference in the Hague in 1964, through Rome's Institute for the Unification of International Law: the Convention on Uniform Law on Formation of Contracts for the Sale of Goods, and the Convention on the Uniform Law on the Sale of Goods, both dated 1 July 1964. Our country also participated at this Conference and the translations of these Conventions into our language were published by the Institute for Comparative Law in Belgrade (1966, Series E – Number 44). Obligation laws of individual countries, despite all the differences between them, are undergoing increasing approximation. Traditional differences among them are increasingly disappearing and the old rules are replaced by new ones, among which the differences are ever smaller. The said Hague Conventions are supported by meditated action of states. The Conventions contain solutions to a great number of issues in the area of sales contacts, the most widely used trade instrument, and many can be generalized. The same approach was followed in this Skica, which adopted a number of provisions from the Hague uniform laws and made them applicable to some other forms of contract as well", Konstantinović, op. cit. p. 7-8.

[42] Skica, Articles 94-96; Uniform law on International Sale of Movable Goods, Articles 26-27.

[43] Skica, Article 211; In English law, Case Hadley v. Baxendale (1854) 9 Ex. p. 341; CC, Article 1150;

[44] Skica, Article 127; In English law, Case Blyth v. Birmingham Waterworths Co (1856) 11 Ex. p. 781 and onwards (p. 784).

[45] Konstantinović, Predgovor, Švajcarski zakonik o obligacijama, prevod (Foreword to the Swiss Code of Obligations, translation) (hereinafter Predgovor), Belgrade, 1976, p. 8.

[46] Skica, Article 8 and onwards, The Swiss Code of Obligations (hereinafter the RO) Articles 2-10.

[47] Skica, Article 151; SCO, Article 42, paragraph 2.

[48] Skica, Article 153; SCO, Article 44, paragraph 2.

[49] True, the rules concerning the statute of limitations are not included in Skica itself but in the earlier promulgated Law on Statutory Limitations of Claims of 1953 (and they were taken over from this law by the editors of the Law of Contractual Obligations), although their spiritual author was Konstantinović.

Obligations. The legislative method (a title above each article about the contents of the article, each paragraph consisting of one sentence only, no reference to other articles of the law, etc.) and the structure are closest to the Swiss model. Therefore, it can be said that French terms (the basis of contract, the structure of delictual liability with three conditions only, without illegality are in the very foundations of the Skica, that elements of the German law are possibly the most numerous, and that according to its structure and appearance the Skica is most reminiscent of the Swiss Code of Obligations.[50]

D. Conclusion

14. Based on the presented summary of the method and contents (as space permitted) one can get an impression of the results achieved. The initial idea of Professor Konstantinović was that the Civil Code should be developed as an original piece of work[51] based on the main principles of our law. Even before World War Two he placed an emphasis on taking into consideration the ideas, traditions and needs of the community for which the code was developed.[52] These ideas were in conflict with the idea of the Preliminary Draft's editor to continue with a modernized version of the Austrian law dominated continuum. And when thirty years later he set out to realize this idea of his, he still had the same central idea in mind: „The key purpose of the whole task was, after studying the whole material, to formulate rules which will regulate contractual obligations *in a manner that best suited our circumstances"*.[53]

15. The purpose of this tendency was to set development of the Serbian law (Konstantinović spoke of Yugoslav law) on its own foundations, so that it is neither a transposition nor an imitation of any other law. Foreign case law and theory, if imitated, [54] harness inventiveness of the national law judges and narrow the horizons of theoretical considerations. Under such circumstances, the dependent lawyers choose to respect authorities, who derive power from their position in a closed system and not from free deliberation on arguments presented in comparative law and legal theory, irrespective of the concrete legal system. It is for this reason that the solutions contained in the Skica implicitly disapprove of a single system of law, while simultaneously remaining open to all European legal systems, from which provisions were borrowed whenever they suited the needs of our circumstances. „Everything was done to this purpose without any bias or selected dogma."[55]

16. The number of elements taken over from major legal systems and their significance in the shaping of the Serbian (and formerly Yugoslav) law point at the significance that foreign legislations, legal theories and comparative law in general had in this process. Practically all the institutes used in the Skica originate from one of the European legal systems. Also,

---

[50] Compare: „In this respect, the Swiss Code of Obligations, as well as the Swiss Civil Code, especially the latter, are reminiscent of the French Civil Code of 1804, which is an example of a clear and accurate style, as it expresses clear and accurate thoughts, which Stendhal, the master of style, read every morning to improve his own style. This, apart from its other qualities, gives the Code a special place in comparative law and is a highly recommended reading for any lawyer, especially to those who engage in editing and drafting legislation". Konstantinović, Predgovor, p. 10.

[51] Konstantinović, Politika sporazuma, p. 306-307.

[52] Konstantinović, Jugoslovenski građanski zakonik, Pravni zbornik, 2-3/1933 p. 70.

[53] Konstantinović, Skica , p. 7.

[54] Konstantinović, Jugoslovenski građanski zakonik, Pravni zbornik, 2-3/1933, p. 72.

[55] Konstantinović, Skica, p. 8.

the Skica includes nothing original, unknown in other legal systems, or new at any cost. In that respect, it is certainly not an original piece of work. If truth be told however, its originality is in synthesizing the elements taken over from other legal systems. The French, the German, the Italian, the Austrian, Common Law, and the Swiss legal concepts, rules and institutions, modified to a smaller or greater extent, are melted into one non-contradictory whole. Harmony of diverse elements in the Skica is a testimony of author's detailed knowledge of the major legal systems, recent developments in comparative law, and case law expressed through court decisions (which marked the turning points in the understanding of law), and his rare ability to produce new work from the existing elements and give it its specific features.

Every aspect of the Skica gives an impression of a code that resulted from the best traditions of European legislation, not of a bizarre work that was created at the periphery of legal civilization.

Part II. Changes in the system of delictual liability

A. The basis of liability

17. The development of obligations law in Serbia (which took place within the Yugoslav law, but also influenced and promoted its development) is characterized by profound changes in all its parts. It seems well founded to say that the most profound and the most far-reaching were the changes in the area of delictual liability. The evolution of law was under considerable influence of the economy and social affairs, the industrial growth, which brought about an increased number of injuries at work, the development of transportation, which fatally led to a great number of injuries in traffic accidents, etc. Before World War Two, Yugoslavia was a relatively under-developed country, and cases of damage resulted mostly from the human factor. Now, increasingly, there were forces at work which far exceeded human power to prevent and remove their unwanted consequences. An increase in the number of damages of all kinds inevitably placed an increased significance on regulating their effects.

18. The evolution of rules governing delictual liability had its internal, legal causes as well. Relieved from legal authority (that ceased to bind them after the Law on Nullifying Legal Regulations in 1946), the court on the one side and law authors on the other, gradually changed their thinking, concepts and finally the very rules of pre-war law. In case law, these attempts were initially modest and generally boiled down to adjustments to individual rules. Over time, encouraged by incentives coming from the practice of supreme courts and supported by legal theory, the courts started passing their verdicts without much hesitation, thus changing the existing rules and creating new ones.[56] There is another unquestionable, although less pronounced and less studied phenomenon, namely the one that spanned quite a long period of time (from 1946, or even earlier, until 1978, when the Law of Obligations was promulgated) in Serbia (and Yugoslavia) – that the Law of Obligations was a judge made Law.

19. These two causes combined first resulted in changing the position of delictual liability in the system of the Law of obligations. In the pre-war law, delictual liability had a mod-

[56] Compare: „New generations of lawyers have not learned to make use of full civil or property codes". Konstantinović, Skica p. 10.

est role[57] in a special part of the law after the nominated contracts, public promise of reward, unsolicited performance of others' work and unlawful enrichment.[58] Legal texts were austere, case law was meager,[59] and legal theory could be counted on the fingers of one hand. After World War II delictual liability received the position it merits, in the general part of the Law of Obligations which speaks of sources of obligations, right after the contracts. The rapid increase of the number of different types of damage resulted in the development of a huge number of cases[60] which, in turn, inspired and encouraged theoretical research.

20. The second novelty in comparison to the pre-war law was segregation of delictual liability on the one side and strict liability on the other. In the pre-war law, opinions of the basis of delictual liability or the so called principle of fault (*culpae*) and the principle of causality (*causae*) were opposed to the exclusion of one another. Thus, for instance, in Serbian legal theory, D. Aranđelović held that liability was still based on the principle of fault, while cases of liability without fault were exceptions[61], while on the other hand B. Blagojević claimed that strict liability was becoming the rule while fault was the exception[62].

21. The discussion regarding the basis of liability provided for the starting point in building a new system of delictual liability. The discussion in theory was held at the beginning of the 1950's, when the first draft of the Law on Compensation of Damages was prepared (1951)

---

[57] In the lectures on Law of Obligations by Professor Živojin Perić, two pages deal only with delictual liability in general part and three pages in Special Part. Specijalni deo Građanskog prava po predavanjima Ž. Perića, štampano kao rukopis, Beograd, bez oznake godine (Special part of Civil law according to lectures by Živojin Perić, printed as a manuscript, not dated).

[58] Compare: Borislav T. Blagojević, Posebni deo obligacionog prava, (Special part of law of obligations), Belgrade, 1939, p. 271-312.

[59] In the period 1932 – 1939, only fifty decisions were published which refer to delictual liability (from nr 792 - 841) which is an indication of their relative scarcity, having in mind the total of 227 decisions concerning other parts of Law of Obligations. Tihomir M. Ivanović, Sudska praksa1932-1939, (Case Law), Belgrade 1940.

[60] In the first Compendium of legal opinions, delictual liability is the subject of 315 decisions (314-629), while the rest of the Law of Obligations is the subject of 212 decisions (101-313). See: A compendium of court decisions in the area of civil law, Belgrade, 1972. The second compendium records 293 decisions on causing of and compensation for damage, while other issues relating to the obligations law comprise 287 decisions. See: Zbirka sudskih odluka iz oblasti građanskog prava, 1973-1986 (A compendium of court decisions in the area of civil law) Belgrade 1986; the ratio is similar between decisions relevant to causing damage (pages 200-226) and contracts (pages 366-374) recorded in the Registar sudskih odluka objavljenih u knjigama I-XV zbirki sudskih odluka, (Registry of court decisions published in volumes I-XV of the compendium of court decisions), Belgrade 1973.

[61] "With respect to all this, it is quite natural that in the science of civil law and in the most contemporary civil laws and projects thereof, there is now a predominant thinking that *the principle of fault should be preserved* with respect to regulating the indemnization issues. However, with respect to the changed relations in the economy and transport, and in view of the request for equitable or just solutions, it is necessary to allow for *exceptions* from this principle, i.e. the laws should also establish liability for such damage as caused by someone without his/her fault."

[62] "Understanding this main idea as just and socially desirable, contemporary private law is characterized by an increasing predominance of strict liability over the subjective one. Thus, the earlier rule: fault is replaced by a new rule: risk. And, yet, this rule is not absolute. Strict liability is becoming the rule, but liability based on fault does not and should not disappear entirely. Risk is the new rule, and fault, remaining still in the legal system, is becoming an exception", Borislav T. Blagojević, Posebni deo obligacionog prava (Special Part of Law of Obligations), p. 276. True, Blagojević speaks here of the relation between the two types of liability in general terms, having in mind the emerging trends in development. A few pages later, he is to state that legal systems are adopting as a rule the subjective theory of identifying the party causing damage, i.e. the theory of fault, there being an increasing amount of exceptions from this rule (p. 288).

and when studies (reports) by M. Konstantinović[63] and S. Jakšić[64] were published from the proceeds of the Fourth Inter-Faculty Conference of Law Faculties in Sarajevo (May 1952). In this respect, the first paper regarding the basis of delictual liability is especially important, since its author was chairman of the commission of experts who prepared the draft law. Mentioning that none of the principles on which liability is based (neither the principle of fault, nor the principle of strict liability) can or should be opted for as an exclusive basis for liability in our contemporary law; the author promotes adoption of both these principles as each of them has its own area of application. Analyzing public discussions and those in the Commission regarding the basis of liability, the author stressed that neither the principle of liability based on fault, nor the principle based on created risk could or should be opted for as an exclusive basis of liability.[65] In our law, he went on to write, there is room for both liability based on fault and strict liability. Both principles are acceptable. Between them the rule-exception relation does not apply, and each of them has its own area of application.[66] It remains only to draw a line between them. Liability based on fault meets the requirement of the just and the ethical in a society.[67] Whenever it is possible to prove the defendant's fault, liability will be soundly grounded.[68] But, this type of liability may only be applied in the area in which relatively weak force was applied, human force or force that can fully be controlled by a human.

22. In the modern world, which has seen the development of industry and the use of a great number of machines and other devices in which huge force is concentrated (exceeding ordinary human force) it is not possible to maintain fault as the exclusive basis of liability. Namely, due to the use of these machines and devices (big transportation means, electrical power, industrial plants, gas pipelines, oil pipelines, weapons, chemical agents, etc.) damage is unavoidable and an individual cannot avoid it despite the greatest of care.[69] Their occurrence can be determined by statistical rules (the rule of great numbers),[70] and it is the price that the human community is paying for social progress. It would therefore not be equitable to attach liability to the one who was there on the spot at the time when (due to the effects of such forces) the accident happened, but to the one who put the dangerous things in motion and who handles them[71]. In such cases, liability should be based on risk created, not on fault[72]. As for the relation between these cases and the areas in which one is held liable for fault, it is worthwhile noting that these are not exceptions. The first reason is that there would be many such exceptions[73] (which would undervalue the rule itself). The second reason is

---

[63] Mihailo Konstantinović, Osnov odgovornosti za prouzrokovanu štetu, Arhiv za pravne društvene nauke 3/1952, (hereinafter Arhiv), (The Basis of Delictual Liability, Archives of Legal and Social Sciences), p. 296 and onwards.

[64] Stevan Jakšić, Osnovni principi naknade štete u našem pravu, (The Basic Principles of Damages in Our Law), Arhiv, 4/1952 p. 420 and onwards.

[65] Konstantinović, Osnov odgovornosti, Arhiv, 3-1952, p. 296.

[66] Mihailo Konstantinović, Obligaciono pravo, (Law of Obligations, according to notes taken from the lectures of Professor M. Konstantinović), Belgrade, 1959, p. 106.

[67] Konstantinović, Osnov odgovornosti, Arhiv, 3/1952, p. 297.

[68] Ibidem

[69] Konstantinović, Osnov odgovornosti, Arhiv, 3/1952, p. 299.

[70] Ibidem

[71] Ibidem

[72] Ibidem

[73] Ibidem

even more important: these exceptions are internally related[74] and they point to a principle in its own right, with its own area of application. That is why in our law, in the Skica, strict liability was partly accepted in the form of liability for dangerous thing[75] or liability for dangerous things and dangerous activities in the Law of Obligations.[76]

23. Apart from the traditionally regulated strict liability for damage by animals[77] the Skica introduced two novelties in this area. The first refers to liability for damage by buildings and the second, liability of the producer for defective products.

24. In contrast to earlier solutions in our and in comparative law, in which the owner's liability (or the liability of the property holder) of buildings was established on the principle of presumed liability,[78] the Skica proposes strict liability, and a more stringent one than liability for dangerous things. While the general rules of liability for dangerous things provide for a possibility of relieving the owner of liability should he/she prove that: 1) damages resulted from an external cause whose effect could not have been presumed or prevented or avoided; 2) damages resulted solely by fault of the damaged party which he could not have foreseen and whose consequences he could not have avoided; 3) that damages resulted solely by fault of the third party which he could not have foreseen and consequences of which he could not have avoided,[79] the rules governing liability for damages from buildings and structures envisage that the owner (or property holder) shall be relieved of liability only if he/she proved that damages were caused by force majeure or by fault of the damaged party.[80] Therefore, the owner could not be relieved of liability when damage was caused by fault of a third party. His/her only option was, after compensating the damaged party for damages, to contact the third party who caused the damage and request from him/her compensation of the amount paid.[81]

25. An interesting as well as major novelty in our law was that the Skica included a rule governing the liability of producers for defective products. It was formulated as follows: „Anyone marketing any product he produced and which, due to some defect that he was not aware may cause damage to persons or things, shall be held accountable for the damage as would result from such defect".[82] The liability of the producer of defective things had a nature of strict liability (the producer was held liable irrespective of his fault) and as such it came into effect as of 1969 when the Skica was published as a legal rule,[83] and it was officially in effect as of 1978 when the Law of Obligations[84] was adopted, *auctoritate legis* (The Directive of the Council of European Communities was adopted much later, on July 25th 1985, however, with a set of rules elaborated to a much higher level).

---

[74] Ibidem

[75] Skica, Article 136 and onwards. Compare: S. Mihajlović, Pojam opasne stvari, Glasnik Advokatske komore u SAP Vojvodini br. 2/1972, p. 1-11 I 3/1972, p. 3-12 (The Concept of a Dangerous thing, the Gazette of the Bar Association in the Province of Vojvodina)

[76] Zakon o obligacionim odnosima, Articles 173-174, (The Law of Obligations).

[77] Skica, Article 142-144; The authors of the draft did not include these rules in the Law of Obligations. The issue was left to the republic legislation, and relevant decision were never taken.

[78] ABGB § 1319; CC, Article 1386; BGB § 836.

[79] Skica, Article 137, p. 1 and 2.

[80] Skica, Article 145, p. 2.

[81] Skica, Article 145, p. 3.

[82] Skica, Article 141.

[83] Many courts (especially in Serbia) began applying the provisions from Skica (as soon as it was published) in form of "legal rules" as stated in the Law of 1946.

[84] The Law of Obligations, Article 179.

B. The rule of full compensation for damages

26. Introducing the rule of full (integral) compensation marks a turning point with respect to laws previously in effect. According to the new rule proposed by the Skica[85] and confirmed in the Law of Obligations, the damaged party is entitled to receiving from the wrong-doer (the responsible person) a compensation for the full damage suffered, meaning ordinary damage (damnum emergens) and the lost profit (lucrum cessans).[86] The rule was adopted in modern law and it is an expression of the basic principle of civil law liability whereby sanctions should consist of repairing the damage (to have the character of reparations). To speak of actual reparation of damages the damaged party must receive compensation to the exact amount of damage, no more, no less[87]. Only in this manner is it possible to re-establish the status of property estate of the damaged party to the level it was before the damage was caused. If the amount of compensation was lower than the amount of damage caused, the compensation would not achieve its purpose, because the damage in its remaining uncompensated amount would continue to affect the damaged party. But, compensation (in principle) should also not be higher than the damage, because the damaged party would be enriched by the excess amount of compensation paid, and there is no basis for that.

27. It is interesting to note that the same year when the Skica set out the rule of full compensation, the same solution was adopted in case law. Namely, at the Conference of judges of the Civil Law Department of the Supreme Court of Yugoslavia and judges representing civil law departments of republic and provincial courts in June 1969 the approach was adopted that „in case of damage or destruction of objects, the damaged party is entitled to full compensation of damage (simple damage and lost profit) irrespective of the level of fault of the person causing damage except when explicitly stated otherwise by a specific regulation".[88] We cannot know with certainty whether this was pure coincidence, or whether the rule proposed by the Skica influenced the judges of the Supreme Court to adopt the identical approach, because after the Conference only a very brief text was published without any detailed justification and without the printed materials presented, but it is probable that there was such influence. It is likely that this was such an influence.[89]

28. In this way, through joint efforts of legal theory and case law, probably the most crucial change was made in the area of delictual liability and in approach to the purpose of the com-

---

[85] Skica, Article 150.

[86] The Law of Obligations, Article 189.

[87] Compare: „Was als Schadensersatz geschuldet wird, das richtet sich nicht nach dem Sandktions- oder dem Präventionsprinzip, sondern nach dem Ausgleichsgedanken. Er bedeutet, daß dem Geschädigten – sehen wir wieder zuerst einmal von § 254 ab – sein gesamter Schaden, ***nicht weniger und nicht mehr*** – ersetzt werden soll, daß er durch die Ersatzleistung so gestellt werden soll, wie er ohne das die Ersatzpflicht des Schädigers begründende Ereignis jetzt stehen würde". Karl Larenz, Lehrbuch des Schuldrechts, Band I Allgemeiner Teil, 14. Auflage, München, 1987, p. 424.

[88] Pravni stavovi savetovanja sudija Građanskog odeljenja Vrhvonog suda Jugoslavije i sudija – predstavnika građanskih odeljenja republičkih i pokrajinskih sudova od 26. i 27. juna 1969. godine, (Legal positions at the Conference of judges of the Civil Law Department of the Supreme Court of Yugoslavia and judges representing civil law departments of republic and provincial courts held on June 26th and 27th 1969.), Zbirka sudskih odluka, XIV, 3, X, 6, p. 114.

[89] It is beyond doubt that the new approach in legal theory happened before the turning point in case law. Namely, even before he definitely crystallized his thoughts and approach and published them in Skica in 1969, Professor Konstantinović in his text of 1966 (the text he titled the Preliminary draft of the Code of Obligations), formulated the rule of full compensation, in the same manner as in Article 133 of the preliminary draft. Compare: "The amount of compensation is determined as a rule according to the damage suffered and lost profits, thus irrespective of the degree of guilt of the party causing damage". M. Konstantinović, Justification of the Preliminary Draft of the Code of Obligations, general part, July 1966, Belgrade, p. 17.

pensation. Until that time, i.e. until the end of the 1960's, our law applied the Austrian system of rules (based on the principle of proportionality of the degree of fault and the scope of compensation) consisting of the following: a) if the person who caused damage did so intentionally or out of gross negligence, the damaged party is entitled to compensation and actual damage (damnum emergens) and lost profits (lucrum cessans);[90] b) if the person who caused damage did so through plain negligence, the damaged party is entitled only to compensation of the actual damage. In the latter, case the court shall refuse the damaged party's claim for lost profits.

The principle of proportionality between the fault and the scope of compensation has a great power of persuasion and this explains its long duration in our law. It suited the natural feeling of the equitable[91], innate in many people. In contrast to it, the modern rule of full compensation irrespective of the degree of fault, suits a more rational approach to compensation of damage which is more suitable to its actual purpose. This is based on a strict separation of the sentence as a sanction in criminal law on the one side and compensation as reparation in civil law. But it implies a greater level of rationality in deliberations, and for this reason the path to its adoption in our law was so long.

29. Namely, it might seem at first sight that there was a sudden change under the influence of theoretical criticism of earlier legal rules. But it was not so. Not only that there was resistance to the new doctrine in legal theory[92] and in case law, but the very proponents of the new approach were indecisive over a relatively long period of time as to which system was better: the old or the new one. So, for instance, M. Konstantinović in his textbook on the Law of Obligations from the 1950s, the chapter on compensation of damage, presented the rules *de lege lata* as they were laid down in the Austrian legal system and the Serbian Civil Code,[93] while he spoke of full compensation of damages *de lege ferenda* only, as they applied in German and French law. It gave an impression of the author favouring a more contemporary approach of integral compensation in that chapter.[94]

30. When we view the whole issue from today's perspective, there is an interesting point in the article on the basis of liability (published at the time) in which Konstantinović with a degree of personal conviction presented the arguments favouring the earlier rule about the higher level of compensation in case of malevolent causing of damage.[95]

---

[90] SCC § 819; ABGB § 1324.

[91] Compare: J. Radišić, Imovinska odgovornost i njen doseg (Delictual Liability and its Scope), Belgrade, 1979, p. 54.

[92] Compare: M. Vuković, Odgovornost za štete (Liability for Damage) Zagreb 1971, p. 251, nº 506, p. 251 nº 510 and p. 252, nº 512.

[93] Konstantinović, Law of Obligations (according to lecture notes) Belgrade, 1952, p. 103.

[94] Compare: "Any honestly, if compensation does not serve for enrichment of the damaged party, there is no reason for him/her to be entitled to full compensation, in principle, i.e. both the compensation of actual damage and the compensation of lost profits, in each case. Because, according to the definition "lost profit" is also a loss, and in order to establish the earlier state, every loss should be compensated. Derogations to this rule could be possible in both respects, but it should be applicable as the general rule". Konstantinović, op. cit., p. 104.

[95] Compare: "In case of more severe fault on part of the party causing damage it is justified to have higher compensation. It is not irrelevant for the damaged party whether the damage was caused by error or malevolence. We feel graver damage if it is caused malevolently. When malevolent damage results from a criminal act, the sentence and the compensation reinstate the disturbed balance. But damage may be caused malevolently without the damaging party violating the criminal code. In such a case, the compensation of simple damage would not suffice. The feeling caused by malevolent damage would not be satisfied. It is just to take into consideration also this malevolent intention, the graver guilt of the damaging party and adequately increase the amount of compensation". Konstantinović, Osnov odgovornosti za prouzrokovanu štetu, Arhiv (The Basis of Delictual Liability) , Nr. 3/1953, p. 301.

31. The idea of establishing a new basic rule in the area of delictual liability, based on integral compensation for damage, matured gradually and with many ups and downs. Such a significant change, which marked a complete breaking away from the entire preceding legal system, was not easy to undertake, because behind the rule of proportionality there was a century of experience which yielded many positive results as well. After a long deliberation and balancing of arguments pro and contra, the decision was finally made, most probably at the beginning of the 1960s. From that moment, the development of our law assumed a path contrary to the Austrian system, more in line with the aspirations of contemporary comparative law.

C. The issue of fault

a) Appreciation of fault in concreto

32. Apart from the issue regarding the scope of compensation, the debate in our legal theory focused most strongly on the concept of fault and its role in the system of delictual liability. The debate started much before the adoption of the Law of Obligations and continued after its coming into effect.

In older legal theory fault was defined as a psychological relation between the tortfeasor to the act itself and to the damage as a consequence thereof.[96] The set of psychological relations that is implied here consists of two phenomena: the awareness and the will[97] (sometimes only the will is considered,[98] or only the awareness).[99] In this respect, Criminal Law

---

[96] Compare: "Guilt (the so-called subjective, psychological, intellectual, spiritual, internal "moral" element, u bipartition of a criminal act, in tripartition guilt) is (in encoclodeadic terms) a set of psychic relations which the perpetrator needs to have with his act generally or with this or that specific criminal act, in order to be the guilty one. These psychic (subjective) relations occur, in themselves, as specific psychic acts (processes). As it was seen, however, these acts are sufficient for criminal liability only if they manifested themselves in the outer world through certain acts, i.e. only the subject performed such acts and these occur as the objects of such acts. In this manner the mentioned psychic acts become part of criminal law, as a basis of criminal liability, only if they manifest themselves as psychic relations of the perpetrator and his act, and it is in this sense that the above definition of guilt is given", Toma Živanović, Osnovi krivičnog prava Kraljevine Jugoslavije, opšti deo, II knjiga (II. Krivac- III Krivična sankcija), 3. izdanje, (The Basics of Criminal Law of the Kingdom of Yugoslavia, general part, volume II (II. The Culprit - III. Criminal Sanctions), 3rd edition)), Belgrade 1937, p. 26.

[97] "A set of psychic relations (which manifest themselves in the conscience and in the will of the perpetrator) towards a specific act is guilt", Nikola Srzentić, Aleksandar Stajić, Krivično pravo FNRJ, opšti deo, 3. izdanje (Criminal Law of FPRY, General Part, 3rd edition), Belgrade 1961, p. 205. Compare with Civil Law, Dimitar Pop Georgijev, Obligaciono pravo, Opšt del, (Law of Obligations, General part), Skopje, 1976, p. 154.

[98] "Fault, in a broader sense, is the moment in the will of the perpetrator of an illegal act, by which he manifests himself as the perpetrator of a criminal offence, as the one who caused or performed the criminal act", Andra Đorđević, Sistem Privatnoga (Građanskoga) prava Kraljevine Srbije u vezi sa Međunarodnim privatnim pravom, Prva knjiga: Opšti deo (druga polovina), (The System of Private (Civil) Law of the Kingdom of Serbia with Respect to International Civil Law, Book One: General Part (second half)), Belgrade, 1896; p. 184. Along the same lines: "Because it was up to his will to undertake the act or not in order to cause damage. Therefore, we cannot speak of a certain will directed at undertaking or not undertaking an act, or of fault, with persons whose will is ignored in the law", Dragoljub Aranđelović, O odgovornosti za naknadu štete, 2. izdanje (On Liability for Compensation of Damages , 2nd edition), Belgrade, 1923, p. 18.

[99] In Contrast with his predecessors, (A. Đorđević, D. Aranđelović) who put the will in the focus, Blagojević, under the influence of Toma Živanović, treated guilt as a phenomenon of conscience and thus defined fault in civil law, in a manner similar to what Živanović wrote in Criminal Law. "The substance of this psychic relation, wrote Blagojecić, depends on each specific case, but it always consists of a gradation of conscience of a person and the effects of his act ", Borislav T. Blagojević, Posebni deo Obligacionog prava, Ugovori, jednostrani pravni poslovi, građansko-pravni delikti, (Special Part of Law of Obligations Contracts, Unilateral legal juristic acts civil-law delicts), Belgrade, 1939, p. 289.

divides the area of guilt into two wide areas: intention and negligence, wherein will and awareness in certain combinations determine the degree of guilt. Thus, intention is direct (when the perpetrator was aware of his act and intended to perform it)[100] and potential (when the perpetrator was aware that due to his action or non-action a forbidden consequence may result, and accepted its onset).[101] In a similar way, negligence is classified as conscious (when the defendant was conscious of the potential onset of consequences)[102] or unknowing negligence (when the defendant was not conscious of the possibility, but could have been and should have been conscious thereof).[103]

33. Such understanding of guilt[104] is accepted by certain legal authors as acceptable for civil law as well. In their opinion, fault in civil law should also be considered and appreciated in a subjective manner. This means that, when a person through his act causes damage to another, the court should ask itself whether the defendant in his subjective characteristics and abilities could comprehend the consequences of his act, and avoid the causing of it. The court is, therefore, to examine the psychological state of the perpetrator and, keeping in mind the personal traits and abilities of the perpetrator, determine if he could have acted otherwise. In doing so, the court is to take into consideration circumstances such as the capacity to comprehend, age, health status, and possible physical deficiency (such as disability, loss of sight, blindness, loss of hearing, etc.), as well as their personal traits such as: strength, intelligence, experience, skills, qualifications, speed of responding, etc. Thus, the negligence of a senior person when crossing the street would be judged more mildly than the behaviour of a person in full strength. The fault of an inexperienced driver or inexperienced craftsman should be judged less stringently than the acting of an experienced driver or a skilled craftsman. This manner of consideration is called consideration *in concreto*, as it takes into consideration the characteristics of a specific perpetrator as a measure of comparison.

34. The appreciation of fault *in concreto* is much more suitable for criminal than for civil law cases. In order to render a conviction in view of the defendant it is necessary to consider all the subjective circumstances, especially the psychological state. This is required in order to meet the social safeguarding against serious abuse of the legal system, and also for reasons of safeguarding the human rights of the defendant. The defendant is faced with detention or some other form of punishment and it is therefore necessary for the court to investigate whether in committing the criminal act the defendant acted conscientiously and willingly. In criminal law, as a rule, the defendant is liable for intention, in which psychological aspects are especially strong. Negligence is only exceptionally the subject of criminal liability, only when explicitly so regulated by the Criminal code. In Civil Law it is of special importance in view of the damaged party to determine the fault of the defendant, and specifically the lower level of such fault. It is less important what degree of fault is involved. In principle, in order to achieve the purpose of civil law sanctions, which is the compensation of damage, it is sufficient to determine if the defendant acted even with a minimum degree of fault, which is to say if he acted negligently. As our law states that the defendant is obliged to provide full compen-

---

[100] Srzentić, Stajić, op. cit., p. 212. Along the same lines, Ljubiša Lazarević, Krivično pravo, Opšti deo (Criminal law, General Part), Belgrade, 2000, p. 214.

[101] Srzentić, Stajić, Ibidem, Lazarević, Ibidem

[102] Srzentić, Stajić, op. cit., p. 219. Lazarević, op. cit., p. 221.

[103] Srzentić, Stajić, op. cit., p. 221, Lazarević, op. cit., p. 223.

[104] Compare: Dimitar Machiedo, Osnov odgovornosti za nanetu štetu, (The Basis of Delictual Liability), Zbornik građanska odgovornost , Belgrade, 1966, p. 31 passim, especially p. 40. Similarly: Pop Georgijev, op. cit., p. 154.

sation of damages regardless of the degree of fault. The main purpose of the damaged party's request shall be satisfied as soon as it is determined by the court that at least the lowest degree of fault exists. It is therefore quite possible that a person be acquitted of criminal liability and be pronounced negligent in a civil law case and in it be liable for damage caused. Shortly, civil law *appreciates* on fault more stringently than criminal law does on guilt.

b. Appreciation of fault in abstracto

35. A more stringent criterion of fault was proposed in the Skica for the Code of Obligations and Contracts. The Article 127, titled: „When does fault exist", states as follows:

> „In appreciation whether the defendant who has caused damage is negligent or not, i.e. whether he acted as he should have, the court shall have in mind the regular course of things and what could be expected of a reasonable and prudent man under the given circumstances."

According to the rule contained in the Skica, the *behaviour* of the person causing the damage is in the centre of conceptual determination of fault, not his psychological relation (mental state) to such acting and the damage as a consequence. It is for this reason that it does not mention the division of fault into intention and negligent. Namely, within the proposed system, it is important to determine the lower level of fault, because for the damaged party it is of the utmost significance that the defendant is negligent, and not what the degree of his fault is. Another feature, in the new approach, is reflected in the fault being determined as *wrongful doing*. We shall pronounce someone negligent if he failed to act as he should have, and this means he is negligent when his behaviour differs from the conduct that could be expected from a reasonable and prudent man.

36. Determining fault in this system consists of two stages. In the first one, the court is called to determine facts of the case, on how the defendant, through whose acting the damage was caused, acted in this specific case, and in the second one to compare the defendant's behaviour with the conduct as it should have been. The judge is required to build an imaginary standard of behaviour (more or less abstract) of a reasonable and prudent man, which will serve as the criterion of comparison. If by comparison he finds that the defendant did not act as a reasonable and prudent man should have acted, the judge will draw the conclusion that such a person is negligent for the damage caused. Therefore, this kind of understanding of fault is said to represent an objective standard of negligence (appreciation of fault *in abstracto*). It is worthwhile to note here that fault remains a subjective element of delictual liability (as it refers to human conduct, which is a subjective phenomenon), but the standard according to which the fault is appreciated is objective. The objective standard of fault (and not objective fault, which would be a contradiction) is reflected in the fault not being appreciated as the mental state, but upon the conduct as a result of psychological processes realised in the external world.

37. If the rule proposed in the Skica had been adopted, our law could have resolved the issue of fault more easily. Namely, the proposed rule starts from the defendant's conduct, as was manifested in the actual event, and not from the psychological experience of what happened in reality. It goes with out saying that the former is more easily proven than the latter, thus removing the criticisms of the system of proven fault.

38. With this notion of fault, it is superfluous to introduce illegality as the fourth element of liability. Illegality is necessary as the condition of liability in systems of special delicts, such as criminal law (and as was the case with the Roman civil law, which did not include a separate rule on causing damage but four delicts of *ius civile,* specifically*: iniuria, furtum, damnum iniuria datum* and *rapina* and three Praetorian delicts: *dolus, metus and fraus creditorum)*. Illegality in these systems served to mark the scope of inadmissible behaviour and

separate it from the area of freedom (admissible behaviour). When liability is formulated in the form of a special rule: „he who through his own fault causes damage to another shall be liable for compensating for such damage", the element of illegality becomes superfluous.[105]

39. By applying the method of determining the defendant's fault *in abstracto*, our law is harmonized with the aspirations of the great major systems in comparative law.[106] Appreciating the fault according to the conduct of a reasonable and prudent person *(personne avisée)* is the predominant approach in the French law.[107] The conduct of a *reasonable man* is broadly accepted as a measure of negligence in the English law.[108] A similar standard, regarding the care required in trade, is accepted in the German Civil Code, in § 276.[109] The only exception is the Austrian law, which still applies the appreciation of fault *in concreto*.[110]

40. The gradual acceptance of the new notion of fault can be seen also in our case law. True, this process was uneven, and judicial practice is not completely consistent. There have been derogations, temporary uncertainties, and even moments when it seemed that the contrary, subjectively seen concept of fault would prevail. It does seem, however, that the fault understood as behaviour, that is different from the conduct of a reasonable and prudent person prevails in court decisions.

The appreciation of fault is of special significance in cases when the actions of the party causing damage and those of the damaged party are intertwined and it is therefore difficult to establish which of the two acted wrongfully. It is interesting to note that such cases with intertwined actions of the two parties are used as an illustration of the argument that in our case law fault is contemplated *in abstracto*.

41. In one specific case, the facts were as follows: the plaintiff, who claimed to understand the business, proposed that a 500 litres barrel, full of wine, be moved to the cellar. The defendant agreed with this proposal. The work was organized by the plaintiff and he determined the individual roles in this task. The defendant was positioned in front of the barrel, and the plaintiff and another person (Š.M.) were supporting it from the sides. At one moment, the plaintiff told the defendant to pull out the lever in order to enable the barrel to be lowered from the upper step to the one below it. When the defendant did so, the barrel charged downwards. The defendant was safe, but the barrel tilted to one side and rolled down the staircase and over the plaintiff's foot, thus causing him an injury. For this reason he filed charges and requested compensation for damage. The first instance court was of the opinion that the damage had not resulted by fault of the defendant, but rather that all persons involved in this task had performed it at their own risk because they should have known that an injury could have hap-

---

[105] Compare: "With this understanding of fault it is not necessary to include illegality as a separate requirement of liability", Konstantinović, Justification for the Preliminary Draft of the Code of Obligations, Belgrade 1966, p. 15.

[106] Compare: Bogdan Loza, Obligaciono pravo, Opšti dio, 4. izdanje (Law of Obligations, General part, 4th edition), Belgrade, 2000, p. 208-211; Marija Karanikić Mirić, Krivica kao osnov vanugovorne odgovornosti, doktorska disertacija (Fault as the basis for extra-contractual liability PH.D, thesis,) Belgrade, 2008, passim.

[107] Henri, Léon Mazeaud, André Tunc, Traité théorique et pratique de la rasponsabilité civile, délictuelle et contractuelle, Tome premier, sixième édition, Paris, 1965, p. 504.

[108] Winfield & Jolowitz on Tort, 16th Edition, W.V.H. Rogers, London, 2002, p. 190 and onwards.

[109] "Fahrlässig handelt wer in Verkehr erforderliche Sorgfalt ausser acht last", BGB, § 276, absatz 1. Compare: Erwin Deutsch, Haftungsrecht, I Band, Allgemeine Lehren, Köln, 1976, p. 282 and onwards.

[110] Helmut Koziol, Oesterreichisches Haftpflichtrecht, Band I, Allgemeiner Teil, Wien, 1973, p. 98-100.

pened, rendering this accident a mere coincidence that affected the plaintiff only. The second instance court was of the same opinion, and it confirmed these reasons and used them as the basis for its decision.

42. The federal Supreme Court reasoned differently. In its opinion, under the given circumstances which were established by the first instance court it did not necessarily follow that the defendant had not done anything that could have caused the damage. The court expressed its position as follows:

> „The defendant may also be negligent for the damage caused if in his operations he failed to act in the manner in which a reasonable and prudent person would be expected to act under the given circumstances and if his failure to do so, consciously or carelessly, caused damage. If it would follow from the circumstances that the defendant had undertaken an act difficult and dangerous for those who undertake it under unusual, unfavourable, and risky circumstances, with unqualified and unskilled persons and/or with an insufficient number of persons, and if he could and should have been aware of it, this would be indicative of his negligence for the resulting damage and, irrespective of the fact that the plaintiff himself offered to assist in moving the barrel and was in charge of the operation and although the defendant under the plaintiff's orders correctly pulled out the lever, the negligence for the damage also rests with the one who caused damage through inadequate handling and manipulating of his own thing or thing given to his care."[111]

This court decision was the basis used by lower instance courts in a whole series of court decisions that followed. Although made almost half a century ago, the position expressed in it has its value even today.

c) Application of the subjective criterion of fault as an exception from established court practice

43. In a brief period of time it seemed that the Supreme Court of Yugoslavia would opt for the subjective, psychological concept of fault. In contrast to the prevailing doctrine and the case law, the Supreme Court in one decision expressed its position on fault as follows:

> „Namely, fault is always a subjective category and this is so at all levels: intent, gross or light negligence. That is why, irrespective of the objectivized (general, abstract) criteria which are used in order to determine by comparison which degree of negligence is involved in a specific case, the subjective characteristics of a person who caused damage can not be completely overseen. First of all, it is obvious that it is not possible to oversee the characteristics which influence the capacity of thinking and especially in certain situations some other characteristics outside of this domain, such as previous experience, skilfulness, strength, etc. An example of a situation in which subjective characteristics will often be taken into account is exceptional and sudden traffic accidents not caused by the driver himself and in which successful or unsuccessful dealing with the danger would very often depend on the adaptability, experience and the „inherited" qualities of reflex response. There is no doubt that in determining whether, under such circumstances, we are dealing with ordinary or gross negligence, we must take into consideration, apart from the general criteria, certain subjective traits of the perpetrator as well."[112]

---

[111] Rešenje Saveznog vrhovnog suda, Rev. 49/58 od 25. februara 1958. (The decree of the federal Supreme Court, Rev. 49/58 of 25 February 1958,) Zbirka sudskih odluka, III, 1,59.

[112] Presuda Vrhovnog suda Jugoslavije, Rev 109/71 od 28. maja 1971, iz arhive Suda (The judgment of the Supreme Court of Yugoslavia, Rev. 109/71 of 28 May 1971, from the court archives).

In an effort to promote the appreciation of fault *in concreto*[113], the writers of the Outline Law of The Law Obligations deleted the provisions from Article 127 of the Skica, regarding the concept of fault, as a departure from behaviour as it should be. Hence, in the general provisions of the Law of Obligations dealing with delictual liability there is no mention of the standard of a reasonable and prudent person. But, although not presented in the general rules, the standard of reasonable care as a measure of fault could be found elsewhere. Namely, in the rules regarding the liability for others, it is stated that the company is liable for damage which an employee causes to third persons „unless proven that the employee under the circumstances acted as he or she should have."[114]

44. Since they understood the defendant's fault as the psychological relation of the defendant which, by the nature of things is a great and sometimes insurmountable difficulty for the damage to be proven in such form by the plaintiff, the authors made another far-reaching step. Instead of the rule: Whoever causes damage to another by his own fault shall compensate for the damage, which was included in the Skica,[115] they formulated the basic rule of liability based on fault, as follows: „Whoever causes damage to another shall compensate for the damage unless it is proven that the damage resulted without his fault".[116] In this manner, the system of presumed fault entered our law,[117] and this was a concept that certain legal authors promoted earlier.[118] Such a rule which resolves one practical problem opened up a series of other problems[119] and put at risk the integrity of the overall system of delictual liability.

d) Return to appreciation of fault in abstracto

45. The fault understood as a psychological concept did not prevail either in legal theory (in contrast with criminal law) or in case law. One could say that before and after the above mentioned *interregnum*, courts expressed the view that the fault consisted in wrongful behaviour, without going into the analysis of psychological or even physical potentials or abilities of the defendant.

The case which enabled the Supreme Court of Yugoslavia to express its position on this issue is very interesting. In a traffic accident the driver caused injuries to a worker who was performing his regular duties on the road. During the proceedings it was determined that the driver was giving sound warning to the road worker but he, due to his partial deafness, did

---

[113] Compare: Dimitar Machiedo, Osnov odgovornosti za nanetu štetu, (The Basis of Delictual Liability), Zbornik građanska odgovornost, Belgrade, 1966, p. 31 passim, and Ž, Šmaljcelj, Pojam nepažnje u građanskom pravu (The Concept of Negligence in Civil Law), Naša zakonitost 1-2/1963, p. 12 and onwards.

[114] Article 170, paragraph 1, The Law of Obligations.

[115] Skica, Article 123, paragraph 1.

[116] The Law of Obligations, Article 154, paragraph 1.

[117] Todor Ačanski, Pretpostavljena krivica, doktorska disertacija (Presumed Fault, doctoral thesis), Novi Sad, 1980, passim.

[118] Compare: M. Vuković, Odgovornost za štete (Liability for Damage), p. 167 etc., (especially p. 173 and onwards); S. Jakšič, Obligaciono pravo (Obligations Law), Sarajevo, 1962, p. 251-252.

[119] Right after the adoption of the law, the courts were obliged to state accurately that the assumption of guilt referred only to ordinary negligence. See: Zaključci XIV zajedničke sednice Saveznog suda, republičkih vrhovnih sudova, pokrajinskih vrhovnih sudova i Vrhovnog vojnog suda održane 25. i 26. marta 1980. godine, Zbirka sudskih odluka (nova serija), V, 1, 20 (Conclusions of the XIV joint session of the federal court and republic and provincial supreme courts and the supreme military court, held on 25 and 26 March 1980.)

not hear the warning and thus the accident happened. The first instance (district) court held that liability was divided and the republic Supreme Court that the sole liability was that of the driver. The Supreme Court of Yugoslavia revoked the judgment of the second instance court, confirming the judgment of the court in the first instance and with respect to this case presented its position on fault:

> „In the opinion of the Supreme Court of Yugoslavia, every person with a certain physical disability/handicap (blind, deaf, etc.) must undertake all possible measures for his own safety and exercise extreme caution when on the road, since in modern traffic he cannot expect the driver to know in advance all the personal characteristics of persons using the road and adjust their driving in line with such knowledge. In this specific case, the plaintiff has not undertaken all that he should have done to avoid the accident; The Supreme Court of Yugoslavia therefore confirms the reasons and the conclusions of the first instance court regarding contributory negligence of the plaintiff for the harmful incident in which the plaintiff suffered harm which is the subject of this dispute."[120]

In the above case it goes without saying that one cannot blame the deaf worker for not having heard the approaching car, because in view of his characteristics and abilities he could not have done so. The Court, however, did not apply the appreciation of fault *in concreto*, but as wrongful behaviour. The Court compared the behaviour of the road worker to the conduct that would have been expected from a reasonable and prudent man in the given circumstances. In this respect, the Court found the road worker negligent of not being assisted by a co-worker on the road who would warn him of an approaching vehicle, as he had done on previous occasions (as the courts established during the proceedings). The liability of the road worker is based on fault, he is not liable according to the rules of objective liability (i.e. strict), but the standard according to which his negligent is objective. This confirms that liability in civil law gradually moved away from fault, understood completely subjectively, towards the wrong-doing understood almost in an objective sense.

46. The confirmation of the notion of wrongful doing as the standard of negligence is also found in one of the more recent decisions of the Supreme Court of Serbia. A person was serving a prison of two years and six months in the penitentiary institution PKD Požarevac. For health reasons (in order to receive treatment outside the penitentiary institution) the convicted person was allowed to terminate serving the sentence in the period from March 6th 1989 to June 6th 1989. He did not return to the penitentiary institution in time and it happened that on June 7th about 10 PM, he murdered a Greek citizen who was travelling through Serbia. During the criminal proceedings (new), the convicted person died. Therefore, the question arose whether the government was liable for the damage caused, since compensation could not be sought from the defendant. In expressing its judgment on this issue, the Supreme Court of Serbia presented the following position:

> „In such a situation and under such circumstances the lower instance courts acted in accordance with the law when they, in the manner stated below, accepted the plaintiff's claim. Namely, from the specific circumstances of the case, it is beyond doubt that there is basis for liability of the sued government for damages caused by its authority in exercising its duty (Article 172, paragraph 1 of the Law of Obligations) because the harmful event, the murder of the plaintiff's father happened on June 7th 1989 at night about 10 PM, when the convicted person was already supposed to be serving his prison sen-

---

[120] Presuda Vrhovnog suda Jugoslavije, Rev 153/67 od 20. jula 1967, Zbirka sudskih odluka, XII 2, 181 (Judgment of the Supreme Court of Yugoslavia. Rev. 153/67 of July 26th 1967,)

tence. This damage could have been prevented by prompt undertaking of measures by controlling the convicted person who was released temporarily from the penitentiary institution and by government authorities' intervening in the exercise of their duty, which had not been the case, thus, rendering the sued government liable under civil law for causing the plaintiffs the disputed damage and the plaintiffs are authorized to request under civil law that the defendant should pay for such damage."[121]

47. As in the preceding case, the Court viewed the fault as failure to act. This error practically has the characteristics of a strict liability. State authorities, in the opinion of the Court, under duty to ensure at any cost that the convicted person was in the penitentiary institution on the day when he should have been there. Therefore, there is no excuse for the error made. The Court does not discuss the objections that the defendant could have presented, but we can imagine them. The sued state could have defended itself by stating that not all the police officers were at the police station, as some of them had interventions outside the station, or that the manager was justifiably absent, or that the lower ranking officer failed to check the date on which the convicted person was to return to the penitentiary to serve his prison sentence, etc. But, none of these statements would have been accepted by the Court, which obviously was of the opinion that the State has resources available through which it can ensure the return of the convicted person to serving the sentence, under any conditions and under any circumstances. Thereby, the negligence on part of the government authorities, although marked as fault („the convicted person" was supposed to be serving his „punishment"), approaches very closely and almost touches the strict liability.

D. Conclusion

After World War Two, the law of obligations in Serbia was developing under a twofold influence of relying on case law and relying on solutions to be found in comparative law. The evolution in understanding, concepts and institutions increasingly widened the gap between the new system of delictual liability from the pre-war law contained in the Serbian Civil Code and relying on the Austrian law. Many new institutions, including among other particularly the rule of full compensation for damages, have marked this development towards modern solutions. In its final form the new Serbian Law of obligations is comprehensive and consistent system of rules equal to the modern trends in comparative law.

However, although the Law of Obligations was promulgated, there remained an important issue of how to understand the fault and the related issue of proven or presumed fault. In the Skica for the Law of Obligations and Contracts, fault was viewed as a standard of conduct of a reasonable and prudent person and hence the general rule of delictual liability was based on the system of proven fault. In contrast to this, the authors of this Law did not include a definition of fault which impliedly meant the acceptance of the position that fault is essentially a psychological concept. Since fault conceived in this manner was difficult to prove in court, the authors introduced the principle of presumed fault and thus interfered with the otherwise consistent system of obligations.

The appreciation of fault *in abstracto* makes proving much easier. Namely, the court need not get involved with investigation on the complex issues of psychological processes and frequently the entangled secrets of the mental state of the wrongdoer with uncertain outcomes. The court simply establishes how the defendant actually acted and compares his or

---

[121] Presuda Vrhovnog suda Srbije, Rev 3113/94 od 25. januara 1996., iz arhive suda (Judgment of the Supreme Court of Serbia Rev. 3113/94 of 25 January 1995, from court archives).

her behaviour with the conduct of a reasonable and prudent person. It is worth noting that the judge, in the absence of other evidence, will assume standard behaviour to be as he (the judge) imagines it.

Thirdly, this encourages social progress. The behaviour of a reasonable and prudent person is not the behaviour of people of average diligence. It is the behaviour of highly diligent person. In that respect, even the acting which is usual in practice may be below the required level, when the criterion used is the conduct of a reasonable and prudent person.

It is worthwhile to note that such a concept of fault makes it unnecessary to include in the legal system of delictual liability the general rule of a person's fault, based on the fact that he caused damage. Such an assumption within the private law, changes the notion of liability, and in the domain of Law of procedure it disturbs the application of the general principle that the plaintiff has to prove whatever he states (actori incumbit probatio).

In brief, the appreciation *in abstracto* objectivizes the fault, but introducing the presumption of fault objectivizes liability. Therefore, the Commission for the drafting of the Civil Code of the Republic of Serbia proposed that the new text of the Law of Obligations should include the notion of fault (which was previously included in the Skica) in Article 171, paragraph 1, and in one of the optional amendments of the general rule of liability based on fault, it was proposed to establish once again the principle of proven fault.

Prof. Dr. *Slobodan Perović**
Chairman of the Union of Associations
of Lawyers of Serbia and Republic of Srpska

OBJECTIVE LIABILITY FOR DAMAGE

Remarks

Legal history of civilization faces one truth: contract and tort are the two branches of the same tree of life. A voluntary act and an involuntary act, an act allowed and act prohibited, are integral parts of the whole horizon of human obligations.

For Gaius' Institutes, contract and tort are *summa divisio* of all sources of obligations.[1] Of all those relations which, by way of mathematical proportion, are expressed by juridicial formula of legal relation, in which one party is entitled to request from the other party to deliver something, act on something, or refrain from an action. [2]

Equity, as the equality of relations in the field of contractual and tortious liability, has its own, not only juridicial past and present, but also a strong component of the ethical and philosophical observation. Because a contract, as an agreement between wills, and a tort, as an act of causing harm, are not just legal categories. They are concurrently norms of equity which express and indicate a certain moral stance. Awareness of being committed to keeping a given word is cumulatively based on morality and prescribed legality in the subject matter of contractual liability. In fact, any want of a contractual will, if it is to reach the level of compulsion, needs to be followed by the power of coercion. This coercion can be heteronymous, external (*ad alterum*) and prescribed by the power of a legal norm, and can be autonomous, internal (*ab agenti*), or compelling in terms of disapproval by community or remorse[3]. Therefore, the will of the contractual party alone, without legal or moral coercion, cannot create a contractual obligation. It can only establish situation, create a fact in the external world, which entails a legal or moral sanction against the breach of promise. In other words, outside of the scope of moral and legal coercion, there is no other basis for feeling of obligation that the given word should be kept.[4] When these two coercive powers are congruent and expressed by legal dogmatism, then it is the sign of a high degree of suitability of the legal norm to moral factor. Concurrently, a coercive legal norm expresses moral imperative and brings about their integrity. Under this assumption, the awareness that the contract

---

* Original text is in local language.

[1] Gaius' Institutes 3, 88 (*Nund transcamus) ad obligationes*. *Quarum summa divisio in duas species diducitur, omnis enim obligatio vel ex contractu nascitur vel ex delicto*.

[2] Just. Inst. 3, Inst. 3, 13, pr-1. *Obligatio est iuris vinculum, quo necessitate adstringimur, alicuius solvendae rei secundum nostrae civitatis iura*.

[3] Saiget, *Le contrat immoral*, Paris, p. 82; Radbruch, Filozofija prava, Belgrade, 1980, p. 60.

[4] Živanović, *Osnovni problemi etike,* Belgrade, 1935; Marković, *Poštenje i moral u pravu*, Arhiv za pravne i društvene nauke, 1932, p. 322; Cardahi, *Droit et moral*, vol. I, Paris, 1950; Perović, *Moralizovanje ugovora,* Pravni život, 1971, no. 10, p. 3–18; *Pravičnost i princip integralne naknade ugovorne i deliktne štete* , Aktuelna pitanja savremenog zakonodavstva, Zbornik radova, Budvanski pravnički dani 2000, p. 9–39.

should be fulfilled is based on the legal norm as an „ethical maximum", and further conduct of the parties is governed and assessed by that conjoined duality of coercion.[5]

As observed, to keep the word in a contract, which means either its execution or failure to execute, depends, to a great extent, on the harmonization of legal and moral systems. When this harmonization is within a range of social tolerance, then it is the first sign of the legal system that is capable of ensuring the reign of principles of legitimacy and legality in the contract law. Hence, the principle of *pacta sunt servanda* and its violation entails liability for the damage that should respond to the requirement of integral compensation.

In essence, the same question is posed for tortious damage. Causing harm by illegal action or omission has its own legal and moral dimension. Because everyone has a duty to refrain from the act that may cause harm to others. The principle of *alterum non laedere* was established even in the Roman School of Stoicism. Therefore, all parties to an obligation, either it is contractual or tortious relation, are obligated to carry out their duties and are responsible for their fulfilment. Even here, the integrality of reparation implies, as it is with contracts, full compensation that should bring the claimant to that financial standing in which he would have been if no harmful act or omission occurred.

However, the principle of integral reparation, although positioned as a pinnacle in the subject of contractual and tortious liability, endures in the contemporary law, under the influence of socialization of the obligations law and the accordant application of commutative and distributive justice, certain deviations in dependence on specific legal situation.

Two Aspects of Equity

According to Hellenic philosophical thought, primarily Aristotle, the just is always found in some proportion, and proportion means equality of relations. From this point of view, equity could be either commutative or distributive – *iustitia commutativa and iustitia distributiva*.[6]

When equity is achieved by absolute intermediate by way of arithmetic proportion, when exactly that much is taken away from a tortfeasor as the damage amounts to and when that value is transferred to the injured party, then it is commutative justice.[7]

However, when equity is achieved by way of geometric proportion, which takes into account the nature and specifics of a person, when thereby, the members of community are recognized for their values, merits, or some other individuality (a higher degree of recognized individuality means a higher degree of belonging), then it is distributive justice.[8]

Commutative justice is based on the ethical principle of equal treatment of equals and unequal treatment of unequals, commensurably to their inequality. Acting under the law of formal logic, all that is in conformity with this principle represents justice and all that deviates from it qualifies as injustice. This means that equal treatment of unequals, and also unequal treatment of equals, represents injustice. In the process of application of legal rules, this

---

[5] „Ethical maximum" (Gustav Schmoller), "Ethical minimum" (Georg Jelinek), Radbruch, Ibidem, p. 60; Morin, *La révolte des faits contre le code*, Paris, 1920; Perović, *Pravna država i kriza pravnog sistema*, *Pravna država*, Belgrade, 1991, p. 77–112.

[6] Aristotle, *Nicomachean Ethics* (translated into Serbian from Ancient Greek by R. Šalabalić), Belgrade, 1970, Book V, p. 111. and alike; or in translation of T. Ladana, Zagreb, 1982, Book V, p. 87. and alike.

[7] Aristotle, Ibidem, p. 120.

[8] Aristotle, Ibidem, p. 117.

means that the same rule should apply to equal cases, and another rule, attuned to these inequalities, should apply to unequal ones.[9]

Justice in this concept is expressed by arithmetic proportion and each party in some legal relation equally gains, thus achieving the equality of what is given with what is gained. In fact, the essence is in the equivalence of prestation, which is expressed in the Roman law by formula „do ut des".[10]

Since everything is equal to itself, the commutative justice achieves equality in mutual relations in such a manner that the value of one is proportionate to the value of another.

Justice, perceived in this way and applied to a contract and tort, means the following: in all bilateral agreements, obligations of the parties are placed in a relation of equality (e.g. buyer gains as much as the seller); in all tortious activities, in which the act of causing damage violates the principle of existent property balance between the tortfeasor and the injured party, this balance must be equivalently restored (e.g. a person who has caused damage to another is obligated to integrally compensate for it).

From the standpoint of commutative justice, between the parties, certain correction is then carried out, which is why the commutative justice is called corrective justice or equalizing justice.[11]

However, what is particularly important for this type of justice is that it does not take into account the individual features of players in a concrete relation, either voluntary relation (contract) or involuntary one (tort). What is important is that justice is achieved by equalization or restoration.[12]

---

[9] Aristotle, Ibidem, p. 120. Aristotle's categories of commutative and distributive justice have survived 23 centuries and still remain current and inescapable when studying the notion of justice and equity. We will mention only some works that are spatially and temporally nearer to us. Thus, Božidar S. Marković, *Pravičnost kao misao i kao pravno iskustvo*, Arhiv za pravne and društvene nauke, September 1937, p. 219–229; *Essai sur les rapports entre la notion de Justice et l'élaboration du Droit privé positif*, Paris, 1930; Jelena Danilović, *Pravičnost kao merilo pri sudskom odlučivanju*, Pravni život, No. 10–12, 1988, p. 1349; Perelman Ch.: *Droit, morale et philosophie*, Paris, 1968 (five lectures on justice) and the edition by Nolit in 1983; Sauer W: *Die Gerechtigkeit*, Berlin, 1959; Del Vecchio, G.: *Philosophie du droit*, Paris, 1953; De Page H.: *A propos du gouvernement des juges, L'équité en face du droit*, Bruxelles–Paris, 1931; Rümelin M.: Die *Gerechtigkeit*, Tübingen, 1920; for Roman law : Voigt M: *Die Lehre vom ius naturale*, *aequum et bonum, und ius gentium der Römer*, Leipzig, 1856; Senn H: *De la justice et du droit*, Paris 1927.

[10] Thus, according to Horvat, Justinian compilation divides diverse contracts, according to the nature of performance and counter-performances, into four groups: a) *do ut des*, b) *do ut facias*, c) *facio ut des*, and d) facio ut facias (Horvat M. *Rimsko pravo*, Zagreb 1958, p. 332, and alike; according to Stojčević, many nameless contracts were categorized by the Beirut School (for the first time in one papyrus from the end of the 5th and beginning of the 6th century AD, Collinet, *Historie de l'école de Beyrouth*, p . 284) into four categories: the cases in which both parties are obligated to mutual gain (*do ut des*), the cases in which one party provides something so that the other party could do something in return (*do ut facias*), the cases in which one party does something for another so that the other party could provide something in return (*facio ut des*), the cases in which obligations of both parties consist in doing something (*facio ut facias*). For more details, Stojčević D, *Rimsko obligaciono pravo*, Belgrade 1960, p 100.

[11] "Equity is achieved by equalizing. It comes to focus in business relations, voluntary and involuntary. Equity in this sense has a quite different character from the equity in distributive sense. Namely, the distributive justice, when awarding common goods, always consists of the process accordant to geometric proportion. However, equity that occurs in business relations entails some equality, and inequity entails the violation of equality, but not in terms of the type of proportion that is called geometric, but in terms of the arithmetic proportion" (Aristotle, Ibidem, p. 120).

[12] In fact, according to Aristotle, by equalization or restoration, one achieves an intermediate, and according to his elementary idea, an intermediate is synonymous to justice.

Hence, according to Aristotle, when a dispute arises, people resort to the judge who restores equality, by seeking with the arithmetic proportion, an intermediate between „the greater and the less".

Therefore, „to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice; and that is the reason people seek the impartial judge i.e. the one who is an intermediate and many call judges mediators, on the assumption that if they get what is intermediate they will get what is just. The just, then, is an intermediate, since the judge is so."[13]

As previously mentioned, Aristotle's philosophy also recognises, besides commutative, the distributive justice as a separate type of justice.

Unlike commutative, the distributive justice is achieved in relations between community and individuals, according to which every person gains as much as he deserves according to his individual merits and contributions to society. It is justice which is applied when evaluating a certain action of a person from the standpoint of the established principles of certain community to which that person belongs, and all this is in accordance with his merits and his position. The essence of this justice is in administering by means of geometric proportion: according to common goods, every person receives *pro rata* to his merit, those more deserving receive more than those less deserving.[14]

The idea of distributive justice, according to which everyone should be given as much as they are due, found itself in the sources of the Roman law of the Ulpian's age. Inspired by this philosophy, justice in the Digests is defined as a constant and perpetual will to allot to every man his due[15], while the maxim „*suum cuique tribuere*" is one of the three commandments of the Roman law.[16]

However, to find an answer to the question of what is due to whom, it is necessary to address other branches of knowledge and practice, which are beyond the norms of the positive law, because justice is a common value and one of the „brightest notions of our spiritual universe."[17]

This means that the category of distributive justice is not unchangeable and given once and for all, but it only „indicates the path that needs to be taken so as to achieve it, while leaves out a crucial question, i.e. as to what one is entitled." [18]

Thus, we arrive to the core of the question: distributive justice is dependent on space and time, since every legally organized community has its own criteria on which attributes constitute this individual value that deserves to be awarded with an appropriate social and legal treatment.

---

[13] "The judge restores equality; it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment. And when the whole has been equally divided, then they say they have 'their own'-i.e. when they have got what is equal. The equal is intermediate between the greater and the lesser line according to arithmetical proportion." (Aristotle, Ibidem).

[14] Aristotle sees the distributive justice as a relation between an individual and community in which individual qualities are considered so that he who is more deserving gains more because his merits are greater.

[15] *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi* (Ulpianus – D. 1, 1, 10, pr.).

[16] *Honeste vivere, alterum non laedere, suum cuique tribuere – iuris praecepta sunt* (Ulpianus – D. 1,1,10, 1).

[17] Perelman, H: *Pravo, moral and filozofija*, Belgrade, 1983, p. 4.

[18] Marković, B: *Suđenje po pravičnosti u opštem i u arbitražnom pravu*, Pravni život, No. 2, 1986, p. 143.

This is the question of a scope and character of the established public order of a certain community,[19] the question of philosophical and political constitution, economic and moral emancipation. In short, it is the question of the degree of the culture and enlightenment of a nation.

In view of these findings, it seems that one could say that distributive justice introduces into the common concept of justice a certain degree of relativity, which means that justice inevitably possesses a spatial and temporal dimension. Primarily, this pertains to conventional categories and norms of the positive law, as the heteronymous law, but not to universal and natural law, as it is the eternal and autonomous law[20], which had a powerful past,[21] and which has defining present.[22]

As noted above, the commutative and distributive justice, each for itself constitutes a separate philosophical concept and a special logical whole. However, when these particularities are put into the function of practice and concrete legal life, it seems that they must be complementary and that they must act in some form of philosophical practical symbiosis. The entire legal world is there, to confirm this conclusion.

Based on this, it can be said for commutative justice that it is guided by the principles of *ius strictum*, while distributive justice is directed by what is called *ius aequum*.[23]

---

[19] Simon: *L'ordre public en droit privé*, Rennes, 1941; Malaurie: *L'ordre public et le contract*, Reims, 1953; Claps-Lienhart: *L'ordre Public*, Lyon, 1934; Marmion: *Etudes sur les lois d'Ordre Public et droit civil interne*, Paris, 1924: Oprea: *Essai sur la notion des bonnes moeurs dans les obligations en droit civil allemand*, Paris, 1935; Saiget: *Le contrat immoral*, Paris, 1939; Pascanu: *La notion d'Ordre Public par rapport aux transformations du droit civil*, Paris, 1937; Tchavdaroff: *De la notion des bonnes moeurs*, Toulouse, 1927; Savey-Casard: *Le refus d'action pour case d'indignité*, Lyon, 1930; Dorat des Monts: *La cause immorale*, Paris, 1956; Bertrand: *La notion d'ordre public en matiore de nullités*, Lille, 1939; Bonnecasei, Estudes de droit civil a la mémoire de H. Capitant, Paris, p. 91; Morandiore: *L'ordre en droit privé interne*, Estudes de droit civil a la mémorie de H. Capitant, Paris, p. 381; Kayser: *Les nullités d'ordre public,* Revue trimestrielle de droit civil, 1933, p. 1115; Cohendy: *Des intérłts de la distinction entre l'inexistence et la nullité d'ordre public*, Revue trimestrielle de droit civil, 1914, no. 1, p. 33; Darbellaly: *Théorie générale de l'illicété*, Fribourg, 1955; Guiraud: *La police et l'ordre public*, Bordeaux, 1938; Bernard: *La notion d'ordre public en droit administratif*, Paris, 1962; Stojanović: *Sloboda ugovaranja i javni poredak*, Arhiv, 1968, No. 3, p. 385; Rastovčan: *Moral, dobri običaji i zlouporaba prava u građanskom zakoniku*, Zagreb, 1927; Živanović: *Osnovni problemi etike (filozofije moralne)*, Belgrade, 1935; Perić: *Uticaj sudije na javni moral*, *Privatno pravo*, Skupljene rasprave iz građanskog prava Ž. Perića, Belgrade, 1912, p. 261; Marković: *Poštenje i moral u pravu*, Arhiv, 1922, p. 332; Perović, S: *Zabranjeni ugovori*, Belgrade, 1975, p. 99–165.

[20] Živanović, T: *Sistem sintetičke pravne filozofije*, Belgrade, 1959, p. 523 and alike.

[21] Strauss L: *Prirodno pravo i istorija*, Sarajevo, 1971 (translated from English by M. Lučić), p. 10.

[22] Cranston, M: *U čemu se sastoje ljudska prava,* published in *Prava čoveka – zbornik dokumenata o pravima čoveka*, Belgrade, 1991, p. 29.

[23] These would be more figurative than originally accurate concepts. Namely, *ius aequum* entails more flexibility in the application of the law than it is the case with *ius strictum*, which is said to be strict in its application. Thus, *ius aequum* is equitable law which means "more freedom and respect for all the circumstances of a concrete case, which is contrary to *ius strictum,* as it was the old civil law which, as a "strict law", does not allow any flexibility in assessing concrete circumstances of different cases." (Horvat, M: *Rimsko pravo*, Zagreb, 1958, p. 39, and alike). However, both concepts were tied up in Roman law to the division of law into *ius civile* and *ius gentium*, so *ius aequum* was the law of *ius gentium*, while *ius strictum* was the law of *ius civile*. For these reasons, the terms of *ius aequum* and *ius strictum* that are used here do not have the original meaning in terms of the aforesaid division, but the aim here is to express that commutative justice is understood as a mathematical formula that is strictly applied, as *ius strictum* was strictly applied, i.e. that distributive justice is applied more liberally when taking into account all the circumstances of a concrete case, as *ius aequum* was freely applied within the framework of Roman *ius gentium*. Fore more details, Horvat, Ibidem.

We have arrived to a crucial question: to what extent the commutative and distributive justice is applicable to the subject matter of contractual and tortious damages and what is their mutual relationship in this legal domain. Further presentment represents an attempt to answer this question. However, it can be already noted here that commutative justice is characteristic for all equivalent relations in obligations and that it was emplaced here as a central point for gathering the regulations of law of obligations that protect the principle of an equivalent exchange. But this central point is not and cannot be on its own. When enforcing the commutative justice as an arithmetic proportion, certain individual features of players of that proportion and their „merits" ought to be considered in a certain measure, which is derived from the character of the given public order so as to achieve „a perfect and full virtue", and this is accomplished by the distributive justice.

In other words, distributive justice introduces a force of life into the field of contractual and tortious damages and enables the principle of commutative justice to be applied in the way that befits people, and not only by numbers and their proportions.

The entire history of the civil law and moral liability was created on this meeting of these two types of justice. And not only the history, but also liability of organized *de lege lata*. Of course, the meeting point of these two types of justice in the private law domain depends on spatial and temporal dimension, which also defines their mutual relationship.

The meaning and domain of application of commutative and distributive justice thus defined equally pertains to contractual, but also to tortious damages. There is still a series of cases, or rather the whole fields of obligations law where the liability of a debtor, i.e. his obligation to compensate for the damages to a creditor, is based on violation of some other obligation which has not been previously established between them, as it is the case with contractual liability. This type of liability, unlike the former, is called non-contractual or tort liability.

Compensations for Tort Damages

The principle of commutative justice applied to the field of tort damage has had its legal fate.[24] The evolution of this type of liability demonstrates that this principle, manifested by the rule of the integral compensation, used to have its own deviations.[25]

An arithmetic proportion of a relationship is also adjusted here by specifics of the case. The individual features of the injured party and tortfeasor, and their position in that relationship, constitute the basis for formulating the rules on reduction of reparation[26], with which the commutative justice withdraws before the requirements of the distributive justice.

As the principle of contractual justice[27] was developed on this duality of requirements, just as well the commutative justice could not remain on its own within the subject matter of

---

[24] Gaudemet, E: *Théorie générale des obligations*, Paris, 1965, p. 296; Bettremieux, R.: *Essai historique et critique sur le fondement de la responsabilité civile*, Lille, 1921; Josserand, L: *Cours de droit civil positif français*, Vol. II, 1938, p. 234; Rodiore, R: *La responsabilité civile*, Paris, 1952, p. 112; Chabas, F: *Responsabilité civile et responsabilité pénale*, Paris, 1975, p. 51.

[25] E.g. Swiss Code of Obligations (Articles 42–44).

[26] Thus, some personal qualities of parties are taken into account, such as, their financial standing, or whether the tortfeasor has caused the damage while providing some service for the injured party, or whether the injured party has contributed to causing the damage (e.g. Article 191 of the Law of Obligations).

[27] Ghestin, J: *Traité de droit civil. Les obligations. La responsabilité: effets*, Paris, 1988; the same author: *Korisno i pravično u ugovorima*, Pravni život, No. 8–9, 1981, p. 43 (translated by M. Orlić).

tort damages. It has ceded here even more space to what is called „distributive equity"[28], which results from the character of a tortious action.[29]

In regards to the basic question on the ways to compensate for the material damage, the contemporary law opts for restoring to former condition and monetary compensation. In fact, the liable person is obligated to restore it to the condition that existed prior to the damage, which conveys the principle of integral compensation in kind. However, when restoring to former condition does not fully remove the inflicted damage, the liable person is obligated to monetary compensate for the remainder of the damage. Thereby, when restoring to the former condition is not possible, or when the court considers that it is not necessary for the liable person to carry out this restoration, the court will rule that this person should pay a certain amount of money to the injured party as the compensation for damages. Finally, the court awards the monetary compensation to the injured party whenever he requests it.[30]

With the question of the extent of the redress for material damage, special attention should be paid to the regulation of contemporary indemnity law, which does not make the traditional distinction between the compensation for an actual damage (*damnum emergens*) and loss of profit (*lucrum cessans*) in dependence on whether the tortfeasor caused the damage with intent or by negligence. Our Law of Obligations does the same.[31] This Law does not accept, in principle, the determination of the extent of compensation in regards to the degree of fault. Accordingly, the injured party is entitled to compensation for the actual damage, but also for the loss of profit.

This policy, which increasingly pervades the contemporary law, proceeds from an idea of full compensation and the standpoint that the interest of the injured party should be the primary focus in the entire indemnity system. It is pointed out that the injured party is indifferent, in general, to the degree of fault of the tortfeasor with which he has caused the damage, but what is important to him is the integral compensation, and not the degree of fault of the tortfeasor. Yet, in some situations the Law also takes into account the degree of fault in terms of determining the scope of compensation, e.g., with affectionate value. Thus, when an object is destroyed or damaged by the criminal act, committed with premeditation, the court can decide on the level of compensation according to the value that the object holds for the injured party.

This Law also conveys the regulation on full compensation by saying that the court, having taken into account the circumstances that occurred after the damage was caused, will award reparation in the amount that is required for restoring the injured party's financial standing to that condition where it would have been if it had not been for the damage or omission.

Nevertheless, the contemporary law, and also the Law of Obligations, recognizes the capabilities for deviating from the rule of integral compensation in terms of reducing the compensation if appropriate conditions were fulfilled. Thus, having taken into account the financial standing of the injured party, the court may decide for the liable person to pay the compensation which is reduced to the amount of the damage, but only if the damage is not caused with intent or by gross negligence (ergo, inadvertently which can easily happen to anyone), and the liable person is in poor financial standing so that the payment of full compensation

---

[28] Aristotle: Ibidem, p. 119.

[29] Aristotle: Ibidem, p. 113.

[30] M. Konstantinović, *Skica za zakonik o obligacijama and ugovorima*, Izdanje Službenog lista SRJ, Belgrade, 1996, Article 147; to this effect, also the Law of Obligations, Article 185.

[31] Law of Obligations (Article 189); M. Konstantinović, Ibidem, Article 150.

would bring him into financial vulnerability. This rule is an expression of socialization of the law in the field of indemnity, and is also recognised, besides by our Law of Obligations, by other contemporary codes of obligations, e.g. the Swiss Code of Obligations.

The reduced compensation, besides shared liability[32], is also prescribed in the cases when the tortfeasor has caused the damage by working on something for the benefit of the injured party. Then, the court may determine the reduced compensation, also by taking into account the considerateness that the tortfeasor shows to his own affairs.[33]

It seems that all the aforementioned deviations from the principle of integral compensation are inspired by application of equity to the subject of the indemnity, and accordingly, more general regulation should read as follows: when the extent of the damage cannot be accurately determined, the court decides on compensation by equity, taking into consideration all the circumstances of the case.[34]

System of talions – the law of the first written sources[35] did not recognize indemnity as reparation in today's sense. Hence, it is hard to say that the principle of commutative justice was acceptable in that period. However, that law was familiar with the retribution by way of the principle „eye for an eye" (*lex talionis*), whereas penalty (*poena*) did not mean indemnity, but payoff for abandoning retribution.[36]

Thereby, it could be noted that in then individual and collective conscience, commutative justice was achieved by way of *talions* as some type of today's restitution in kind. Nonetheless, the evolution of liability has abandoned this private system of damage repair and increasingly accepted compensation as an organized legal sanction against the committed tort, in which the impact and development of the concept of fault has had an unusually important role. [37]

Lex Aquilia – As early as the mid-third century BC, the Roman law established the foundations for the indemnity as reparation, and not only as the private penalty. This turning point in the development of this type of liability is related to *Lex Aquilia*[38], according to which the tortfeasor was obligated to pay to the injured party only the highest value that the damaged or destroyed object had in the last thirty days i.e. one year.[39] This Aquilian law of

---

[32] According to the Law of Obligations (Article 192), the injured party who has contributed to causing the damage, or to making it greater than it would have been otherwise, is only entitled to proportionately reduced compensation. When it is impossible to determine which part of the damage has originated from the injured party's action, the court awards compensation by taking into account the circumstances of the case. To this effect, M. Konstantinović, Ibidem, Article 154.

[33] Law of Obligations (Article 191); M. Konstantinović, Ibidem, Article 153.

[34] M. Konstantinović, Ibidem, Article 151.

[35] Horvat, M: *Rimsko pravo*, Zagreb, 1958, p. 262; Stojčević, D: *Rimsko privatno pravo*, Belgrade 1960, p. 29; Puhan I.: *Rimsko pravo*, 1970, p. 332; Romac A.: *Izvori rimskog prava*, Zagreb, 1973, p. 439.

[36] Cigoj, S.: *Građanska odgovornost*, Enciklopedija imovinskog prava, Belgrade 1978, Vol. I, p. 400.

[37] Horvat: Ibidem; Cigoj: Ibidem.

[38] Stojčević, Ibidem; Romac: Ibidem.

[39] The first chapter of the Aquilian law on damages stipulates that: the wrongful killing of somebody else's slave or four-footed grazing beast rendered the wrongdoer liable to pay damages to the owner equal to the highest value of that object during the previous year. In regards to other objects (except killing of slave and beast), liability for wrongful damage to property, inflicted by burning, breaking, or tearing, here the wrongdoer had to pay the highest value of the object in question within the preceding thirty days. (Romac A.:Ibidem, p. 33).

damage (later known under the name of Aquilian damage or Aquilian action) introduces an important distinction into this subject matter: the paid sum of money is not penalty, but damage compensation. Until then, any attack on someone's rights was encompassed by the notion of *iniuria* and the wrongdoer paid a certain sum of money as penalty, while its amount was determined by severity of the committed act, and not by the extent of the damage. [40] In fact, this monetary penalty was some type of substitute for personal retribution.[41]

Concurrently with the development of the damage compensation in Aquilian sense, the development of liability for the damage based on the fault of an offender should be also mentioned. Initially, for the enforcement of compensation as private penalty, it was sufficient to establish that the act of a person has caused (*causa*) adverse effects, which is why this liability was called „causal liability"[42]. Only in the later phase of the Roman law (classical Roman law), offender's fault was gradually taken into account, i.e the degree of his fault, and it was subjective liability based on the fault of an offender (*culpa*), which is why this liability is also called „culpa liability".

This liability was gradually developed in the Roman law[43] so that only then with the Justinian law, the subjective liability on the basis of fault has obtained full predominance over the remains of causal liability in the form of „custodial liability".[44] In this manner, the typology of certain degrees of faults has developed, starting with intent (*dolus*), to various forms of negligence (*culpa*) i.e. failure of due diligence[45], which is retained in today's practice.

However, the evolution of liability on the basis of fault did not end with the end of the existence of the Roman law. After the fall of the Roman state and the sources of the civil law codified in the 5th century, there came a long standstill in the development of law and jurisprudence in general. The return to natural, closed economy, especially in the western regions of the Roman Empire was not the process which could continue already established concepts in the developed Roman law. Barbarian codes which were enforced in these regions in early feudalism reintroduced the compensation in terms of penalty or retribution.[46] Yet, as of the 13th century and the Renaissance, the regulation has become increasingly prominent, by which the tortfeasor is obligated to compensate for the damage to the injured party if it is caused by his fault.[47]

Fault – However, fault as the civil law concept has obtained its full meaning and significance at the beginning of the 19th century, when fault was comprehended, under the influ-

---

[40] Stojčević, D: Ibidem, p. 29 and 41.

[41] Cigoj, S: Ibidem, p. 400.

[42] Horvat, M: Ibidem, p. 264.

[43] Stojčević, D: Ibidem, p. 262–267.

[44] Horvat, M: Ibidem.

[45] Stojčević, D: Ibidem, p. 41.

[46] Cigoj, S: Ibidem, p. 400; Ripert, G.: *La rogle morale dans les obligations civiles*, Paris, 1927, p. 327.

[47] Pirovano A.: Faute civile et faute pénale, Paris 1966. Literature on tort liability is very prolific. Here, we quote some of more important works: Mazeaud, H: *Responsabilité contractuelle et délictuelle*, Rev. trim. de droit civil, 1929, p. 551; Mazeaud, Tunc: *Traité théorique et pratique de la responsabilité civile*, *délictuelle et contractuelle*, Vol. I, Paris, 1965; Starck, B: *Droit civil*, Paris 1972, p. 12; Tourneau. Ph: *La responsibilité civile*, Paris 1976, p. 49; Lalou, Azard: *Traité pratique de la responsabilité civile*, Paris, 1962; Marty, Raynaud: *Droit civil,* Vol. II, Paris, 1962, p. 329; Deschenaux, Tercier: *La responsabilité civile*, Berne 1975.

ence of the School of Natural Laws[48] and individualistic philosophy[49], as the necessity and prerequisite for any compensation. The individual liability of members of the community, conveyed by the way of subjective theory based on the fault of the offender, was in conformity with the fundamental orientation of society, which has freed itself of feudal constraints after the French Revolution, and which proclaimed philosophy of political and economic liberalism.[50]

Then, fault as an individual category, on which liability was based, largely managed to cover all adverse events since they were „rare" in the view of then development of technical civilization, and in comparison with today's hazardous way of life. Regardless of the fact that it would not reign supreme for more than a century, fault was at the peak of its powers in that period. Modern codifications of that age (French and Austrian Civil Codes) have accepted subjective liability, and Ihering would say that it is not the damage that binds compensation, but rather the fault.[51]

This formula symbolizes centuries-long evolution of fault as the basis of liability, starting from the Aquilian law of damages to the middle of the last century. Yet, as it is known, this is also the end of fault as the only basis for liability, because at that time, liability without fault was being established (objective liability or liability for hazardous objects), so as to be at the beginning of our century theoretically established[52] and added to already existing subjective liability. More will follow on this. Previously, let us see how fault, as the basis of liability, is used in the context of principles of commutative and distributive justice.

Considering that commutative justice does not take into account features of an individual, it would seem that the notion of fault is closer to distributive justice, which, as it is known, takes into account the "merits" of an individual in resolving relations between a community and an individual. Primarily, when fault is understood as a personal, and even as a psychological category. [53]

However, different definitions of fault are emphasized by legal theory, which proceed from subjective criterion, through a series of differences, to reduction of fault to a corresponding standard, which is an objective category.

That developmental path has precisely followed this sequence, so that, according to prevailing opinion, fault is perceived today as a very flexible and adaptable concept, which essentially comes down to some type of social standard: at fault is any person who has not behaved the way it could reasonably be expected from him to behave;[54] therefore, when someone behaves the way he should not in a given situation, and thereby, he is capable of tort, which is determined by comparison, then such a person is at fault and bears the consequences of such an act. The comparison is carried out in compliance with the criterion of the

---

[48] Radišić, J: *Imovinska odgovornost i njen doseg*, Belgrade, 1980, p. 36.

[49] Gounot: *Le principe de l'autonomie de la volonté en droit privé*, Dijon, 1912; Waline: *L'individualisme et le droit*, Paris, 1945.

[50] Marty, Raynaud: *Droit civil*, Vol. II, Paris, 1962, p. 30; Planiol, Ripert, Boulanger: *Traité élémentaire de droit civil*, Vol. II, Paris 1952, p. 6; Carbonnier: *Théorie des obligations*, Paris 1963, p. 81; Ripert: *La regle morale dans les obligations civiles*, Paris 1927, p. 40.

[51] Ihering: *Das Schuldmoment im römischen Privatrecht*, 1867, p. 40 (quote from: Radišić, J.: Ibidem, p. 37).

[52] Ristiš, R: *Teorija objektivne odgovornosti*, Novi Sad, 1934.

[53] Pirovano, A.: *Faute civile et faute pénale*, Paris, 1966; Chabas, F: *Responsabilité civile et responsabilité pénale*, Paris 1975, p. 51.

[54] Konstantinović, M: *Skica za zakonik o obligacijama and ugovorima*, Belgrade 1969, p. 49.

regular course of events, and also in compliance with what could be expected from a reasonable and considerate person in given circumstances.[55]

Hence, when fault is understood in this way, then it largely represents an objective perspective, which, when placed into the context of the principle of integral compensation, results in the arithmetic proportion between the injured party and tortfeasor, by a means of commutative justice.

Nonetheless, the commutative justice also suffers here from the impact of its "sister", the distributive justice. In fact, when determining levels of compensation, some quite personal features of a tortfeasor and the injured party are often taken into account so that the levels of compensation greatly depend on these features, and they may be lower than the actual damage or higher when compared to the objective value of the damage (compensation of affective value). All this indicates a serious presence of criteria of distributive justice in the subject matter of the compensation for tort damages.

Thus, taking into account the financial standing of the injured party, the court may sentence the liable person to pay a lower compensation than the damage amounts to if it is not caused either with intent or by gross negligence, and the liable person is in poor financial standing, and the payment of the full compensation would bring him into financial vulnerability.[56] As previously mentioned, this regulation[57] introduces distributive justice into this subject matter as corrective in regards to the commutative justice with the help of the criterion of the financial standing of an injured party and tortfeasor, which is the question of the personal financial standing of the parties, which is completely different in different cases.

Such relativity, which means that the social demands have penetrated the legal system, is far from the automatism of arithmetic proportion and the integral compensation. But the law is not mathematical, but rather a social category, which has its objective, which is achieved in this matter by combination of requirements of both commutative and distributive justice, and which is borne by the character of the given public order.

There is also deviation from the integral compensation in case when a tortfeasor causes damage by doing something for the benefit of the injured party. Under this assumption, the court may decide to reduce the compensation, taking into account the considerateness that the tortfeasor has demonstrated in his affairs.[58] In fact, this is the case of applying the regulation on reducing the compensation due to the benevolence of the party, e.g., the damage was caused during a free-of-charge transportation of the injured party. [59]

The regulation on divided liabilities also serves the same purpose. Thereby, the injured party who contributed to the damage to occur or to be higher than it would have been otherwise, is entitled only to proportionately reduced compensation and also when it is impossible to determine which part of the damage comes from the injured party's action, the court awards compensation, having taken into account the circumstances of the case.[60]

---

[55] Konstantinović, M.: *Građanska odgovornost*, zbirka referata, Beograd 1966, p. 332.

[56] This regulation is demonstrated in the Article 191 of the Law of Obligations.

[57] Article 44 of the Swiss Code of Obligations and Article 153 of the Draft Code of Obligations and Contracts (Konstantinović, M, Belgrade, 1969, *p.* 56.

[58] This regulation is demonstrated in the Article 191, Paragraph 2. of the Law of Obligations. Also, Article 153, Paragraph 2. of the Draft Code of Obligations and Contracts.

[59] Radišić, J: Ibidem, p. 165–180.

[60] This regulation is demonstrated in the Article 192. of the Law of Obligations. Also, Article 43. of the Swiss Code of Obligations.

As observed, the circumstances of the case are often taken into account when awarding compensations, which means distancing from the principle of the arithmetic intermediate, which, indeed, is emplaced here as a basic rule. Thus, according to some views,[61] when the extent of the damage cannot be accurately determined, the court awards compensation by equity, taking into account all the circumstances of the case.[62]

No-Fault Liability
Objective Liability

To base liability upon tortfeasor's fault represents a tremendous progress in the legal history of civilization, and the Roman law has left us precious legacy in this field. The principle of „whoever is at fault should be held accountable" attained, as previously mentioned, the most extensive application in the course of the 19th century. But the end of the 19th and the beginning of the 20th century brought an end to the absolute reign of this principle. In addition to, and concurrently with this principle, the objective liability was established for the damage that is not based on fault of the tortfeasor, but on the fact of the damage, caused either by holding or using the so-called hazardous objects i.e. by carrying out hazardous activities. This liability, which is also called a no-fault liability and which was theoretically explained at the turn of the 20th century, today is the inevitability of the contemporary world.[63]

In fact, the last years of the 19th century, and particularly our time, which has brought about a high degree of technical development, forced the legal doctrine and jurisprudence to finally depart from a thousand year long dogma, by which liability was always founded on the fault of a tortfeasor. The traditional theory of liability, with its origins in the Roman concept of Aquilian fault, up to that time, based its regulations on the three cumulatively required facts: damage, causation, and fault. Specifically, in order that the injured party could gain the corresponding compensation, he should also prove, among the other things, the fault of the tortfeasor. Fault was the cornerstone of the classical theory of liability, which had the axiom written on its frontispiece: no liability without proven fault.

For a long time, it seemed that nothing could happen to have the faith lost in such a legal regulation. It conformed to both legal and moral sense that nothing was more natural than that the one who caused the damage to another, by his own fault, should be held accountable. Whenever a person behaves the way he should not have behaved in given circumstances and when such a behaviour results in damage to another, that person must compensate for that damage. It is hard even today to fully deny the foundations on which the rule that liability is based on fault rests. This rule is the expression of a long evolution and of the social imperative that every person should bear consequences of his action that could be qualified as his fault. Therefore, fault as the basis of liability for the damage is not abandoned by contemporary law and it can be considered that fault, in some of its aspects, will always follow the rules of liability. But if fault, as the basis for liability, continues to exist in our age, this does not mean that fault would still remain the only criterion to be taken into account when awarding compensation.

---

[61] Article 42. of the Swiss Code of Obligations.

[62] Thus, according to Article 151 of the Draft, when the extent of damage cannot be precisely determined, the Court awards compensation by principle of equity, taking into account all circumstances of the case.

[63] Josserand, L: *La responsabilité du fait des choses inanimées*, Paris, 1897.

Fault, as the basis of liability, appears to be in the circumstances of the contemporary world and highly developed technical mind, insufficient and powerless to legally encompass the whole new world of the cases in which the cause of damage remains anonymous. The principle, which indivertibly bases the liability on fault, had been suitable for centuries to societies in which human needs were mainly fulfilled by engaging simple technical resources. The cases of damage, in comparison to our age, had not represented, by their number and frequency, some more significant social phenomenon to which the legislators should pay some particular attention.

However, the 20th century is the century of unthought-of technical progress, but also of the progress to which we constantly make sacrifices, and which constantly claims its „tribute in blood". Adverse events are increasing in great progression, and it is not possible to find fault in many of them because it is simply non-existent since the damage is an inevitable companion to common progress and lifestyle of a modern man. Every year, more than one hundred thousand people are the casualties of traffic accidents. This number is fifteen or twenty times higher when it comes to severe bodily injuries in consequence of these accidents. In this regard, our country is no exception.

All this indicates an antinomy that high technical development of civilization brings about: a modern man has managed to achieve for his own sake unthought-of technical progress, but at the same time, this progress partly destroys him.

This symbiosis of advancement and hazard, progress and sacrifice, represents a true epidemic of which the world is unable to cure itself. The casualties of this epidemic are more numerous today than casualties of many cataclysms in human history, which we are so used to quote as being enormous. Of course, this has no intent of saying that technical and other progress should be halted until certain humanitarian problems are resolved. The purpose of these statements and quoted figures was only to better illustrate the social significance of legal rules that should accompany the phenomenon of the developed technical mind and all the practical consequences that this brings forth in the field of law. Primarily, when we consider all the hazards that result from the opening of the „planetary era", in which the man uses diverse energy sources, especially nuclear, and this all increasingly affects the changed prospects of legal norms that regulate these new relations.[64]

Thanks to all of this, legal organization of liability for damages had to endure significant changes. The classical concept on proving fault of the tortfeasor, as the prerequisite for compensation, could not withstand the powerful wave of technical progress, without leaving an injured party without compensation.

The law, by its nature, has to respond to the new phenomena and events that are of vital interest for social community, because if it remained silent in this regard, it would have betrayed itself. New theories surfaced,[65] new answers were proposed, and the case law has adopted the rule that when the damaged was caused by the so-called hazardous objects, then the liability is not based on fault, i.e. fault is not determined at all.[66] A debtor of the compen-

---

[64] Cigoj, S: *Nuklearno odškodinsko pravo*, Ljubljana, 1985.

[65] Ristić, R: Ibidem, p. 25–86.

[66] To this effect, refer to the evolution of the French case law in regards to the enforcement of the Article 1382 of the Civil Code, which practically transitioned from subjective to objective liability, without changing the aforementioned provision of the Code. It was said about this well-known provision of this Code: "It establishes such a broad principle of equity so that every activity would be paralyzed with its literal application" (Lévy, E: *L'exercice du droit collectif*, *Revue trimestrielle de droit civil*, 1903, *p.* 95).

sation, under certain circumstances, becomes an owner, and sometimes even a holder of the hazardous object i.e. a performer of the hazardous activity. Defining the concept of hazardous objects practically means the establishment of the framework within which no-fault liability functions.[67]

Therefore, when it comes to the legal regulation of the subject matter of liability, any contemporary law of obligations must take into consideration that the complex reality of the human life of the twentieth century has introduced into the subject matter of liability two criteria, of which one is objective and based on risk, and the other subjective and based on fault.[68]

Duality of the bases of liability

This duality of the bases of liability in contemporary law produces, among the other things, the question of the degree of attainment of common justice in Aristotelian meaning of that concept.[69]

In respect to the subjective liability, the question of fault and its gradation in relation to the extent of compensation has been resolved, as previously mentioned, by applying the principle of commutative justice, edited by regards of distributive justice. In particular, it should be pointed out that the traditional means for determining the compensation proceeded from the severity of fault, so that the tortfeasor who caused the damage with intent (*dolus*) or by gross negligence (*culpa lata*) was obligated to fully compensate for the damage (both actual damage and loss of profit); whereas the one who caused the damage inadvertently was obligated to compensate only for the actual damage. Thereby, traditional law rendered better adherence to distributive justice because it attached greater importance to an individual feature of the tortfeasor (the degree of fault) than to the integral compensation, which was an attribute of the commutative justice.

On the contrary, many contemporary laws[70], in principle, do not make this distinction and consider that the injured party is entitled to full compensation for damages (actual damage and loss of profit), regardless of the degree of fault of the tortfeasor who caused the damage.

This is the consequence of an idea of full compensation and the standpoint that the entire system of compensation should be set up so that the interests of the injured party are primary. It is emphasized that the injured party is, in general, indifferent to the circumstances of the degree of tortfeasor's fault in causing the damage, what is then important to him is the integral compensation, and not the degree of fault of the tortfeasor.

---

[67] The hazardous objects are considered to be movable or immovable property which represents an increased risk of damage to environment by its very position, or use, or features, or very existence, so they should be specially monitored (Article 136 of the Draft Code of Obligations and Contracts).

[68] Starck, B: *Droit civil*, Paris, 1972, p. 152; Mazeaud, Tunc: *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle*, Vol. I, Paris, 1965, p. 452; Tourneau, Ph: *La responsabilité civile*, Paris, 1976, p. 615; Tunc, A: *Les problemes conteporaine de la responsabilité civile*, Revue internationale de droit comparé, Paris, 1967, p. 771; Weill, A: *Droit civil*, Les obligations, Paris, 1971, p. 680.

[69] Aristotel: Ibidem, p. 113 and alike.

[70] The Law of Obligations (Article 189) does not make a traditional distinction between the compensation for actual damage and the loss of profit in dependence on whether the tortfeasor has caused the damage with intent or by negligence. Determination of the scope of compensation by the degree of fault, this Law, in principle, does not recognize. Thereby, an injured party is entitled to compensation for actual damages and also for the loss of profit.

In this way, the contemporary law, in the subject matter of damage compensation on the basis of subjective liability, decreased the field of the distributive and increased the scope of the commutative justice. Understandably, not in terms of the absolute reign of commutative justice, but in terms of its relative domain, which was previously mentioned.

However, how should be the objective liability explained from the standpoint of commutative and distributive justice? It seems that the occurrence of this liability results from two requirements. The first can be seen in social necessity of today's developed technical civilization for the damage to be repaired regardless of the individual fault of the tortfeasor, whenever such fault is anonymous or common, in the sense that certain activity, by its very character, is related to an increased risk. Then, it should be proceeded in accordance with the principle, „where the profit is, there the burden should be".[71]

In these circumstances, the liability based on the created risk has also occurred at the request of commutative justice that the injured party is entitled to integral compensation, regardless of the fault of the offender. And this is the second request upon which the objective liability rests.

However, compensation by simple arithmetic proportion was unable to resolve this problem by itself. Given that the cause of the damage remains outside of the scope of fault, the owner or holder of the hazardous object was sought for, but also the injured party, and by way of applying the criterion of his individual feature and attitude towards the damage, more complex rules were adopted that also contain the viewpoints of the distributive justice. So the action of the injured party, in terms of contributing to the cause of damage, can free the owner of the hazardous object from liability to compensate for the damage, partially or fully.[72]

Finally, when it comes to objective liability, it should be observed that, at least initially, it has approached the socialization of liability, which is rather an expression of the distributive than the commutative justice. In fact, proceeding assumption is here, essentially, that all members of some community contribute, directly or indirectly, to technical existence and its progress; thereby, they participate in the "common fault" for damage, which is derived from that progress. But this is a broad formula of sociological explanation that is expressed in the law today, by way of the concept of liability for created risk.

Socialization of liability

If the objective liability was derived from the current degree of development of the technical mind and requirements for better social justice, then its presence today is only a prelude into more powerful phase of socialization of liability for the damage resulting from the „common fault".

As it was the case at the beginning of the twentieth century when the subjective liability was powerless to encompass the new world of relations which was created by adverse effects of hazardous activities and objects, it is the same case at the end of the same century when the objective liability remains powerless to respond to numerous requests of injured parties or casualties.[73]

The contemporary world and its technical civilization at the beginning of the so-called „planetary era" multiplies with fearful progression the hazardous events that often exceed by

---

[71] *Ubi emolumentum, ibi et onus esse debet* (Sec. Paulus, D. 50, 17, 10).

[72] To that effect, Article 177 Of the Law of Obligations and Article 137 of the Draft Code of Obligations and Contracts.

[73] Tunc, A: *La responsabilité civile*, Paris, 1981.

their scope the national and natural borders and threaten with environmental disaster (e.g. damages originating from the nuclear energy). The law with its existing concepts simply is not capable of following this "progress" and increasingly more hazardous automatism of life.

In this regard, it is certain that the environmental ethics, which the positive law (despite of all the reparation measures, and even preventions under the threat of corresponding sanctions) is still powerless to achieve, should be developed.

Only a high degree of reason and authority of the intellect as an attribute of the rational conception of the natural law, may instil hope for the „environmental ethics of future" so that future generations could inhabit our world. This is about human concern for nature, which means concern for his own survival, and also the survival of those who come after us.

The positive law, which is not consumed by substratum of the natural law, or the positive law, which possesses that substratum to some extent (e.g. numerous regulations on environmental protection) but does not practically enforce it, is not capable of reaching a high degree of environmental ethics that is only capable of preserving the nature to which we belong and which is our source of life.

It seems that in that situation, socialization of liability is the only path that the law will take *pro futuro* in this field. Only well-maintained social funds organized on the level of some collective (the state, insurance companies) and in conformity with the rules of the new phenomenon and new theory of socialization of liability, can be efficient and equitable in certain cases, while in other cases (cases of major disasters), they can achieve that only partially, and in the third, they cannot achieve that at all. In this latter case (fortunately, still rare for now), the law is utterly powerless, and then, the damage should be accepted as *vis maior*, as leap of faith that remains without compensation.

Trichotomy of liability

The theory of socialization of liability should include that field of tort damage that occurs as a consequence of group or individual hazardous activity which jeopardizes in a greater extent many personal and material goods. By nature of origin and effects of hazardous objects and hazardous activities, fault of the offender is lost there as the *titulus* of liability. Unlike „actual" hazardous objects and activities, the consequences and adverse effects here are such that they endanger personal and material existence of a large number of people, up to the level of possible disaster. They can be a single use or effect (e.g. source of accumulated energy), or continuous use of hazardous objects which inexorably causes enormous material and moral damages (e.g. traffic, especially automobiles).

In regards to these damages, it is necessary to arrange for mandatory insurance and establishment of social funds which could indemnify, according to separate rules, every person who was a victim of the specified adverse event.

In this manner, the damage compensation would become separate from the liability for damage. From the standpoint of classical rules of liability, this is difficult to understand, but from the standpoint of survival and the imperative of today's life, this is easy to understand. Fault as a relevant circumstance would remain only for the regress claim against the tortfeasor who caused the damage with intent, and also for the indemnity regime when paying corresponding premiums.

With these enormous and massive damages, it is the compensation that matters, and it must be certain and efficient, free of classical categories of judicial procedure, and this can only be achieved by establishing the mandatory insurance funds. The burden of contribution

and the right to compensation should be distributed in accordance with the principles of commutative and distributive justice.

In all other cases of damages caused by hazardous objects and hazardous activities, the classical theory of objective liability in line with the established principles and rules would be still applied.

Finally, the old and ancient theory of subjective liability with fault, as a necessary prerequisite for compensation, would remain present in all other fields of causation, in which the damage does not occur as the result of hazardous objects and hazardous activities.

This trichotomy of legally organized liability seems to be suitable for today's diversification of sources of hazards and a range of their hazardous consequences. If the question were raised on future of mutual relations in the said trichotomy of liability, it could be said that socialization of liability was waiting to enter more significantly into the legal life of the twenty-first century.

The ancient concept of justice in modern conditions of mass loss

When the subject is, indeed, the establishment of socialization theory of liability, it should be observed that it will encounter a number of obstacles. After all, that was the case with its predecessor in the form of theory of objective liability in the early 20th century. The theory of socialization of liability is making its way in a certain number of countries (e.g. New Zealand, Quebec, Sweden). The same process awaits other countries when they accomplish the requirements, both legally and materially.

In all this, the ancient concepts of commutative and distributive justice do not lose its relevance. The question is raised about their relations in this sketched trichotomy of liability. If one starts with subjective liability, through objective, to socialization of liability, one can observe a certain shift in focus from commutative to distributive justice. The integral compensation, dictated by the arithmetic logic of commutative justice, also remains as requirement in the hypothesis of socialization of liability. However, the viewpoints of distributive justice, dictated by the logic of geometric progression of distributive justice, are adjusting this compensation to capabilities and needs of a modern man, who mainly becomes a victim of his own way of life.

Hence, the requirements of commutative, and especially distributive justice, are today transformed into the foundation for building the socialization theory of liability. This construction becomes a necessity of the developed technical world that has managed to soar into the universe, but is unable to defend itself here on Earth from the epidemic of common damages, which daily seeks and claims new casualties.

Therefore, two fields of common justice still stand, as they did twenty centuries ago, on the universal plane of the contemporary legal world, on which the following is written: „Damage and its compensation". In one field, the greater extent has the commutative, and in another, the distributive justice, but both are with their floating boundaries.

If our individual and common want dictates to us to find ourselves on the path of common justice as true virtue, then the choice has already been made for us, the lawyers: by way of law towards justice.

II
NOVINE U RAZVOJU OBLIGACIONOG PRAVA

Prof. dr.sc. *Tatjana Josipović**

IZAZOVI HARMONIZACIJE GRAĐANSKOG PRAVA PUTEM DIREKTIVA

1. Uvod

Direktive su najčešći i najvažniji instrument za harmonizaciju nacionalnih građanskopravnih poredaka s pravom Europske unije.[1] Zbog svoje fleksibilnosti u pogledu izbora metode i oblika implementacije, direktive se smatraju najpogodnijim sredstvom harmonizacije građanskog prava.[2] Implementacijom direktiva se u nacionalnim privatnopravnim porecima uspostavljaju zajednički građanskopravni elementi u državama članicama.[3] Direktivama se tada najčešće određuju bitni, glavni elementi određenih građanskopravnih instituta kako bi se njihovom implementacijom u nacionalne pravne poretke ostvario određeni stupanj njihove usklađenosti nužan za efikasno funkcioniranje unutarnjeg tržišta u Europskoj uniji. U tom su smislu direktive posebno važan instrument harmonizacije u onim građanskopravnim područjima u kojima se zbog načela supsidijarnosti i načela proporcionalnosti (čl. 5/4,3, Ugovora o Europskoj uniji/UEU) [4] ne mogu donositi drugi, jače obvezujući akti koji se izravno primjenjuju na području svih država članica (npr. uredbe). S obzirom na ograničene ovlasti Unije (čl. 5/1 UEU), u velikom broju slučajeva i ne postoje mogućnosti da se drugim instrumentima uređuju pojedina područja građanskog prava. U najvećem broju slučajeve se direktive s područja privatnog prava donose se temeljem čl. 114, i 115. U o funkcioniranje Europske unije/UFEU kao mjere kojima se postiže približavanje, harmonizacija nacionalnih pravnih poredaka radi uspostave i funkcioniranja unutarnjeg tržišta.

Državama članicama ostavljeno je da u okviru svog nacionalnog pravnog poretka slobodno odaberu način implementacije direktive odnosno da same odrede kako će u svom pravnom poretku ostvariti zadane ciljeve direktive. Države članice samo određuju metodu i oblik implementacije direktive čime im se omogućuje da ciljeve direktive ostvare sukladno svom nacionalnom administrativnom i pravnom uređenju, podjeli nadležnosti, organizacijskoj strukturi. Države članice same određuju i metodu ostvarivanja zadanog rezulta-

---

* Originalni tekst je na lokalnom jeziku.

[1] Direktive su pravni akti Unije koji obvezuju države članice da u svojim nacionalnim pravnim porecima ostvare rezultate, ciljeve određene direktivnom, pri čemu je odabir oblika i metode njihovog postizanja prepušten državama članicama. V. čl. 288/3. Ugovora o funkcioniranju Europske unije/UFEU – konsolidirana verzija (OJC 2010, 83, 47)

[2] V. Prechal,S.: Directives in EC Law, Oxford, 2006. s. 3; Schwarze,J.: EU-Kommentar, Baden-Baden 2000. (citira se Schwarze/Kommentar), s. 2081.

[3] V. Müller-Graff,P.Ch: EEC Directives as a Means of Private Law Unification, Towards a European Civil Code,Hague, 2004, s. 78.

[4] Ugovor o Europskoj uniji/UEU - konsolidirana verzija (OJC 2010, 83,13)

ta.[5] Moguće je da za neke države članice neće niti biti potrebe za donošenjem posebnih mjera za implementaciju direktive, jer se njezini ciljevi već efikasno ostvaruju u okviru njihovog pravnog sustava. S druge strane, neke će države članice morati poduzeti odgovarajuće mjere, uključujući i određene zakonodavne aktivnosti, pri čemu je državama članicama ostavljeno na izbor kojom će vrstom akta to učiniti, da li će donijeti posebni zakon ili će izmijeniti i dopuniti već postojeći zakon (jedan ili više njih), da li će samo donijeti odgovarajući podzakonski akt, provesti neku mjeru gospodarske ili socijalne politike i sl. Državama članicama ostavljena je sloboda i u odlučivanju da li će osobama u čiju se korist implementacijom osnivaju neka prava priznati veću zaštitu od one koja je predviđena direktivom, da li će područje primjene direktive proširiti radi ostvarivanja konzistentnosti svog građanskopravnog poretka i na druge pravne odnose na koje se direktiva inače ne odnosi. Državama članicama, često je direktivama ostavljena i mogućnost da optiraju samo za neku od mogućih mjera iz direktive, a nekada i da isključe iz područja primjene direktive određen krug adresata ili njezinu primjenu na određena područja.

U kojoj mjeri su državama članica ostavljene takve mogućnosti ovisi, prvenstveno, o tome koliko su detaljno u direktivi definirani ciljevi koji se njezinom implementacijom moraju ostvariti,[6] kako je u direktivi određeno područje njezine primjene, radi li se o direktivi kojoj je cilj na razini Unije osigurati samo minimalni stupanj zaštite na određenom pravnom području (direktive minimalne harmonizacije) ili se radi o direktivi čiji se rezultati mogu ostvariti samo ako sve države članice u istom stupnju i na sadržajno isti način (doduše različitim metodama i različitim sredstvima) osiguraju na svom području ostvarivanje rezultata direktive (direktive maksimalne harmonizacije). Upravo će o svim tim faktorima ovisiti i kako implementacija direktiva utječe na konzistentnost građanskopravnih poredaka država članica, tumačenje normi građanskog prava, te na postupanje u praksi prilikom primjene harmoniziranih odredbi građanskog prava.

2. Funkcionalno usmjerena harmonizacija građanskog prava

Osnovni cilj koji se mora postići harmonizacijom putem direktiva jest otklanjanje razlika u nacionalnim građanskopravnim porecima država članica koje su smetanja uspostavi i funkcioniranju unutarnjeg tržišta. U tom su smislu ovlasti Unije harmonizaciju putem direktiva isključivo funkcionalno određene, a Unija ih može ostvarivati samo u mjeri u kojoj je to potrebno za funkcioniranje tržišta. Premda građansko pravo država članica ima u pravu Uni-

---

[5] No, neovisno o slobodi država članica u izboru oblika i metode u implementacije direktive, države članice prilikom odabira načina implementacije moraju izabrati onaj oblik i metodu implementacije kojima će se u potpunosti i bezuvjetno ostvariti očekivani rezultati iz direktive i to ne samo na normativnoj, već i na administrativnoj, a posebno na razini ostvarivanja ciljeva direktiva u konkretnim slučajevima u praksi. Ostvarivanje ciljeva direktive u nacionalnim pravnim porecima država članica podrazumijeva, naime, osiguranje svih pravnih, administrativnih, pravosudnih, financijskih i drugih pretpostavki nužnih za efikasno praktično ostvarivanje ciljeva direktive

V. Calliess.Ch.,Ruffert,M.: Kommentar zu EU-Vertrag und EG-Vertrag, Luchterhand, 2007. (citira se: Calliess.Ch. i dr/ Kommentar), s. , s, 2135; Prechal,S.: Directives in EC Law, s. 52; Prokopf,K.H.: Das gemeinschaftlichrechtliche Rechtsinstrument der Richtilinie, Berlin, 2006, s. 102; Herrmann,Ch: Richtlinienumsetzung durch die Rechtsprechung, Berlin, 2003, s. 27.

[6] V. Prechal,S.: Directives in EC Law, s. 44

je posebnu ulogu za ostvarivanje pretpostavki za funkcioniranje unutarnjeg tržišta,[7] u osnivačkim ugovorima čak niti ne postoje posebne i izričite odredbe temeljem kojih bi Unija imala generalnu ovlast za harmonizaciju građanskog prava. Ovlasti Unije za harmonizaciju građanskog prava putem direktiva, prvenstveno, proizlaze iz odredbi UFEU koje općenito ovlašćuju Uniju da poduzima mjere potrebne za nesmetano funkcioniranje unutarnjeg tržišta, za nesmetano ostvarivanje tržišnih sloboda i tržišne konkurancije (čl. 114, 115, 49, 56, 101,102 UFEU) , te za ostvarivanje određenih politika Unije važnih za razvoj unutarnjeg tržišta kao što su npr. politika zaštite potrošača (čl. 169/2. UFEU), prometna politika (čl.90,100 UFEU) i sl (citirati članke). Ako je radi ostvarivanja tih ciljeva potrebno i opravdano harmonizirati i određena područja nacionalnih građanskopravnih poredaka država članica, Unija će za to imati ovlasti. Međutim, i tada će Unija imati ovlasti donositi direktive radi harmonizacije samo onih područja građanskog prava koja su važna osnova za razvoj tržišta, slobodan promet roba, usluga, kapitala kao što su neki aspekti odštetnog prava, ugovornog prava, stvarnopravnih osiguranja tražbina i sl. Građanskopravna područja koja nisu od primarne važnosti za funkcioniranje unutarnjeg tržišta (npr. nasljedno pravo), u pravilu, neće biti predmet harmonizacije putem direktiva. Za ta se građanskopravna područja najčešće donose posebne uredbe kojima se samo uređuju kolizijske norme za rješavanje sukoba zakona u sporovima s međunarodnim elementom i to u cilju nesmetanog osiguranja slobode kretanja osoba na području Europske unije.

Zbog ograničenih ovlasti Unije harmonizaciju građanskog prava karakterizira,stoga, funkcionalni pristup u odabiru građanskopravnih područja koja će se harmonizirati. On je, ponajprije, određen ciljevima integracije europskog tržišta, potrebnom za otklanjanjem smetnji razvoju tržišta i tržišne konkurencije. To dovodi do tzv. **sektorske i segmentirane harmonizacije** samo pojedinih građanskopravnih područja. Najčešće se harmonizacija provodi samo u okviru pojedinih građanskopravnih instituta (npr. odgovornost prodavatelja za materijalne nedostatke stvari, odgovornost za štetu proizvođača za neispravan proizvod) ili čak samo u odnosu na neke aspekte pojedinih građanskopravnih instituta (npr. posebne obveze trgovaca u određenim potrošačkim ugovorima, utjecaj nepoštenih klauzula na valjanost potrošačkih ugovora, pravo na odustanak od potrošačkih ugovora i sl). U pravilu se direktive niti ne donose kako bi se u cijelosti harmonizirala pojedina građanskopravna područja (npr. ugovorno pravo ili odštetno pravo).

3. Modeli harmonizacije građanskog prava putem direktiva

Direktive temeljem kojih se harmoniziraju nacionalni građanskopravni poreci država članica, ovisno o ciljevima koje Unija želi postići putem određene direktive, često različito određuju obveze država članica u pogledu njihove implementacije u nacionalni pravni poredak, personalno i teritorijalno područje primjene direktive, mogućnost izbora država članica između više opcija prilikom njegove implementacije, dopuštenost uređivanja nacionalnim

[7] Građanskopravne norme, kao i druge privatnopravne norme, temelj su za ostvarivanje privatne autonomije i slobode ugovaranja na kojima počiva tržišno gospodarstvo i ostvarivanje tržišnih sloboda. One su u određenom smislu konstitutivni element tržišta Basedow,J.: A common contract Law for the common Market, Common Market Law Review, 1996, 1178; Schmid, Ch.: Legitimacy Conditions for a European Civil Code, Maastricht Journal of European and Comparative Law, 3/2001, s. 281; Rutgers,J.W.: Free Movements and Contract law, European Review for Contract Law, 3/2008, s. 475; Georgiades,A.: Europäische Privatrechtsvereinheinlichung und nationale Rechtskulturen, Festschrift für Claus Wilhelm Canaris, München 2007, Band II, s. 604.

propisima i većeg stupnja zaštite od onog koji je određen direktivom. Zbog toga se harmonizacija putem direktiva razlikuje po nekoliko kriterija.

Ovisno o stupnju, intenzitetu u kojem se ostvaruje harmonizacija odnosno ovisno o tome imaju li države članice mogućnost odstupanja od odredbi direktive na način da propišu strožija ili drukčija pravila u pravnom području koje je predmet usklađivanja razlikuju se **maksimalna (maximum) i minimalna (minimum) harmonizacija (harmonisation)**. Kod direktiva maksimalne harmonizacije državama članicama nije ostavljena nikakva fleksibilnost odnosno mogućnost odstupanje od odredbi direktive temeljem koje se provodi harmonizacija.[8] Tada će izravno, iz izričite odredbe u direktivi, ili posredno, iz njezinog cjelokupnog sadržaja, proizlaziti da je isključena svaka mogućnost da se prilikom implementacije odstupi od sadržaja svih ili samo nekih njezinih odredbi. Harmonizacija se zapravo provodi implementacijom u nacionalno zakonodavstvo sadržajno gotovo identičnih odredbi iz direktive. Pritom nije nužno da su sve odredbe u direktivi odredbe maksimalna harmonizacije. Moguće je da se samo za određene odredbe u direktivi određeno da su odredbe maksimalna harmonizacije dok u pogledu drugih odredbi direktive države članice imaju veće mogućnosti prilagodbe svom nacionalnom pravnom poretku (tv. ciljana maksimalna harmonizacija, targeted maximum harmonisation). Za razliku od toga kod direktiva minimalne harmonizacije države članice imaju određenu fleksibilnost prilikom uređenja pravnog područja na kojem se provodi harmonizacija i mogu u određenim granicama odstupiti od odredbi direktive (npr. urediti veću zaštitu prava na koje se odnosi direktiva od zaštite koja je kao minimalna propisana direktivom). Države članice obavezne su tada implementacijom direktive, primarno, osigurati barem minimalnu razinu usklađivanja (npr. minimum zaštite) koji se direktivom zahtijeva.[9] Međutim, temeljem izričitih odredbi direktive države članice ovlaštene su za pitanja za koja im je to dopušteno propisati i veće standarde pravne zaštite od onih kojih se kao minimalni predviđeni direktivom. Tada je moguće i da se direktivom odredi državama članicama izbor između nekoliko mogućih varijanti za uređenje određenog pitanja u postupku usklađivanja (**alternativna harmonizacija)** pri čemu izbor svake od tih varijanti osigurava minimalno uređenje pravnih odnosa sukladno ciljevima koji se žele ostvariti direktivnom. [10]

Rezultati maksimalne odnosno minimalne harmonizacije putem direktiva značajno se razlikuju kako u pogledu svojih učinaka za integraciju privatnog prava na razini Unije tako i u pogledu nacionalnih pravnih poredaka. Maksimalno usklađivanje faktično dovodi do ujednačavanja, unificiranja određenog pravnog područja na razini Unije. Kad se maksimalna harmonizacija usklađivanje provodi putem direktiva, nacionalna pravna uređenja na području primje-

---

[8] V. Slot,J,P.: Harmonisation, European law Review, 1996 s. 382; Van Gervan,W.: Hamonization of Private Law: Do we need it?, McDonnell,A (Ed): A Review of Forty Years of Community Law, Legal Developments in the European Communities and the European Union, Hague, 2005.,s. 230; Mak,V.: Review of the Consumer Acquis: Towards Maximum Harmonization? ERLP, 1/2009, s. 59.

[9] V. Weatherill,S.: Maximum or Minimum Harmonisation - What Kind of „Europe" Do We Want?, Boele-Woelki, K. (ed): The Future of European Contract Law, essays in honour of Ewoud Hondius Alphen aan den Rijn, 2007, s. 133; Kurcz,B.: Kurcz,B.: Hamonisation by means of Directives – never – ending story? EBLR, 2001,s, 296

U pravilu u direktivama postoje posebne klauzule (*explicit minimum harmonisation clauses*) iz kojih proizlazi mogućnost da se na području usklađivanja na nacionalnoj razini uvede veća. Međutim, iz prakse Suda proizlazi da nije nužno da uvijek u direktivi postoji takva klauzula da bi se mjera smatrala mjerom minimalnog usklađivanja već to proizlazi iz sadržaja odnosno konteksta direktive (*implicite miminum harmonisation clausses*). V. Dougan,M.: Minimum Hamonization and the Internal Market, CMLR, 2000, 856; Kurcz,B.: o.c.s, 292.

[10] V. Van Gervan,W.: Hamonization of Private Law, s. 230; Kurcz,B.: o.c.,s. 296

ne direktive više se zapravo ne razlikuju. Premda se i dalje primjenjuju nacionalne odredbe građanskog prava, u svim državama članicama za uređenje pravnog područja na koji se odnosi direktiva vrijede sadržajno ista pravila. Kad se, pak, provodi minimalna harmonizacija ostvaruje se samo minimalni zajednički standard u pravnom uređenju određenog građanskopravnog područja ili samo nekih njegovih segmenata. Nacionalni pravni poreci država članica i dalje se, međutim, međusobno više ili manje razlikuju. Kolike će te razlike biti ovisit će o tome da li su države članice iskoristile mogućnost iz direktive da prošire zaštitu u određenom području ili da drukčije urede određeno pravno pitanje, te do koje su mjere zaista odstupile od odredbi direktive. Moguće je, naime, da se neke države članice odluče zadržati samo na minimalnim standardima zaštite iz direktive, dok druge države članice mogu odlučiti da tu zaštitu u određenoj mjeri povećaju, prošire i sl. Minimalna harmonizacija putem direktiva, stoga, ne dovodi do potpunog usklađivanja nacionalnih pravnih poredaka. To posebno u slučajevima kad se minimalna harmonizacija provodi na temelju direktiva koje ostavljaju mogućnost državama članicama da izaberu neku od ponuđenih varijanti u direktivi ili da u okvirima direktive optiraju koje će biti njezino personalno područje primjene. Sve to opet dovodi do toga da se pravni poreci usklađeni temeljem akata minimalnog usklađivanja međusobno razlikuju.[11]

Ovisno o opsegu i sadržaju harmonizacije razlikuju se **potpuna (full) i parcijalna (djelomična, piecemeal) harmonizacija**. Harmonizacija je potpuna kad su direktivnom obuhvaćeni svi mogući aspekti nekog pravnog instituta ili pravnog područja. Harmonizacija putem direktiva na području građanskog prava bit će, međutim, najčešće parcijalna. O parcijalnoj harmonizaciji radit će se, kad su direktivom obuhvaćeni samo jedan ili više aspekata iz nekog kompleksnog pravnog područja ili se ono odnosi samo na određene grupe proizvoda ili usluga ili je usklađivanje personalno ograničeno samo na određene grupe sudionika na tržištu.[12] Parcijalnom harmonizacijom mogu biti obuhvaćeni samo neki aspekti određenog pravnog instituta, ona se može odnositi samo na neke aspekte ostvarivanja neke djelatnost, samo na pravne odnose u prekograničnom prometu nekom robom ili uslugama i sl. [13] Ako se parcijalna harmonizacija provodi samo u odnosu na specifičnosti samo jedne vrste roba, djelatnosti, usluga, na samo jedan pravni institut (npr. jedan potrošački ugovor) radi se o tzv. **vertikalnoj harmonizaciji.** Kad je, međutim, usklađivanjem obuhvaćeno grupa proizvoda, usluga, djelatnosti koje imaju neka zajednička obilježja, grupa pravnih instituta koji imaju zajednička obilježja (npr. svi potrošački ugovori) radi se o tzv. **horizontalnoj harmonizaciji.** [14] Parcijalno usklađivanje razlikuje se i ovisno o tome da li je direktivom državama članicama ostavljena mogućnost izbora da li će usklađivanje na određenom pravnom području provesti samo u dijelu koji se odnosi na prekogranično zasnivanje određenih pravnih odnosa, prekogranični promet određene robe, usluge, obavljanja neke djelatnosti ili će usklađivanje protegnuti i na pravne odnose koji se u pogledu te robe, usluga, djelatnosti zasnivaju na domaćem tržištu

---

[11] Zato se u praksi minimalna harmonizacija putem direktiva često kombinira s primjenom pravila o uzajamnom priznavanju ili s pravilom o primjeni države porijekla.Moguće je npr. da države članice uvedu veći stupanj zaštite za domaće proizvode, a da putem klauzule uzajamnog priznavanja dopuštaju uvoz robe manje kvalitete iz drugih država članica. To, međutim, može dovesti do obrnute diskriminacije. V. Dougan,M.: o.c., s. 867.

[12] V. Mak,V.: o.c., s. 59; Kurcz,B.: o.c.s, 294, 295.

[13] Parcijalna harmonizacija kod kojeg se usklađuju samo neki aspekti određenog pravnog instituta ne isključuje mogućnost da se novim mjerama usklađivanja kasnije usklade i drugi aspekti tog pravnog instituta, da se proširi područje primjene mjere usklađenja u personalnom ili materijalnom smislu. Tada će raditi o tzv. „progresivnom usklađivanju".

[14] V. Ihns,A.: Entwicklung und Grundlagen der europäischen Rechtsangleichung, Frankfurt am Main, 2005, s. 72; Kurcz,B.: o.c.s, 294.

(tzv. **opcijska harmonizacija**). [15] No, moguće je da je u direktivi određeno da države članice moraju omogućiti sudionicima na tržištu mogućnost izbora pravnog režima odnosno izbora između usklađenog pravnog uređenja nekog pravnog instituta koji je bio predmet usklađivanja i domaćeg pravnog uređenja koje nije bilo obuhvaćeno usklađivanjem (tzv. **fakultativna harmonizacija**). Za razliku od opcijske harmonizacije kod koje je ostavljeno državama članicama da odluče prilikom implementacije direktive da li će harmonizacijom obuhvatiti samo prekogranične pravne odnose ili i domaće, kod fakultativne harmonizacije izbor između primjene harmoniziranih pravnih normi i normi domaćeg prava koje nisu bile obuhvaćene harmonizacijom leži na samim subjektima na tržištu.[16]

4. Utjecaj harmonizacije putem direktiva na građansko pravo država članica

4.1. Utjecaj minimalne i maksimalne harmonizacije

Utjecaj harmonizacije putem direktiva na nacionalna građanskopravna uređenja najviše ovisi o tome kakvog je intenziteta usklađivanje odnosno provodi li se usklađivanje direktivama minimalne ili maksimalne harmonizacije. O tome će ovisiti imaju li države članice mogućnost da u određenim slučajevima odstupe od standarda zaštite građanskih prava koju su implementacijom direktive dužne osigurati osobama na koje se odnosi personalno područje primjene direktive. Kao što je već rečeno, maksimalna harmonizacija doprinosi većem stupnju usklađenosti nacionalnih privatnopravnih poredaka, jer države članice ne mogu određena pravna pitanja iz direktive urediti drukčije, ne mogu odrediti veći stupanj zaštite, drugačiji sadržaj određenog pravnog instituta i sl.[17] Zbog toga je i utjecaj maksimalne harmonizacije na nacionalne građanskopravne poretke puno veći nego kad se provodi minimalna harmonizacija. To posebno dolazi do izražaja kad se promatra kako harmonizacija utječe na daljnji razvoj nacionalnih građanskopravnih poredaka.

Kad se u nacionalni pravni poredak implementiraju direktive minimalne harmonizacije, državama članicama ostavljana je mogućnost da u svom nacionalnom zaknodavstvu propišu i veći stupanj zaštite od onog koji se zahtijeva direktivom, jer se direktivama tada ne određuje gornja granica zaštite. Minimalnom harmonizacijom uvažavaju se tako različite nacionalne potrebe država članica za zaštitom određenih interesa, te njihov različit odnos prema zaštiti određenih socijalnih vrijednosti i, uopće, različito poimanje socijalne pravde.[18] Osim toga,

---

[15] Opcija za harmonizacijom samo prekograničnih aspekata prometa dovodi do paralelizma u pravnom uređenju sadržajno istih odnosa ovisno o tome ostvaruju li se oni prekogranično ili samo na teritoriju države članice. To može dovesti i do obrnute diskriminacije sudionika na tržištu ako su usklađivanjem prekogranični odnosi uređeni liberalnije. Parcijalno usklađivanje kojim su obuhvaćeni samo prekogranični odnosi na tržištu može dovesti do toga da se za prekogranične i domaće odnose ne primjenjuju ista pravila odnosno da se za domaće odnose primjenjuju stroža pravila koja mogu dovesti do obrnute diskriminacije domaćih sudionika na tržištu. V. Ihns,A.: o.c., s. 70; Ludwigs,M.: Rechtsangleichung nach Art. 94,95 EG-Vertrag, Baden-Baden, 2004, s. 110; Kurcz,B.: o.c.s, 295.

[16] V. Ludwigs,M.: Rechtsangleichung..., s. 110; Van Gervan,W.: Hamonization of Private Law, s. 230.

[17] V. Ihns,A.: o.c., s. 70; Bock,Y.: Rechtsangleichung und Regulierung im Binnenmarkt, Baden-Baden, 2005, s. 56; V. Rott,P.: Minimum Harmonization for the Completion of the internal Market? The Example of Consumer Sales Law, Common Market Law Review, 40, 2003, s. 1130

[18] V. Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, EUI Working papers LAW, 2008/14, s. 40.

države članice tada imaju veću slobodu razvijati sukladno svojim potrebama građanskopravno područje koje je pokriveno minimalnim usklađivanjem, već i druga komplementarna građanskopravna područja.[19] Države članice limitirane su, dakako, prilikom određivanja gornjih granica zaštite odredbama primarnog prava Unije o zaštiti i ostvarivanju tržišnih sloboda na unutarnjem tržištu, te općim načelima zaštite ljudskih prava i sloboda.[20] Gornja granica zaštite koja se tada može osigurati nacionalnim zakonodavstvom određena je zapravo granicama određenim pravilima primarnog prava Unije o ostvarivanju tržišnih sloboda odnosno granicama u kojima se povećani stupanj zaštite može opravdati nekim od razloga zbog kojih se i inače u nacionalnom zakonodavstvu mogu odrediti iznimke od primjene pravila o tržišnim slobodama (market freedoms)[21] odnosno iznimke utemeljene na osobito opravdanim razlozima (mandatory requirements) sukladno praksi Suda EU.[22]

Prilikom implementacije direktiva maksimalne harmonizacije države članice ne mogu prilagoditi odredbe direktive svom nacionalnom pravu, svojim socijalnim i kulturnim specifičnostima, gospodarskim okolnostima. Države članice ne mogu odrediti viši stupanj i druge standarde zaštite on onih koji su određeni direktivom. Čak što više države članice ne mogu niti zadržati u svom nacionalnom građanskopravnom poretku već ranije donijete propise kojima se u slučajevima na koje se odnosi direktiva maksimalne harmonizacije pruža viši stupanj zaštite ili drukčija zaštita od one koja je određena direktivom.[23] [24] To će nekim će slučajevima značiti da će se implementacijom direktive maksimalne harmonizacije čak i smanjiti stupanj zaštite određenih građanskih prava u usporedbi sa stupnjem zaštite koji je postojao na razini nacionalnog zakonodavstva prije implementacije direktive,[25] jer će države članice imati obvezu promijeniti svoje nacionalno zakonodavstvo kako bi ga prilagodile zahtjevima iz direktive.

Razlike između maksimalne i minimalne harmonizacije građanskog prava imaju posebno važan utjecaj i na postupanje država članica nakon što je već provedeno usklađivanje. Maksimalna odnosno minimalna harmonizacija ima značajan utjecaj kako na daljnju normativnu aktivnost država članica na području na kojem je provedeno usklađenje, tako i na primjenu implementacijskih propisa i njihovo tumačenje u praksi. Nakon što se provede usklađivanje (neovisno o njegovom intenzitetu), države članice dužne su temeljem čl. 4/3 UEU TEU suzdržavati se od mjera kojima bi u svojim nacionalnim pravnim porecima otežali ostvarivanje ciljeva radi kojih je provedena harmonizacija. Kad je provedena maksimalna harmonizacija, ta će obveza za države članice značiti da su one, sve dok je na snazi direktiva temeljem koje je takvo

---

[19] V. Cafaggi,F.: Which Governance for European Private Law?, EUI Working Papers LAW 2007/26, s. 29.

[20] V. Cecco,F.: Room to move? Minimum harmonization and fundamental rights, CMLR 2006, s. 13; Rott,P.:o.c., s. 1110., 1118; Unberath,H.,Johnston,A.: The double-headed aproach of the ECJ concernig consumer protection, CMLR, 2007, s. 1257.

[21] Npr. čl. 45/3, 51,52,62, 64, 65. UFEU TFEU

[22] O konceptu „osobito opravdanih razloga" v. više Craig.De Burca: EU Law, Oxford, 2008, pp. 705-717.

For more on the concept of „the mandatory requirements" see in Craig.De Burca: EU Law, Oxford, 2008, pp. 705-717.

[23] V. Micklitz,H.W.,Reich,N.: Crónica de una muerte anunciada: The Commision proposal for a „Directive on sconsumer rights", 479; Mak,V.: o.c., s. 59,61; Unberath,H.,Johnston,A.: o.c., s. 1272; Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, 40; Cafaggi,F.: Which Governance for European Private Law?, 29.

[24] V. Commission / France (C-52/00, ECR 2002 p. I-3827), Commission / Greece (C-154/00, ECR 2002 p. I-3879), González Sánchez (C-183/00, ECR 2002 p. I-3901)

[25] V. Mak,V.: o.c., s. 61

usklađivanje provedeno, ograničene u donošenju bilo kakvih mjera na usklađenom području i da zapravo ne mogu ništa mijenjati u pravnom području obuhvaćenom maksimalnom harmonizacijom. U biti se u području građanskog prava u kojem je provedena maksimalna harmonizacija pravno uređenje na određeni način stratificira, jer nakon toga više nema niti mogućnosti promjene.[26] Kod minimalne harmonizacije, države članice ovlaštene su, pak, i nakon što su implementirale direktivu mijenjati svoje nacionalno zakonodavstvo u pitanjima u kojima im je direktivom dopušteno odstupanje od minimalne harmonizacije usklađivanja. Dakako to mogu činiti u okvirima određenim direktivom, pa su ograničene utoliko da se nikako ne mogu spustiti ispod onog minimuma koji je određen direktivom.

Implementacija direktive maksimalne odnosno minimalne harmonizacije utječe i na mogućnosti tumačenja implementacijskog propisa u sudskoj praksi, a posebno i na tumačenje ostalih segmenata nacionalnog građanskog prava koji se primjenjuju na području na koji se odnosi direktiva. Sudovi prilikom tumačenja tada moraju voditi računa o tome kakvog je intenziteta bila harmonizacija, jer će o tome ovisiti granice odnosno stupanj njihove fleksibilnosti u interpretaciji nacionalnog građanskog prava sukladno ciljevima direktive. S druge strane, i uloga Suda EU u postupcima povodom prethodnog pitanja (čl. 267. UFEU) je drukčija ovisno o tome radi li se o direktivi maksimalne ili minimalne harmonizacije. Kad se radi o direktivama maksimalne harmonizacije na području građanskog prava za očekivati je da će uloga Suda EU u tumačenju takvih direktiva biti puno veća, jer će se pred nacionalnim sudovima češće pojavljivati pitanja kako tumačiti određenu odredbu direktive od čijeg se sadržaja nije moglo odstupiti prilikom implementacije. To će biti važno ne samo za primjenu nacionalnog propisa kojim je takva direktiva implementirana, već i za tumačenje ostalih nacionalnih propisa sukladno direktivi. Kad se, pak, radi o direktivama minimalne harmonizacije, od Suda EU će se češće zahtijevati tumačenje odredbi direktive radi utvrđenja da li je država članica implementirajući direktivu sukladno primarnom pravu Unije uredila veći stupanj zaštite u određenom građanskopravnom području odnosno kako treba tumačiti sadržaj minimalne zaštite koja se mora osigurati implementacijom direktive.

Na području harmonizacije građanskog i, uopće privatnog prava do sada su se pretežno donosile direktive minimalne harmonizacije koje su omogućavale državama članicama veću fleksibilnost kako u implementaciji direktive tako i u kasnijem razvoju svojih nacionalnih građanskopravnih poredaka.[27] Time je bilo omogućeno državama članicama da svoje građan-

---

[26] Na neki način time dolazi i do svojevrsne redistribucije ovlasti između država članica i Unije u uređenju određenog pravnog područja. U pravnom području u kojem je provedena maksimalna harmonizacija regulatorne kompetencije za uređenje tog područja zapravo su u onom sadržaju koji je pokriven direktivom maksimalnog usklađenje prenesene na Uniju. V. Weatherill,S.: Maximum or Minimum Harmonisation - What Kind of „Europe" Do We Want?, Boele-Woelki, K. (ed): The Future of European Contract Law, essays in honour of Ewoud Hondius Alphen aan den Rijn, 2007, s. 145.

[27] Npr. u brojnim direktivama o potrošačkim ugovorima sadržana je klauzula minimalnog usklađenja (tzv minimum clause) temeljem koje je bilo omogućeno državama članicama da prošire stupanj zaštite potrošača. Usp. npr. čl. 8. Direktive 85/877/EEZ o zaštiti potrošača u ugovorima sklopljenim izvan poslovnih prostorija, čl. 15. Direktive 87/102/EEZ o potrošačkim kreditima, čl. 8. Direktive 90/314/EEZ o turističkim paket aranžmanima, čl. 8. Direktive 93/13/EEZ o nepoštenim odredbama u potrošačkim ugovorima, čl. 11. Direktive 94/47/EZ o timeshareu, čl. 7. Direktive 98/27/EZ o sudskim/upravnim zabranama za zaštitu interesa potrošača, čl. 8/2 Direktiva 1999/44/EZ o nekim nekim aspektima prodaje robe široke potrošnje i popratnim jamstvima

O tome u kojoj su mjeri pojedine države članice prilikom implementacije koristile mogućnost da temeljem klauzula minimalnog usklađenja osiguraju veću zaštitu potrošača v. Schulte-Nölke,H.; Twigg-Flesner,Ch, Ebers,M. (Eds): EC Consumer Law Compendium, München, 2008 (obj. i na web stranici: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp), s. 11, 15, 18, 21, 23, 25, 28, 30, 33, 36, 40, 42, 45, 47, 50, 52, 54, 57, 61, 63, 66, 68, 72, 75, 77.

sko privatno pravo u okvirima određenim primarnim pravom Unije autonomno razvijaju i na usklađenim građasnkopravnim područjima (dakako uvažavajući minimalne granice zaštite koja se morala osigurati implementacijom direktive). Međutim, minimalna harmonizacija putem dirketiva na području građanskog prava pokazala se u dosadašnjoj praksi nedovoljno efikasnim instrumentom za otklanjanje razlika u nacionalnim građanskopravnim porecima. Čak, što više, pokazalo se da su upravo zbog različitog korištenja klauzula minimalne harmonizacije u direktivama nastale nove razlike između nacionalnih zakonodavstava koja su uzrokovale nove smetnje na unutarnjem tržištu, smanjile povjerenja potrošača, dovele do narušavanja konkurencije.[28] Zato je u posljednje vrijeme zamjetan trend da se i na području građanskog prava (posebno na području potrošačkih ugovora) direktive minimalne harmonizacije zamjenjuju direktivama maksimalne harmonizacije.[29] Donošenje takvih direktiva nedvojbeno će utjecati na daljnji razvoj građanskog prava u područjima na kojima je provedeno potpuno harmonizacija, a posebno na mogućnosti nacionalnih zakonodavaca da reagiraju na vrlo dinamične promjene na području građanskog prava. Naime, na građanskopravnim područjima u kojima je provedeno maksimalna harmonizacija svaka inicijativa za daljnjim promjenama je zapravo na Uniji pa će i daljnji razvoj tih područja ovisiti o mogućnostima tijela Unije da brzo reagiraju na promjene i razvoj.

4.2. Utjecaj funkcionalno usmjerene harmonizacije na građansko pravo

Funkcionalni pristup u harmonizaciji građanskog prava putem direktiva često dovodi do fragmentacije nacionalnih građanskopravnih poredaka. Do toga dolazi posebno u slučajevima kad se pojedine direktive implementiraju donošenjem posebnih zakona kojima se uređuje samo materija uređena direktivama. Pravno uređenje građanskog prava zbog toga postaje vrlo segmentirano i kompleksno. Vrlo često uz opći propisa na određenom građanskopravnom području postoji i čitav niz posebnih zakona u odnosu na koje postoje još „posebniji" zakoni koji uređuju pojedina pitanja iz direktiva.[30] Njihov je međusobni odnos vrlo je kom-

---

[28] Usp. npr. istraživanje koje je provedeno u pogledu načina implementacije direktiva o potrošačkim ugovorima koje su sve bile direktive minimalnog usklađivanja objavljeno u Schulte-Nölke,H.; Twigg-Flesner,Ch, Ebers,M. (Eds): EC Consumer Law Compendium. Istraživanje je pokazalo da u implementacijskim nacionalnim propisima država članica postoje značajne razlike u pogledu dužine roka u kojem potrošač može odustati od ugovora, u definiciji pojam „potrošač", „trgovac" i sl. Razlike postoje i u načinu implementacije, kao i u mogućnostima korištenja klauzula o minimalnom usklađivanju, opcija iz direktiva i dr.

Usp.t. 3.2., 4.5.Green Paper on the Review of the Consumer Acquis COM (2006) 744 final od 08.02.2007 (http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/green-paper_cons_acquis_en.pdf)

[29] V. Micklitz,H.W.: The Visible Hand of European Regulatory Private Law, 24; Unberath,H.,Johnston,A.: o.c., s. 1254; Mak,V.: o.c., s 58;

Usp. npr. t. 1,2,3. Preambula Direktive 2008/122/EC o timesharu, t.1-9. Direktive 2008/48/EC o o potrošačkom kreditu, Direktiva 2005/29/EZ o nepoštenim poslovnim praksama, Direktiva 2002/65/EZ o sklapanju na daljinu ugovora o potrošačkim financijskim uslugama.

Usp. npr. prijedlog Direktive o pravima potrošača COM(2008) 614 final, 2008/0196(COD) od 8.10.2008 (http://ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf) O prijedlogu Direketive o pravu potrošača v. više: Micklitz,H. W.,Reich,N.: Crónica de una muerte anunciada: The Commision proposal for a „Directive on consumer rights", s. 471-519; Zypries,B.: Der Vorschlag für eine Richtlinie über Verbraucherrechte, ZEuP, 2/2009, s. 225-229; Effer-Uhe,D,O,Watson,J.M.: Der Entwurf einer horizontalen Richtlinie über Rechte der Verbraucher, GPR, 1/09, s. 7-15; Jud,B., Wendehorst,Ch: Proposal for a Directive on Consumer Rights – an Academic Position Paper, GPR, 2/09

[30] Npr. uz opći zakon koji uređuje obvezno i ugovorno pravo, postoji poseban zakon koji uređuje određenu vrstu ugovora, te poseban zakon koji uređuje zaštitu potrošača u toj vrsti ugovora.

pliciran. U praksi je nekad vrlo često teško odrediti koji se posebni zakoni primjenjuje, koji od posebnih zakona ima prednost pred drugim posebnim zakonom, koji je"posebniji" od nekog drugog, na koje se aspekte određenog pravnog odnosa primjenjuje koji od zakon.

S obzirom na to da se harmonizacija putem direktiva provodi ciljano radi zaštite određene kategorije sudionika na tržištu, radi zaštite slabije ugovorne strane u određenim vrstama ugovora, radi zaštite ugovornih strana od specifičnih povreda ugovornih obveza i sl, implementacija direktiva često dovodi i do multipliciranja pravnog uređenja istih ili sličnih pravnih odnosa na različitim razinama. Sve države članice već imaju u građanskim zakonicima ili u drugim općim građanskopravnim propisima (zakoni o obveznim odnosima, zakoni o vlasništvu i sl) na općoj razini manje ili više uređenu zaštitu vrijednosti koje se na specifičan način štite i direktivama. Ta se zaštita na razni općih propisa građanskog prava često ostvaruje primjenom općih načela građanskog prava (npr. zabrana zlouporabe prava, načelo savjesnosti i poštenja, načelo ravnopravnosti stranaka, načelo jednake vrijednosti činidaba, obaveza suradnje i sl) koja su na različite načine razrađena u brojnim građanskopravnim odredbama o odgovornosti za povredu ugovornih obveza, o valjanosti ugovora, odgovornosti za štetu, zaštiti pojedinih subjektivnih građanskih prava itd.. Nakon implementacije direktiva većina se tih istih vrijednosti štiti i primjenom posebnog propisa kojim je implementirana direktiva. Implementacijom direktiva uspostavlja se tako vrlo često nekoliko različitih sustava pravne zaštite istih vrijednosti. Najbolji primjer za to je implementacija direktiva o potrošačkim ugovorima i tzv. antidiskriminacijskih direktiva. Te direktive uređuju vrlo konkretne oblike zaštite slabije ugovorne strane (potrošača, zaposlenika, primatelja usluge) u pojedinim potrošačkim ugovorima, zaštitu od diskriminacije u ugovorima u radu te ugovorima o pružanju usluga. Ta se zaštita u većini građanskopravnih poredaka može ostvariti i primjenom općih pravila obveznog prava o načelima obveznog prava, o tumačenju ugovora, o ništavost ugovora sklopljenog suprotno ustavu i načelu savjesnosti i poštenja i sl. No, implementacijom direktiva razvija se poseban sustav zakona o zaštiti potrošača, o zabrani diskriminacije, o zaštiti radnika, o zaštiti stranaka u pojedinim ugovorima (npr. trgovački zastupnici) i dr. kojima se također ostvaruje zaštita tih istih vrijednosti. U posebnim zakonima odredbe o toj zaštiti su, doduše, razrađenije, konkretnije, detaljnije od onih u općim odredbama obveznog prava tako da je nedvojbeno da ti posebni sustavi zaštite nastali izravnim implementiranjem direktiva osiguravaju efikasniju i veću zaštitu.[31]

4.3. Utjecaj harmonizacije na sadržaj građanskog prava

Implementacijom direktiva na području građanskog prava mijenja ili proširuje sadržaj uređenja pojedinih građanskopravnih područja. Vrlo često se direktivama u nacionalne pravne poretke uvode i novi građanskopravni instituti, koji su često već i na razini same direktive samo djelomično uređeni.[32] Implementacija novih pravnih instituta te fragmentarno

---

[31] U nekim će slučajevima konkretiziranje određenih pojmova prilikom implementacije direktiva nesporno doprinijeti i jednostavnijoj i boljom primjeni pravila općeg građanskog prava. Npr. implementacija Direktive o 93/13/EZZ o nepoštenim klauzulama u potrošačkim ugovorima zahtijeva da se u nacionalni propis implementira i njezin aneks u kojem su primjerice navode nepoštene klauzule u potrošačkim ugovorima. Te odredbe nedvojbeno mogu doprinijeti i tumačenju općih odredbi ugovornog prava o postupanju ugovornih strana sukladno načelu savjesnosti i poštenja, u procjeni valjanosti pojedinih općih uvjeta poslovanja u trgovačkim ugovorima i sl.

[32] Tako npr. nova Direktiva 2008/122/EZ o timesharu uređuje samo neke aspekte ugovora o timesharingu i nekih drugih ugovora kojima je svrha vremenski ograničeno korištenje nekretnina (formu ugovora, obvezu predugovornog obavještavanja, pravo na odustanak od ugovora i dr.

implementiranje u nacionalne pravne poretke samo određenih aspekata pojedinih privatnopravnih instituta nepovoljno utječe na sustavnost nacionalnih građanskopravnih poredaka.[33] Problemi se npr. javljaju zbog toga što se pravni institut odnosno pojedini aspekti nekog pravnog instituta koji su uređeni direktivom ne mogu uvijek u potpunosti implementacijom uklopiti u postojeći sustav nacionalnog građanskog prava.[34] Nekad zbog toga što takav pravni institut uopće ne postoji, a nekad i zbog toga što njegovo uređenje značajno odstupa od načela na kojima se temelji domaći pravni poredak (npr. zbog toga što se radi o pravnom institutu preuzetom iz pravnog kruga kojem ne pripada nacionalni pravni poredak u koji se implementira).[35] [36]

Implementacija direktiva kojima se usklađuje građansko pravo u nekim slučajevima dovodi i do uspostavljanja drukčije ravnoteže između mandatornih (kogentnih) i dispozitivnih odredbi u određenim građanskopravnim područjima radi veće zaštite slabije strane u građanskopravnom odnosu. U velikom broju slučajeva direktive nalažu državama članicama da radi uspostavljanja zaštite pojedinih kategorija sudionika na tržištu (npr. potrošača, zaposlenika) uvedu određene kogentne norme u pravna područja koja su tradicionalno uređena dispozitivnim normama (npr. ugovorno pravo).[37] Takav pristup često zahtijeva i posebno uređenje građanskog pravnih učinaka postupanja protivno mandatornim, kogentnim nor-

---

[33] V. Rittner,F.:o.c., s. 853; Wilhelmsson,T: : Private Law in the EU: Harmonised or Fragmentes Europaisation?, European Review of Private Law, 1/2002, s.82; Basedow,J.: Codification of Private Law in the Euroepan Union: the making od a Hybrid, European Review of private law, 1/2001. s. 38; Blaurock,U.. Europäisches Privatrecht, Juristien Zeitung, 6/1994, s. 272; Schulte-Nölke,H.: Schulte-Nölke,H.,Schulze,R.: Europäische Rechtsangleichung und nationale Privatrechte - Einführung u Schulte-Nölke,H.,Schulze,R. (Hrsg): Europäische Rechtsangleichung und nationale Privatrechte. Baden-Baden, 1999, o.c., s. 15; Timmermans,Ch.W.A.: Timmermans,Ch.W.A.: Zur Entwicklung des europäischen Zivilrecht, Zeitschrift für Europäisches Privatrecht, 1/1999., s. 3; López Rodrígez,A.M.: o.c., s.229; Smits,J.: The making of European private law, Antwerpen-Oxford-New York, 2002. s. 11; Gebauer,M.: Grundfragen der Europäisierung des Privatrechts, Heidelberg, 1998, s. 94,109; Micklitz,H.W.: Review of Academic Approaches to the European Contract Law Codification Project, Andenas,M. i dr (ed): Lieber Amicorum Guido Alpa - Private Law Beyond the national Systems, London, 2007, 703; Smits,J.: The making of European private law, s, 90; Roth,W.H.: Transposing „Pointillist" EC Guidelines into Systematic National Codes - Problems and Consequences, European Review of Private Law, 6/2002, s. 767-769.

[34] V. Collins,H.: The European Civil Code, Cambridge, 2008, s. 44

[35] Neki autori govore o „iznenađujućem efektima" prava Unije - „surprise effects" „Jack-in-the-Box effects of the EC law". Ističe se da je implementacija prava Unije u nacionalne poretke unijela element neodređenosti i nepredvidivosti. Tradicionalnim pravnim metodama ukorijenjenim u nacionalnim privatnopravnim porecima često se ne može predvidjeti kako će implementacija utjecati na funkcioniranje i primjenu nacionalnog prava i njegovo, eventualno, neprimjenjivanje zbog prednosti prava Unije. V. Wilhelmsson,T: Private Law in the EU..., .,s. 79.

[36] Tako se npr. kontinentalnoeuropski pravni sustavi imaju puno više problema s implementacijom direktiva kojima se uvode pravni instituti koji su se razvili u common law sustavima. U pravilu se radi o pravnim institutima čije je uređenje utemeljeno na načelima čija provedba u kontinantelnoeuropskim sustavima zahtijeva puno veću prilagodbu. Tako npr. Direktiva o financijskim osiguranjima sadržava čitav niz pravnih instituta o založnom pravu na pravima, namirivanju založnih vjerovnika i dr. koji su proizišli iz angloameričkog prava. Njezina implementacija u kontinentalnoeuropske pravne poretke značila je značajno odstupanje od tradicionalnog pravnog uređenja založnog prava na pravu.

[37] V. Micklitz,H.W.: Persepktiven eines Europäischen Privatrechts, Zeitschrift für Europäisches Privatrecht, 1999, s 721,722.

mama, a aktualizira i pitanje postupanja sudova u sporovima koji proizađu iz takvih pravnih odnosa.[38]

Na području građanskog prava takav je trend najuočljiviji prilikom implementacija direktiva na području obveznog tj. ugovornog prava, jer je ono najčešći predmet harmonizacije. Implementacija direktiva kojima se u ugovornim odnosima štite potrošači ili u kojima se štite stranke od svih oblika diskriminacije značajno je utjecala i na promjene sadržaja obveznog prava država članice ili barem na uspostavljanje drukčijih balansa u pružanju i ostvarivanju zaštite određenih vrijednosti. Tako npr. implementacija direktiva utječe na potenciranje nekih vrijednosti u općem ugovornom pravu kao što npr. veća zaštite socijalnih vrijednosti u ugovornom pravu (npr. zaštita slabije ugovorne strane/potrošača, zaposlenika, veća zaštita osobnih podataka,veća zaštita od diskriminacije, veća zaštita legitimnih očekivanja potrošača u ugovornom i odštetnom pravu). S druge strane, implementacija utječe na značajnu konkretizaciju načela savjesnosti i poštenja (npr. kroz primjene nepoštenih klauzula u potrošačkim ugovorima, kod predugovorna odgovornosti za štetu, prilikom kontrole sadržaja ugovora), kao i na konkretiziranje zaštite temeljenih ustavnih ljudskih prava u ugovornom pravu (npr. izričitim zabranama diskriminacije u privatnopravnim odnosima vezanim za zapošljavanje, promet dobara, pružanje i primanje usluga). Implementacija utječe i na veću transparentnost ugovornih odnosa (npr. kroz posebno uređenje predugovorne obveze informiranja, obveza informiranja tijekom trajanja ugovornog odnosa, odgovornost za propuštanje dužnosti informiranja), te na veću zaštita slobode odlučivanja slabije strane (npr. pravo potrošača na odustanak od ugovora). Implementacijom se često uspostavlja i veća odgovornost ugovornih strana tijekom pregovaranja i tijekom izvršavanja ugovornih obveza (npr. predugovorna odgovornost za štetu, odgovornost za nedostatke prodane stvari), kao i veća zaštita ugovornih strana (npr. zaštita vjerovnika u slučaju zakašnjenja, odgovornost za nedostatke proizvoda).

Sve to ne samo da dovodi do promjene odnosa između mandatornih i dispozitivnih pravila na način da se radi zaštite slabije strane temeljem direktiva mora propisati veći broj mandatornih odredbi, već utječe i na ograničenje ugovorne autonomije radi zaštite slabije ugovorne strane i osiguranja ravnopravnosti stranaka (zabrana odricanja od prava, veća kontrola sadržaja ugovora), te na drukčije tumačenje tradicionalnih načela ugovornog prava (načelo *pacta sunt servanda* u svjetlu prava potrošača na odustanak od ugovora). Uvode se i neki potpuno novi elementi u ugovorno pravo kao što su djelovanje ugovornih odnosa prema trećima (utjecaj odustanka od ugovora na vezane ugovore s trećima). Implementaciju direktiva na području građanskog prava često prati i implementacija posebnih procesnih pravila o zaštiti građanskih prava uređenih direktivom kao što su kolektivna zaštita slabije strane u ugovoru (kolektivne tužbe za zaštitu potrošača, za zaštitu od diskriminacije), posebna pravila o teretu dokazivanja, djelovanje sudskih odluka o prema trećima. I na kraju vrlo često se države članice obvezuju da prilikom implementacije direktiva na području građanskog prava povredu određenog građanskopravnog odnosa za koju je tradicionalno predviđena samo građanskopravna sankcija (raskid ugovora, odgovornost za štetu i sl) uvedu i posebne javnopravne sankcije za povredu prava slabije ugovorne strane (npr. prekršajna odgovornost trgovca zbog

---

[38] V. Loos,M.B.M.: The Influence of European Consumer Law on General Contract Law and the Need for Sponaneous Harmonization, European Review of Private Law 3/2007, 519,520.

Tako se npr. u praksi Suda EU već u nekoliko predmeta pojavilo pitanje da li bi nacionalni sudovi po službenoj dužnosti trebali voditi računa o tome da li su odredbe u potrošačkim ugovorima nepoštene sukladno Direktiva 93/13/EEZ o nepoštenim odredbama u potrošačkim ugovorima . V. Océano Grupo Editorial and Salvat Editores (C-240/98 to C-244/98, ECR 2000 p. I-4941); Cofidis (C-473/00, ECR 2002 p. I-10875); Mostaza Claro (C-168/05, ECR 2006 p. I-10421); Asturcom Telecomunicaciones (C-40/08); Pannon GSM (C-243/08); Martín Martín (C-227/08).

neispunjenja obveza iz potrošačkog ugovora ili odbijanja sklapanja ugovora, prekršajna odgovornost pružatelja usluga ili poslodavca zbog diskriminacije i sl.)

Promjene koje u nacionalnom građanskom pravu nastaju implementacijom direktiva utječu i na kasniju primjenu nacionalnih propisa kojima je implementirana direktiva. Nakon što se implementiraju direktive, najvažnije pitanje za praktičnu realizaciju njihovih ciljeva upravo je praktična primjena implementacijskih mjera u sudskoj praksi. Vrlo često direktive s područja građanskog prava ne sadrže detaljne i konkretne definicije relevantnih pojmova već su u direktivi navedeni samo različiti pravni standardi koji u direktivi nisu uopće ili su vrlo općenito određeni.[39][40] Nakon što se takva direktiva implementira, u praksi mogu nastati problemi s tumačenjem pojedinih njezinih odredbi odnosno odredbi implementacijskog propisa u kojima se propis poziva na pravne standarde iz direktive. Moguće je također da u praksi nastanu problemi zbog toga što se na isti građanskopravni odnos u praksi mogu primijeniti dva ili više implementacijskih propisa kojima su u nacionalno zakonodavstvo preuzete različite direktive.[41] U takvim će slučajeva ujednačenom tumačenju pojedinih odredbi direktive sigurno doprinijeti tumačenje Suda EU u postupku povodom prethodnog pitanja kojeg se inicirali nacionalni sudovi (čl. 267. UFEU TFEU). No, unatoč tome što Sud EU može doprinijeti jedinstvenom tumačenju odredbi direktive, u velikom će broju slučajeva ipak o sudskoj praksi nacionalnih sudova ovisiti kako se tumače pojedini pojmovi iz direktive i u kojoj se mjeri na nacionalnoj razini ostvaruju ciljevi direktive, ali i koliko sve to opet dovodi do novih razlika u pružanju zaštite pojedinih građanskih prava na razni Unije.[42] Naposljetku, na razlike u ostvarivanju zaštite istih građanskih prava koja se ostvaruje temeljem implementacijskih propisa značajno mogu utjecati i razlike u procesnim propisima. Te razlike mogu dovesti do toga da se ne mogu na isti način u svim državama članicama ostvarivati ciljevi koji su se trebali ostvariti usklađivanjem supstancijalnog građanskog prava.

S druge strane, nekada će primjena implementacijskog propisa u praksi zahtijevati i odgovarajuću primjenu drugih nacionalnih propisa kojima nije izravno preuzeta direktiva . To će npr. biti slučaj kod parcijalnog usklađivanja tj. kad direktivom nije predviđeno normativno usklađivanje svih aspekata pravnih odnosa kojih proizlaze iz određenog pravnog instituta (npr. direktivom su uređeni samo određeni aspekti određenog potrošačkog ugovora).[43] Tada će za područje na koje se odnosi direktiva i koje je pokriveno implementacijskim aktom vrijediti

---

[39] V. Unberath,H.,Johnston,A.: o.c., s. 1266; Rott,P.: o.c., s. 1110; Loos,M.B.M.: o.c., s. 520; Cafaggi,F.: Which Governance for European Private Law?, 18.

[40] Tako se npr. u direktivama spominju pojmovi kao što su načelo savjesnosti i poštenja, nepoštene ugovorne odredbe (Direktiva 93/13/EEZ o nepoštenim odredbama u potrošačkim ugovorima) nepoštena poslovna praksa, važan utjecaj na ekonomsko ponašanje potrošača, profesionalna pažnja (Direktiva 2005/29/EZ o nepoštenim poslovnim praksama), stavljanje u nepovoljniji položaj, ostvarivanje jednakih mogućnosti, usporediva situacija (Direktiva *2000/43*/EZ o primjeni načela ravnopravnosti osoba bez obzira na njihovo rasno ili etničko podrijetlo i sl.

[41] Moguće su, naime, situacije da se na potrošački ugovor kojeg su sklopile stranke u sporu, s obzirom na njegov sadržaj, mjesto i način sklapanja mogu primijeniti različite tj. implementacijski propisi kojima su one preuzete u nacionalno zakonodavstvo. Npr. zbog sadržaja ugovora trebao bi se primijeniti propis koji uređuje potrošački ugovor o kreditu i kojim je implementirana Direktiva o potrošačkom kreditu , a s obzirom na to gdje je ugovor sklopljen trebao bi se primijeniti propis koji uređuje sklapanje ugovora izvan poslovnih prostorija i kojim je implementirana Direktiva o potrošačkim ugovorima sklopljenim izvan poslovnih prostorija. V. Heininger (C-481/99, ECR 2001 p. I-9945)

[42] V. Cafaggi,F.: Which Governance for European Private Law?, 18.

[43] V. Basedow,J.: Conflict of Laws and the Harmonization of Substantive Private law in the European Union, Andenas,M. i dr (ed): Lieber Amicorum Guido Alpa - Private Law Beyond the national Systems, London, 2007, s. 183.

novo uređenje iz implementacijskog akta. Na ostale aspekte tog istog građanskopravnog odnosa koji nisu uređeni implementacijskom propisom primjenjivat će se, nacionalno pravo države članice, ali i primarno pravo Unije koje će imati prednost u primjeni ako je neusklađeno nacionalno pravo države članice suprotno primarnom pravu Unije. Tada će fragmentarni i selektivni pristup prilikom normativnog usklađivanja postaviti pred nacionalne sudove i druga tijela koja primjenjuju implementacijski propis vrlo zahtjevne zadatke: od utvrđivanja radi li se o sporu koji spada u područje primjene direktive preko utvrđivanja koje se nacionalno pravo supsidijarno primjenjuju uz implementacijski propis do tumačenja nacionalnog prava sukladno ciljevima direktive. U konačnici je moguće, da primjena nacionalnih implementacijskih propisa, zbog različitih mogućnosti tumačenja nacionalnog prava sukladno ciljevima direktive, različitih uređenja sudskih i drugih postupaka u kojima se odlučuje o primjeni implementacijskog propisa, razlika u standardima pravne zaštite i dr. u praksi dovede do potpuno različitih rezultata u ostvarivanju ciljeva direktive.

5. Proširena harmonizacija građanskog prava kao reakcija na fragmentarnu harmonizaciju

Harmonizacija građanskog prava putem direktiva se značajno održava na postojeće nacionalne građanskopravne sustave država članica. S jedne strane, pod utjecajem direktiva se građansko pravo modernizira i prilagođava zahtjevima tržišta, ali postaje i senzibilnije na pružanje specifične građanskopravne zaštite slabije zaštićenim sudionicima na tržištu (potrošači, zaposlenici i sl). S druge strane, fragmentarnom harmonizacijom se narušava postojeći sustav građanskopravnih normi, multiplicira se zaštita istih građanskih prava , uvode se novi pravni instituti koji se ne mogu jednostavno uklopiti i postojeći građanskopravni režim. Stoga se nužno nameće pitanje kako u postupcima harmonizacije putem direktiva uspostaviti optimalni odnos između procesa harmonizacije građanskog prava s pravom Unije i autonomnog razvoja nacionalnog građanskopravnog poretka. U tom je kontekstu najvažnije pitanje što učiniti kako bi se i nakon što se direktive implementiraju u nacionalni građanskopravni poredak očuvala njegova sustavnost i cjelovitost. U nekim će slučajevima da bi se postiglo biti potrebna cjelovitija reforma određenog segmenta domaćeg građanskopravnog poretka kako bi se međusobno uskladili propis kojim je implementirana direktiva i ostalo građanskopravno zakonodavstvo.

Očuvanje ili novo uspostavljanje sustavnosti građanskopravnog uređenja zahtijevat će u određenim slučajevima i odgovarajuću promjenu i prilagodbu i drugih komplementarnih građanskopravnih područja koja su relevantna za uređenje pravnih odnosa na koje se odnosi direktiva. Sve to može dovesti i do promjene nekih tradicionalnih načela na kojima se temelji uređenje pojedinih segmenata nacionalnih građanskopravnih uređenja, do promjene uloge koju su pojedina građanskopravna područja imala u nacionalnom zakonodavstvu, do novog uređenja pojedinih pravnih instituta, do unošenja u građanskopravnih poredak novih vrijednosti kojima je na europskoj razini priznat poseban ekonomski ili socijalni značaj za uređenje privatnopravnih odnosa. Moguće su i promjene hijerarhijskih odnosa između pojedinih dijelova nacionalnog građanskog prava, pa čak i promjena važnosti koju pojedini segmenti građanskog prava imaju u nacionalnom pravnom poretku.[44] S druge strane, može nastati i potreba za uvođenjem novih

[44] Takav je trend najočitiji kod ugovornog potrošačkog prava koje se razvija pod utjecajem direktiva o potrošačkim ugovorima. Neovisno o tome da li su te direktive implementirane posebnim propisima ili su uklopljene u već postojeće propisa o zaštiti potrošača ili građanske zakonike, odredbe o potrošačkim ugovorima uvijek imaju prednost u primjeni pred općim odredbama ugovornog prava koje se primjenjuju tek supsidijarno. S obzirom na to da se na tržištu većina ugovora sklapa upravo između potrošača i trgovaca potrošačko ugovorno pravo u razvijenim tržišnim odnosima može imati puno veće značenje od općeg ugovornog prava.

oblika zaštite privatnih prava ako je implementacijom u pravni poredak unose novi privatnopravni instituti ili se postojećim privatnim pravima daje drukčiji sadržaj, kao i za proširenjem personalnog područja primjene direktive kako bi se izbjegla obrnuta diskriminacija itd.[45] Takvi će procesi u konačnici dovesti do svojevrsne europeizacije cjelokupnog građanskopravnog uređenja, jer će se i drugi segmenti građanskog prava autonomnom odlukom nacionalnih zakonodavaca prilagoditi na određeni način europskim standardima (tzv. spin-off effect dirketiva).[46]

S druge strane, moguće je da se nacionalni zakonodavci autonomno odluče područje primjene direktive proširiti i na druge osobe ili i na druge slične pravne odnose kako bi očuvali konzistentnost nacionalnog građanskopravnog poretka (npr. da prošire primjenu odredbe iz direktive o odgovornosti prodavatelja za materijalne nedostatke kod potrošačke prodaje robe na sve kupoprodajne ugovore). Da li će se nacionalni zakonodavac odlučiti na takvu tzv**. autonomnu ili proširenu harmonizaciju** nacionalnog građanskog prava ovisi isključivo o njihovoj odluci.[47] Odredbe osnivačkih ugovora o obvezama vezanim za implementaciju direktiva (čl.4/3 TEU, čl. 288/3 TFEU) na to ih ne obvezuju. Sa stajališta Unije važno je jedino da države članice u svojim nacionalnim zakonodavstvima provedu sve mjere nužne da se osigura na njihovom području ostvarivanje ciljeva direktive (čl. 288/3. TFEU) odnosno da se time otklone smetnje za prekogranično ostvarivanje tržišnih sloboda, pristup tržištu, smetnje konkurenciji i sl. Sa stajališta izvršavanja obveza u vezi s implementacijom direktive dovoljan je i najjednostavniji pragmatični pristup da se direktiva implementira posebnim zakonom u koji će se manje više preuzeti njezin sadržaj te da se ni na koji način ne intervenira u druga područja nacionalnog privatnog prava. S obzirom da će taj propis imati prednost pred ostalim nacionalnim propisima koji bi se mogli primijeniti na pravne odnose na koji se odnosi direktiva, već će i to biti dovoljno da se na razini Unije uspostavi sustav u kojem će se na cijelom njezinom području ostvariti ciljevi direktive (npr. otklanjanje konkretnih smetnji za ostvarivanje neke tržišne slobode, otklanjanje konkurencije na tržištu i dr). No, takav pristup nedvojbeno neće doprinijeti očuvanju konzistentnosti i cjelovitosti nacionalnih građanskopravnih uređenja država članica, posebno u onim slučajevima u kojima su predmet normativnog usklađivanja složeni privatnopravni odnosi na čije se osnivanje, realizaciju i zaštitu neizostavno moraju primijeniti i ostali segmenti nacionalnog građanskog prava.

Odluka o tome da li će se paralelno s implementacijom direktive ili kasnije provesti i reforma cijelog segmenta građanskopravnog područja na koji se odnosi direktiva kako bi se zadržala njegova konzistentnost i cjelovitost isključivo se donosi se autonomno i isključivo na nacionalnoj razini. Dakako, da se pritom za nacionalne zakonodavce javlja čitav niz vrlo važnih doktrinarnih pitanja o tome kako provoditi takvo spontano (autonomno) usklađivanje - od toga do kojeg stupanja općenitosti i apstraktnosti urediti pravne odnose na koje se odnose direktive preko toga kako odrediti personalno područje primjene tih normi do nomotehničkih pitanja vezanih za to da li implementaciju provoditi donošenjem novih propisa ili intervencijom (izmjenama i dopunama) već postojećih propisa. Javlja se čitav niz drugih vrlo ozbiljnih pitanja kao što su: da li razvijati paralelne sustave normi od kojih će jedne vrijediti samo za građanskopravne odnose s međunarodnim elementom, a druge samo za domaće građanskopravne

---

[45] Tako npr. normativno usklađivanje zaštite potrošača iz potrošačkih ugovora zahtijeva i normativno usklađivanje zaštite njihovih prava uvođenjem kolektivne tužbi. V. npr. Direktiva 2009/22/EZ o sudskim/upravnim zabranama za zaštitu interesa potrošača. Implementacija antidiskriminacijskih direktiva također zahtijeva posebno uređenje ostvarivanja zaštite u slučaju povrede prava na jednaki tretman i sl.

[46] V. Blaurock,U.: o.c., s. 274, Micklitz,H.W.: Persepktiven eines Europäischen Privatrechts, s . 255; Werro,F.. o.c., s. 36,37,42; Weatherill,S.: Why Object to the Harmonization of Private Law by the EC?, European Review of Private Law, 5/2004, 651, 652; Cafaggi,F.: Which Governance for European Private Law?, 14; Loos,M.B.M.: o.c., s. 523.

[47] V. Loos,M.B.M.: oc., s. 524.

odnose; da li uopćavati sustav zaštite koje za pojedine vrste osoba propisuju različite direktive (npr. uspostavom istih standarda zaštite za sve potrošačke ugovore) ili se opredijeliti za jednostavniji pristup u kojem će se za svaki potrošački ugovor sukladno svakoj posebnoj direktivi urediti različita zaštita potrošača iz svakog pojedinog potrošačkog ugovora; da li zaštitu koja se temeljem implementacije direktive treba pružiti određenom krugu osoba u određenim pravnim odnosima (npr. zaštita potrošača u pravnim odnosima s trgovcima) proširiti i na druge osobe koje sudjeluju na tržištu (npr. zaštita trgovaca u njihovim međusobnim pravnim odnosima ili zaštita potrošača u njihovim međusobnim pravnim odnosima); da li pravno uređenje koje propisuje direktiva za pojedine vrste ugovora uopćiti kako bi se primjenjivalo na sve ugovorne odnose; kako uspostaviti optimalni odnos između javnopravnog i privatnopravnog uređenja određenih pravnih instituta koji se implementacijom direktive moraju uvesti u nacionalni pravni poredak; kako ostvariti optimalni balans između supstancijalnih i kolizijskih normi iz direktiva, u kojoj mjeri i na koji način procesno pravo prilagoditi pravnom uređenju materijalnog prava čiju promjenu zahtijeva implementacija direktiva. [48] [49]

* * *

Nacionalni zakonodavci se prilikom implementacija direktiva s područja građanskog prava susreću s nizom dvojbi. Jedna od najvećih svakako jest da li i, ako da, kako prilikom implementacije direktiva i dalje zadržati „klasični" „tradicionalni" pristup u uređenju građanskog prava - pristup u kojem se favorizira uređenje građanskopravnih odnosa na apstraktnoj i općoj razini i u kojem se iznimke od općeg uređenja svode samo na minimalnu mjeru, ako i ukoliko je to zaista potrebno zbog specifičnosti određenog građanskopravnog odnosa. To je vrlo važno strateško pitanje za daljnji razvoj nacionalnih građanskopravnih poredaka država članica o kojem se ne bi trebalo ad hoc odlučivati u svakom pojedinačnom slučaju implementacije direktive. Raspravi o ovom pitanju trebalo bi pristupiti sustavno kako bi se istražile i sagledale sve moguće implikacije različitih pristupa u implementaciji direktiva nužne za donošenje stava o optimalnom načinu usklađivanja građanskog prava s pravom Europske unije.

---

[48] V. Roth,W.H.; Transposing „Pointillist" EC Guidelines into Systematic National Codes, s. 770-774; Smits,J.M.: European Private Law: A plea for..., s. 94.

[49] Primjer autonomnog/proširenog usklađivanja nacionalnog privatnog prava pod utjecajem normativnog usklađivanja određenih segmenata privatnog prava na razini Unije je temeljita reforma njemačkog obveznog prava provedena temeljem Schuldrechtsmodernisierungsgesetz koji je stupio na snagu 1.1.2002. godine. Njime je provedena reforma njemačkog obveznog prava uređenog Građanskim zakonikom iz 1900 godine i to upravo radi stvaranja jedinstvenog sustava obveznog prava u koji su uključene i odredbe brojnih direktiva o zaštiti potrošača. Sve su te direktiva (osim Direktive br. 1999/44 o određenim aspektima prodaje potrošačke robe i jamstvima) već prije bile implementirane u njemački pravni poredak posebnim zakonima. Kako bi se pravila o potrošačkim ugovorima uklopila u opći sustav obveznog prava dopunjen je i izmijenjen Građanski zakonik i u njega su unijete i odredbe o potrošačkim ugovorima i direktiva. Time je ponovo stvoren jedinstveni sustav obveznog prava koji je do tada bio razbijen brojnim posebnim zakonima o preuzimanju pojedinih potrošačkih direktiva. Sukladno tome su neke odredbe o potrošačima smještene u općem dijelu BGB (definicija potrošača/Par.13, trgovca/Par14, pravo na opoziv potrošačkih ugovora/Par. 355-359, nepoštene odredbe u ugovoru/Par 305-310), dok su sami potrošački ugovori uređeni u okviru odredbi o pojedinim V. Schulze,R.,Schulte-Nölke,H.: Schuldrechtsreform und Gemeinschaftsrecht u Schulze,R.,Schulte-Nölke,H (Hrsg): Die Schuldrechtsreform vor dem Hintergrung des Gemeinschaftsrechts, Tübingen, 2001, s. 7, 15; Nölke,H.: EC Private Law and the German Civil Code u Schulze,R.,Ajani,G. (Hrsg): Gemeinsame Prinzipien des Europäischen Privatrechts, Baden-Baden, 2003. s. 217-226; Arndt,H. W.. Europarecht, Heidelberg, 2003,, s. 203-205; Schulke-Nölke,H., Twigg-Flesner,Ch., Ebers,M. (Eds).: EC Consumer Law Compendium 30-31; Rösler,H.: Europeanisation of Private Law Through Directives – Determinig Factors and Modalities of Implementation, Eureopan Journal of Law Reform, 3/2010, s. 317.

Sličan proces „europeizacije" građanskog prava proveden je i prilikom donošenja nizozemskog Građanskog zakonika u koji je implementirano 20 direktiva s područja privatnog prava. V. više Smits,J. M.: European Private Law: A plea for..., s. 93,94; Loos,M.B.M.: o.c., s. 525

Prof.dr *Branko Morait**
Pravni fakultet Univerziteta
u Banja Luci i Forum za građansko pravo
jugoistočne Evrope

POVREDE LIČNIH PRAVA KAO USLOV ODGOVORNOSTI NA NAKNADU NEMATERIJALNE ŠTETE

Apstrakt: *Predmet ovog rada je istraživanje povrede ličnih prava kao uslova odgovornosti na naknadu nematerijalne štete. Uporedno-pravno posmatrano uočava se tendencija afirmacije objektivnog koncepta nematerijalne štete kao povrede ličnih prava.*

Ključne riječi: *nematerijalna šteta, lična dobra, lična prava, pravna lica, sudska zaštita*

Spremnost za okupljanje pravnih poslenika iz bivših jugoslovenskih republika u Forum za građansko pravo jugoistočne Evrope pod pokroviteljstvom GTZ sa željom da se dostignuto u procesu pravne reforme sagleda i krene naprijed u vječno traženje pravednog prava omogućena je, u oblasti obligacija, recepcijom Zakona o obligacionim odnosima. Kako je istakao akademik, profesor Perović, trideset godina poslije, „država se raspala, a Zakon preživeo." (...) "Zar se i to može?" Za ovaj fenomen vitalnosti kodifikacije nađeno je i objašnjenje u činjenici da je ona „nastavila da živi u svim bivšim republikama Jugoslavije, danas samostalnim, nezavisnim i suverenim državama, često sa pokojom inovacijom, ali sa suštinskom istovetnošću."[1]

Zakon o obligacionim odnosima, koji je stupio na snagu 1. oktobra 1978. godine [2] u području vanugovorne odgovornosti definisao je odredbom člana 155. imovinsku štetu kao umanjenje nečije imovine i spriječavanje njenog povećanja. Nematerijalnu štetu je, istom odredbom, definisao kao nanošenje drugome fizičkog ili psihičkog bola ili straha. Tako je zasnovao tzv. subjektivnu koncepciju nematerijalne štete. Da bi se upotpunila slika i utvrdila cjelovitost ovog koncepta nematerijalne štete nužno je povezati i odredbu člana 200. ZOO/78 kojom je propisana novčana naknada nematerijalne štete. Prema toj odredbi, novčanu naknadu, kao osnovni oblik naknade štete, nije moguće zahtevati za svaki slučaj pretrpljenih fizičkih bolova, duševnih bolova i pretrpljen strah, nego samo za one pretrpljene bolove i strah koji proizlaze iz tamo navedenih ličnih dobara i vrijednosti fizičkog lica. Ta lična dobra i takve ljudske vrijednosti definisane ovim zakonom su: smanjenje životne aktivnosti, naruženost, povreda ugleda, časti, slobode ili prava ličnosti, smrt bliskog lica i strah. Pored toga, kao poseban slučaj satisfakcije, odnosno priznavanja prava na pravičnu novčanu naknadu zbog pretrpljenih duševnih bolova, u smislu odredbe člana 202. ZOO/78, imaće lice koje

---

* Originalni tekst je na lokalnom jeziku.

[1] Slobodan K.Perović, „Trideset godina posle",Predgovor za osamnaesto izdanje Zakona o obligacionim odnosima sa registrom pojmova, „Službeni glasnik RS", Beograd, 2009.

[2] "Službeni list SFRJ", br. 29/78, 39/85, 45/89 i 57/89 (u daljem tekstu: ZOO/78)

je prevarom, prinudom ili zloupotrebom nekog odnosa potčinjenosti ili zavisnosti navedeno na kažnjivu obljubu ili kažnjivu bludnu radnju, a i lice prema kojem je izvršeno neko drugo djelo protiv dostojanstva ličnosti i morala. Zbog toga se u komentarima navodi da je ZOO usvojio subjektivno-objektivnu koncepciju nematerijalne štete, jer svaki pretrpljeni bolovi i strah neće predstavljati osnov za dobijanje novčane naknade štete. Ideja vodilja redaktora ZOO/78 je kompromis između dotadašnjeg negiranja prava na naknadu nematerijalne štete, kao neželjene pojave komercijalizacije ličnih dobara i ljudskih vrijednosti i, s druge strane, pokušaja ohrabrenja sudske prakse da, u zakonom propisanim slučajevima, može dosuditi novčanu naknadu štete za povredu ljudske ličnosti. To je bio odgovor zakonodavca na dotadašnju kolebljivost sudske prakse u mnogobrojnim i različitim slučajevima podnošenja zahtjeva od strane oštećenih lica radi dosuđivanja novčane naknade nematerijalne štete od strane građana, a sve više i pravnih lica.

U literaturi se često nailazi na stanovište da je ZOO/78 omogućio da se novčana naknada nematerijalne štete dosuđuje u svim važnijim slučajevima, kao i da su formulacije ovog Zakona široke i da su njime uzroci nastanka pravno priznatnih oblika nematerijalne štete uglavnom pobrojani. Izvan tog nabrajanja ostali su drugi slučajevi koji, iz zakonske perspektive, nisu pravno relevantni, ali ih zainteresovana lica subjektivno smatraju osnovom za dosuđivanje novčane naknade nematerijalne štete mada ih dotadašnja sudska praksa, te kasnije redaktori ZOO/78, koji su se na nju oslonili, nisu ubrojali u zakonske pretpostavke, jer ih nisu ocijenili kao važnijim slučajevima koji dovode do dovoljno ozbiljne nematerijalne štete.[3]

Kriterijumi za utvrđivanje postojanja nematerijalne štete koji opravdavaju dosuđivanje novčane naknade za pretrpljene fizičke i duševne bolove i za strah, navedeni su u odredbi člana 200. stav 1. i 2. ZOO/78. To su: okolnosti slučaja koje opravdavaju dosuđivanje novčane naknade su jačina bolova i njihovo trajanje odnosno intenzitet straha i njegovo trajanje. Kao dodatne okolnosti koje, pored osnovanosti naknade, opredjeljuju sud u pogledu određivanja visine naknade nabrojane su: značenje povrijeđenog dobra, cilj kojem služi naknada i „opreznost“, da se dosuđivanjem naknade ne pogoduje težnjama koje nisu spojive sa njenom prirodom i društvenom svrhom.

Pored navedenih ograničenja kojima se sud trebao rukovoditi u pogledu lica koja ulaze u krug onih kojima pripada pravo na naknadu nematerijalne štete povodom smrti ili teškog invaliditetu bliskog lica (odredba člana 201. ZOO/78) kao i mogućnost nasljeđivanja ili ustupanja koja se priznavala samo ako je potraživanje utvrđeno pravosnažnom odlukom ili pismenim sporazumom (odredba člana 204. ZOO/78).

I u postojećim rješenjima ZOO/78 (odredbe čl. 157. i 199) kojima su predviđene nenovčane sankcije za pretrpljenu nematerijalnu štetu zbog povrede prava ličnosti nije se pravila razlika da li zahtjev potiče od fizičkog ili od pravnog lica, jer je i pravno lice moglo zahtjevati prestanak radnje kojom se vrijeđa njegova ličnost i ishoditi objavljivanje presude, opozivanje izjave, objavljivanje ispravke ili nešto drugo čime se postiže svrha koja se u obligacionom pravu postiže naknadom. S druge strane, u pogledu primjene odredbe člana 200. ZOO/78, pravno lice bi, hipotetički, imalo pravo na novčanu naknadu nematerijalne štete ako

---

[3] Kao takvi se navode: „duševni bolovi zbog nasilnog pobačaja, povreda roditeljskih osjećaja zamjenom njihovog djeteta za tuđe dijete, privremeno odvajanje roditelja od djeteta, povreda afekcija usljed uništenja stvari, neispunjenje obećanja da se zaključi brak, silovanje, prekid školovanja, iseljenje u neodgovarajući stan, privremena nemogućnost korištenja automobila, nezakonito postupanje pri odlučivanju o prijemu na rad, nezakonito odpuštanje s posla, neiskorišten godišnji odmor, propušteno putovanje ili izlet, nesudjelovanje na skupovima i sl..“

– navedeno prema dr. Obren Stanković: naknada štete, Enciklopedija imovinskog prava i prava udruženog rada, tom II, NIU „Službeni list SFRJ“, Beograd, 1978., str. 307-316

bi uspjelo s dokazom da je zbog povrede prava ličnosti pretrpjelo duševne bolove pravnorelevantnog intenziteta i trajanja, što bi bilo apsurdno. [4]

ZOO/78 ovim je propisivanjem ukazao na dilemu oko pronalaženja adekvatne sankcije koja se treba primijeniti zbog povrede prava ličnosti, jer je promovisao tužbu na propuštanje radnje kojom se vrši vrijeđanje ličnosti u odredbi člana 157., kao primjeren oblik nenovčane satisfakcije, odnosno objavljivanje presude ili ispravke u slučaju povrede prava ličnosti ili povlačenje izjave kojom je povreda učinjena ili nešto drugo čime se može ostvariti svrha koja se postiže naknadnom štete (član 199. ZOO/78). Pored toga, kao sredstvo odvraćanja od vršenja povrede prava ličnosti drugoga, odredbom člana 157. stav 2. ZOO/78 predviđena je i privatna kazna, plaćanje određenog novčanog iznosa u korist lica kojim je nanesena povreda ličnih dobara.

Prema subjektivnom sistemu naknade nematerijalne štete formiranim rješenjima ZOO/78, razvijeno je shvatanje u pravničkoj javnosti da je poželjno, u takvim slučajevima, dosuđivati nenovačnu mjeru radi zaštite prava ličnosti, a da je novčana naknada izuzetak koji treba restriktivno tumačiti i primjenjivati. Izgleda da se gubilo iz vida da je preduslov nastanku nematerijalne štete, trpljenju bolova i straha, prethodna povreda ličnih dobara odnosno prava ličnosti. To se jednostavno može provjeriti kada se uporede lična dobra i ljudske vrijednosti koje mogu biti predmet povrede: pravo na život, tjelesni i duševni integritet, zdravlje, čast, ime i privatni život. I prema rješenjima ZOO/78 lična prava su bila prisutna u pozadini, odnosno podlozi odgovornosti za naknade nematerijalne štete koja se sastojala u nastanku pravnorelevantnih fizičkih ili duševnih bolova ili straha. Ostala lična prava su bila predmetom zaštite samo pod uslovom da je njihovom povredom stvoreno pravnorelevatno stanje fizičkih i psihičkih bolova i straha. Sama činjenica povrede ostalih ličnih prava, isto kao i onih ličnih prava koja su pobrojana u odredbi člana 200. ZOO/78 nije, sama po sebi, dovodila do zasnivanja obligacionog odnosa na naknadu štete. Uslovi odgovornosti bili su: protivpravnost i šteta.

Koliko su rješenja ZOO/78 bila ispred svoga vremena svjedoči podatak da je u Austriji 2005. izrađen Nacrt zakona o naknadi štete. Pored osnovnog, odranije zaštićenog, ličnog prava na tjelesnu i duhovnu nepovredivost iz paragrafa 1325 ABGB, u paragrafu 1316. Nacrta po prvi put su taksativno navedeni slučajevi u kojima se dosuđuje bolnina, kao što je povreda prava na privatnost, bolnina bliskim srodnicima u slučaju smrti ili teške tjelesne povrede, povrede prava na polni integritet seksualnim zlostavljanjem, povrede prava na polnu samoopredjeljenost,, diskriminacije po osnovu pola, etničkog porijekla, religije ili invaliditeta, doživljenog smrtnog straha ili straha zbog teške povrede. Prilikom odmjeravanja težište se od težine krivice pomjera na značaj povrijeđenog dobra i obim i trajanje povrede. [5]

II Zakonska reforma zaštite ličnih prava u Jugoistočnoj Evropi

Ovaj prikaz možemo podijeliti prema zaštićenim objektima tj. na reformu zaštite ličnosti fizičkih i zaštite ličnosti pravnih lica, i prema pravnim područjima na kojima su uslijedile ili slijede nova zakonska rješenja o obligaciono-pravnoj zaštiti prava ličnosti.

---

[4] Novi zakon o obveznim odnosima-najznačajnije izmjene-novi instituti, Inženjerski biro d.d., Zagreb, lipanj 2005., Petar Klarić, Naknada neimovinske štete, strana 29.

[5] Aleksandra Vučić-Milovanović, profesor Pravnog fakulteta u Beču: Novine kod instituta naknade bolnine u austrijskom pravu, Zbornik radova-Aktuelna pitanja građanske kodifikacije, Niš, 2008. str 116.

U **Republici Srbiji** započeo je rad na izradi Građanskog zakonika. Na osmoj sjednici Komisije za izradu Građanskog zakonika Srbije, održanoj 27. jula 2007. godine zadužen je član Komisije, Snežana Andrejević, sudija Vrhovnog suda Srbije, da pripremi cjelokupnu sudsku praksu (od 1976. do 2006. godine), koja je relevantna za izbor budućih rješenja budućeg zakona. Na devetoj sjednici iste komisije prezentirana je izvještaj, Sudska praksa –stavovi o naknadi nematerijalne štete-nekad i sad.[6] Navedeni izvještaj se zasniva na Zaključcima Savjetovanja predstavnika Saveznog suda, vrhovnih sudova republika i autonomnih pokrajina i Vrhovnog vojnog suda od 15. i 16. oktobra 1986. godine, „O pravno priznatoj odnosno pravo nepriznatoj nematerijalnoj šteti", „O nematerijalnoj šteti koja je nastala i budućoj šteti", „O mogućnosti kumulativnog izricanja više sankcija za istu nematerijalnu štetu", „O fizičkim bolovima", „O strahu", „O duševnim bolovima zbog naruženosti", „O duševnim bolovima zbog umanjenja životne aktivnosti", kao i drugi zaključci i načelni stavovi vezani za pojedine vidove nematerijalne štete.[7] IZ sadržaja ovog preglednog izvještaja ne proizilazi da se sugerišu određeni zaključci u pravcu reformisanja postojećih zakonskih rješenja iz ZOO/78 koji su pojašnjeni, podržani i protumačeni radi pravilne primjene zakonskih odredaba od strane sudova od strane najviših sudskih instanci i autoriteta onoga vremena.

U pomenutom izvještaju, što je za našu temu aktuelno, izlaže se zaključak pomenutog savjetovanja „O pravno priznatoj odnosno pravno nepriznatoj nematerijalnoj šteti", čiji stav 2. glasi:" Oštećenom se zbog povrede nematerijalnih prava ličnosti novčana naknada može dosuditi samo kad su se posledice te povrede manifestovale u jednom od vidova nematerijalne štete. I kada je neki od vidova nematerijalne štete nastao, oštećenom se novčana naknada može dosuditi samo kada jačina i trajanje bolova i straha ili druge okolnosti slučaja to opravdavaju, da bi se kod oštećenog uspostavila narušena psihička ravnoteža."[8]

Kao primjer drugačijeg stava navodi autorica izvještaja pok. profesora Cigoja, koji drži, po shvatanju autorice, da se, kao šteta, ne smatraju samo bolovi i strah, koji su posljedica povrede, već i sama povreda prava ličnosti može predstavljati štetu i bez utvrđivanja postojanja bolova.[9] Autorica izvještaja zaključuje da ZOO/78 određuje pravno priznate vidove nematerijalne štete taksativno, a ne primjerice.[10] Navedenim izvještajem, koji treba da posluži za izradu, eventualno, drugačijih rješenja budućeg građanskog zakonika Srbije, nije pokrenuto pitanje de lege ferenda tako da se ne mogu utvrditi stavovi Komisije po ovom pitanju.

U **Republici Hrvatskoj** se odredbom člana 19. Zakona o obveznim odnosima[11] definišu „prava osobnosti" koja uživaju zaštitu. Ovim uređenjem zaštićena su, srazmjerno svojim osobinama, približno podjednako. Pod pravima osobnosti ZOO/05 podrazumjeva: pravo na život i tjelesno i duševno zdravlje, ugled, čast, dostojanstvo, ime, privatnost osobnog i obiteljskog života, slobodu i dr. „Pravna osoba" ima pravo na zaštitu svih navedenih prava osobnosti izuzev onih koja su vezana uz biološku suštinu fizičkog lica. „Pravna osoba" ima, naročito, pravo na ugled i dobar glas, čast, ime odnosno firmu, poslovnu tajnu, slobodu privređivanja i dr.

---

[6] Rad na izradi Građanskog zakonika Republike Srbije, Pravni život, 11/2007, str. 25,25

[7] Sudska praksa-Stavovi o naknadi nematerijalne štete nekad i sad-, prilog pripremila Snežana Andrejević, sudija Vrhpovnog suda Srbije, Pravni život, 11/2009, str. 177-211

[8] Ibid.,str. 177

[9] Ibid.,str 178

[10] Ibid.

[11] „Narodne novine" , broj 35/05 (u daljem tekstu: ZOO/05)

Republika Makedonija je, po uzoru na Republiku Hrvatsku, Zakonom o izmjenama i dopunama Zakona o obligacionim odnosima,[12]redefinisala nematerijalnu štetu kao povredu prava ličnosti. Odredbom člana 9-a, među osnovna načela, utvrđena je zaštita ličnih prava. Odredbom stava(1) ovog člana propisano je da svako fizičko i pravno lice, pored zaštite imovinskih prava ima i pravo na zaštitu svojih ličnih prava saglasno zakonu. Stavom (2) istog člana kao lična prava navedena su: pravo na život, tjelesno i duševno zdravlje, čast, ugled, dostojanstvo, lično ime, privatnost ličnog i porodičnog života, sloboda, intelektualna tvorevina i druga lična prava. Stavom (3) propisano je i da pravna lica imaju sva navedena lična prava, izuzev onih vezanih za biološku suštinu fizičkih lica, a naročito pravo na dobar glas i ugled, naziv odnosno firmu, poslovnu tajnu, slobodu preduzetništva i druga lična prava ovih lica. Redefinisan je zakonski pojam štete tako što je sada šteta umanjenje nečije imovine (obična šteta) i spriječavanje njenog povećanja (izmakla korist), a i povreda ličnih prava.[13] Po uzoru na rješenja u OZ Republike Slovenije, zahtjev da se prestane s povredom prava ličnosti dopunjen je i zahtjevom da se uklone posljedice nastale takvom štetnom radnjom.[14]Kod normiranja naknade nematerijalne štete zbog povrede ličnih prava napušten je naziv „novčana naknada“ i zamijenjen nazivom „pravična novčana naknada“, koja se dosuđuje ako težina povrede i okolnosti slučaja to opravdavaju.[15] Mjerila za odlučivanje suda o zahtjevu za pravičnu novčanu naknadu zbog povrede ličnih prava biće jačina i trajanje povrede kojom su prouzrokovani fizički bolovi, duševni bolovi i strah, a vodiće se računa da se naknadom ne pogoduje težnjama koje su nespojive s njenom prirodom i društvenom svrhom.[16]Povreda prava na ugled i druga lična prava pravnog lica predstavljaju osnov za dosuđivanje pravične novčane naknade, ako okolnosti slučaja i težina povrede to dozvoljavaju.[17]Predviđena je i primjena pravila drugog zakona koji uređuje ova pitanja.[18] Zanimljiva je nova odredba[19] koja propisuje dospjelost i visinu pravične novčane naknade. Obaveza na isplatu pravične novčane naknade dospijeva danom donošenja prvostepene presude kojom je utvrđena visina te naknade. Moguće je da sud uzme u obzir i vrijeme između nastanka štete i donošenja prvostepene presude, ako dužina čekanja na satisfakciju i druge okolnosti to opravdavaju.[20]

Zaštita ličnosti pravnog lica utvrđena je i odredbom člana 183. Obligacijskog zakonika **Republike Slovenije**.[21] Prema ovoj zakonskoj odredbi za povredu ugleda ili dobrog imena, sud će dosuditi pravnom licu pravičnu novčanu odštetu nezavisno od nastanka imovinske štete, pa i ako imovinske štete nema, ako utvrdi da okolnosti slučaja to opravdavaju. Što se tiče zaštite fizičkih lica, odredba člana 179. OZ preuzeta je odredba člana 200. ZOO/78.

---

[12] „Službeni vesnik na Republika Makedonija“, broj 84/ 2008.

[13] Član 142 ZOO RM izmijenjen i dopunjen 2008. odredbom člana 41. Zakona o izmjenama i dopunama ZOO

[14] Član 144 ZOO RM izmijenjen odredom člana 43 Zakona o izmjenama i dopunama ZOO iz 2008.

[15] Član 189. stav (1) ZOO RM

[16] Član 189. stav (2) ZOO RM

[17] Član 189. stav (3) ZOO RM

[18] Član 189. stav (4) ZOO RM

[19] Član 192-a ZOO RM

[20] Više vidi: Gale Galev, Jadranka Dabovik-Anastasovska, Obligaciono pravo, Skopje, 2009., str. 651.

[21] Uradni list Republike Slovenije, Št. 83/01, 28/06, 32/04, 40/07

Republika Crna Gora donijela je novi Zakon o obligacionim odnosima[22] i u njemu zadržala stavove 1. i 2. člana 200. ZOO/78, pa je izmijenila stav 3. prema kojem, za povredu ugleda i prava ličnosti pravnog lica sud će, ako procijeni da težina povrede i okolnosti slučaja to opravdavaju, dosuditi pravnom licu pravičnu novčanu naknadu, nezavisno od naknade imovinske štete.

U **Bosni i Hercegovini** (FBiH/RS), po ugledu na promociju objektivne koncepcije naknade nematerijalne štete izvršenu ZOO/05 izmjenjene su i dopunjene odredbe čl. 174. – 175., 178., 234., 238. radne verzije ZOO BiH/09. Po uzoru na ZOO/05 RH redefinisana je odredba o pojmu štete, jer je uz imovinsku štetu povreda prava ličnosti definisana kao nematerijalna šteta. Pod pravima ličnosti su nabrojana prava na život, tjelesno i duševno zdravlje, ugled, čast, dostojanstvo, ime, privatnost ličnog i porodičnog života, sloboda i dr. Pravno lice ima sva navedena prava ličnosti, osim onih vezanih uz biološku bit fizičke ličnosti a osobito pravo na ugled i dobar glas, čast, ime, odnosno firmu, poslovnu tajnu, slobodu privređivanja i dr. Zahtjev za povredom prava ličnosti proširen je i na uklanjanje nastalih posljedica, po uzoru na OZ R Slovenije. Kod naknade nematerijalne štete utvrđena je pravična novčana naknada, kao kod ZOO/05 RH i ZOO RM/08. Utvrđeno je pravo na nasljeđivanje i ustupanje potraživanja naknade nematerijalne štete, samo ako je oštećeni podnio pismeni zahtjev ili tužbu.

III Preliminarne ocjene zakonodavne reforme zaštite prava ličnosti

ZOO/05, što se tiče reforme zaštite ljudskih prava, bio je prvi u regionu postavljajući lična prava odnosno njihovu povredu kao uslov obligacije na novčanu naknadu nematerijalne štete. Ne samo da je povreda ličnog prava shvaćena kao protivpravna radnja nego je već sama povreda kvalifikovana kao prouzrokovana šteta. U odredbi članka 1046. ZOO/05 vidi se redefinisani opšti pojam štete koja se definiše kao umanjenje imovine i sprečavanje njenog povećanja i povreda „prava osobnosti“ (neimovinska šteta). Zbog toga su komentatori ZOO/05 ovu koncepciju neimovinske štete nazvali objektivnom, jer umjesto definisanja izvršenog u ZOO/78, po kojem je nematerijalna šteta nanošenje drugome fizičkog ili psihičkog bola ili straha, prema ZOO/05 neimovinska šteta je povreda prava osobnosti (prava ličnosti). Komentatori ZOO/05 ove izmjene proglašavaju kao napuštanje mješovite, subjektivno-objektivne koncepcije ZOO/78 i prihvatanje objektivne koncepcije neimovinske štete, prema kojoj je već sama povreda „prava osobnosti“ neimovinska šteta. Dakle, umjesto dva uslova odgovornosti, koja su proizilazila iz definicije nematerijalne štete ZOO/78, protivpravnosti radnje i nastale štete, izgleda da je u ZOO/05 izvršeno integrisanje oba ova uslova, jer je dovoljno da dođe do povrede prava ličnosti da bi se smatralo kako je šteta prouzrokovana. Da li je ovakvo redefinisanje odnosno poistovjećivanje dva uslova odgovornosti za nastalu štetu nedostatak ili prednost ponuđene objektivne koncepcije neimovinske štete iz ZOO/05? Odgovor se mora potražiti zalaženjem na područje naknade štete. I po dosadašnjoj regulativi naknada nematerijalne štete se kvalifikovala kao pravična, a nije se smatrala ekvivalentom pričinjene povrede. Nastale povrede ličnosti nisu se mogle novčanim iznosom nadoknaditi, nego se smatralo da je dosuđeni novčani iznos imovinska satisfakcija za pretrpljenu nematerijalnu štetu. U prilogu ove hipoteze je odredba članka 1100. ZOO/05 naslovljena kao: „pravična novčana naknada“. Pravična novčana naknada će se dosuditi za povredu „prava osobnosti“ ako sud nađe da težina povrede i okolnosti to opravdavaju, nezavisno od naknade imo-

[22] „Službeni list Crne Gore“, broj 47/08 od 07.08.2008. godine

vinske štete, a i kada ova nije nastala. U stavku 2. članka 1100., pri odlučivanju o visini pravične novčane naknade, kao mjerilo dolazi do izražaja sadržaj nematerijalne štete definisan ZOO/78, tj. sud će voditi računa o jačini i trajanju fizičkih odnosno duševnih bolova i straha, kao i o kriterijumima za odmjeravanje visine naknade poznatih iz ZOO/78, tj. cilja kojem služi naknada i opreznosti o tome da se njenim dosuđivanjem ne pogoduje težnjama koje nisu spojive sa njenom prirodom i društvenom svrhom.

Ako uporedimo rješenja subjektivne i objektivne koncepcije nematerijalne – neimovinske štete možemo preliminarno zaključiti da njihova divergencija nije tolika koliko se na prvi pogled čini. To iz razloga što pravo na naknadu štete odnosno prouzrokovanje štete kao izvor obligacije na novčanu naknadu štete ima svoja „urođena" ograničenja odnosno domet. Da bi obligacija nastala mora nastati šteta. Ne može se obligacija formirati povodom pretpostavke ili fikcije da je šteta nastala. Ako novčana naknada ne može biti ekvivalent pričinjenoj šteti, što je bezbroj puta ponovljeno kao istinito, onda se naknada nematerijalne štete može shvatiti samo kao pravična naknada. Obligacija na naknadu štete ovdje se javlja samo kao sredstvo da se opravda transfer novčanog iznosa na ime satisfakcije odnosno pravične naknade, ali to nije naknada štete prema uobičajnom shvatanju kakvu ona ima u oblasti imovinske odgovornosti. Zbog toga i subjektivna i objektivna koncepcija naknade štete konvergiraju kao konstrukcija odgovornosti za povredu ličnih prava i ličnih dobara.

Konzistentnost objektivne koncepcije naknade neimovinske štete promovisane ZOO/05 ide u prilog priznavanju prava na pravičnu novčanu naknadu u cilju popravljanja neimovinske štete za povredu ugleda i drugih ličnih prava pravnog lica. Sud će ovakvu naknadu pravnom licu dosuditi primjenom odredbe stavka 3. članka 1100. ZOO/05, ako procijeni da to težina povrede i okolnosti slučaja opravdavaju, nezavisno od naknade imovinske štete, a kada ove uopšte i nema. Ovo je, na terenu sveobuhvatne zaštite pravnih lica, značajna prednost u odnosu na subjektivnu koncepciju, jer sudska praksa nije mogla prihvatiti, na primjer, da se za povredu dobrog poslovnog ugleda može dosuditi novčana naknada u smislu odredbe člana 200. ZOO/78. Prema stanovištu revizijskog suda,[23]naknadu za nematerijalnu štetu moguće je priznati samo za onu nematerijalnu štetu koju priznaje zakon, a ne za bilo koju nematerijalnu štetu. Povreda dobrog poslovnog ugleda, sama po sebi, ne može dovesti do novčane naknade nematerijalne štete, jer je, po shvatanju revizijskog suda, nematerijalna šteta subjektivna kategorija. Tako, prema ispravnom tumačenju sudske prakse ZOO/78, koja se nije mogla izdići iznad zakona, naknada nematerijalne štete koju potražuje pravno lice (privredni subjekt), ne uživa sudsku zaštitu, jer se vidovi nematerijalne štete (pretrpljeni bolovi, strah i dr.) mogu dosuđivati samo fizičkim licima.

Objektivna koncepcija naknade neimovinske štete ZOO/05 ima svoja ograničenja u pogledu definisanja „prava osobnosti" (ličnih prava). Lična prava imaju svoj objekt, a to je lično dobro. U lična dobra danas ulaze ne samo ona koja pripadaju čovjeku kao biološkom biću (život, tijelo, zdravlje) nego i ona koja se u savremeno doba priznaju kao integralni elementi čovjekove ličnosti (sloboda, čast, ime, intimni i porodični život, glas, slika, privatna pisma i td.).[24] Lična prava su apsolutnog dejstva, djeluju erga omnes, izvan su prometa i ne mogu biti predmet izvršenja, ne mogu se nasljeđivati, mogu se štiti nakon smrti titulara, a neka se ne mogu povrijediti poslije smrti titulara. Postmortalna zaštita nekih ličnih prava, kao što su: čast, ime, privatni spisi, intimni život i slično se nasleđuje.[25]

---

[23] Iz rješenja Vrhovnog suda Srbije, Prev. 127/97 od 26. marta 1997., navedeno prema M. Vrhovšek, V. Kozar, nematerijalna šteta zbog narušavanja ugleda pravnog lica, Pravna riječ, Banja Luka, 2009., st. 54.

[24] S. Krneta, Lična prava, odrednica u enciklopediji imovinskog prava i prava udruženog rada, tom I, Beograd 1978, strana 910.

[25] Ibid.

Moguće su nedoumice, kod pristalica objektivne koncepcije, jer odredba članka 19. ZOO/05, koja definiše i pobraja prava osobnosti, ne čini to taksativno nego egzemplarno. Pitanje ostaje otvoreno, kako će se ponuđeni katalog prava popunjavati, jer je ovaj katalog otvoren i pored nabrojanih i druga lična prava mogu biti predmetom zakonske zaštite. Postavlja se pitanje, da li su sudskoj praksi širom otvorena vrata da sama procjenjuje, bez postavljenih zakonskih kriterija, koje će pravo priznati kao pravo osobnosti, a koje neće? Iz koje opšte definicije ili iz kojeg kataloga prava će sudska praksa crpiti rješenja za svoje ocjene odnosno kvalifikacije pojedinih ličnih prava i njihove podobnosti za sudsku zaštitu? Ova pitanja se postavljaju još i iz razloga što postoji relativizacija ovog pitanja kroz izjednačavanja ličnih prava sa ustavnim pravima i ljudskim pravima odnosno prirodnim pravima.[26] Kako smo već istakli lična prava su subjektivna apsolutna prava, a pravna priroda međunarodno priznatih ljudskih ili ustavnih prava do sada nije bila na taj način kvalifikovana. Kako ističu pojedini autori, nabrajanje prava ličnosti, koliko god iscrpno bilo, nije konačno. Otvorena je lista prava osobnosti koja se popunjava zavisno od razvoja kulturne i pravne svijesti društva.[27] Drugi autori ističu da su prava ličnosti „ u fazi stvaranja", te da njihovo priznanje od strane pravnog poretka nastupa tek kada njihov sadržaj i granice budu provjerene i utvrđene u sudskoj praksi.[28]

Princip obligacionog prava, da se šteta, kao uslov građansko-pravne odgovornosti na naknadu štete, mora dokazati zadržan je i u polju primjene objektivne koncepcije naknade neimovinske štete. Ipak, po ovom principu, uočava se bitna razlika u odnosu na subjektivnu koncepciju nematerijalne štete po kojoj je oštećeni morao dokazivati bolove i strah pravnorelevantnog intenziteta i trajanja koji potiče iz zakonskom definicijom obuhvaćenih vidova nematerijalne štete. U postupku dokazivanja ovih činjenica bila je veoma značajna uloga vještaka kao dokaznog sredstva na sudu. Prema novom uređenju ZOO/05, oštećeni treba da dokaže da mu je štetnom radnjom povrijeđeno neko lično pravo, koje je obuhvaćeno ili zakonskom definicijom ličnih prava ili se nalazi izvan te definicije, ali je priznato od strane sudske prakse. Ako oštećeni, fizičko ili pravno lice, zahtijeva pravičnu novčanu naknadu morao bi dokazati težinu povrede i zakonom propisane okolnosti koje dozvoljavaju dosuđivanje takve naknade štete.

ZOO/05 izvršio je značajne izmjene i drugih odredaba vezanih za oblast neimovinske štete. Tako je, odredbom članka 1101., u slučaju smrti ili osobito teškog invaliditeta pravo na pravičnu naknadu priznato članovima uže obitelji, bez uslovljavanja da se to njima priznaje za njihove duševne bolove, kako je uređeno u odredbi člana 201. stav 1. ZOO/78. Pravo na pravičnu novčanu naknadu priznato je i roditeljima u slučaju gubitka začetog, a nerođenog djeteta (članka 1101. stavka 3. ZOO/05). Značajna je i odredba članka 103., prema kojoj obveza pravične novčane naknade dospjeva danom podnošenja pisanog zahtjeva ili tužbe, osim ako je šteta nastala nakon toga. [29]U istom cilju je odredba članka 1105. stavak 1. da tražbina naknade neimovinske štete prelazi na nasljednike samo ako je oštećenik podnio pisani zahtjev ili tužbu.

Značajna promjena se dogodila i u oblasti ugovorne odgovornosti za štetu. Prema odredbi članka 346. stavka 1. ZOO/05, vjerovnik ima pravo na naknadu obične štete i izmakle

---

[26] I. Babić, Obligaciono pravo, opšti deo, „Službeni glasnik", Beograd-Sremska Kamenica, 2009., str. 255.

[27] P. Klarić, op.cit., strana 31 (navodi tipologiju švajcarskog autora Terciera koji dijeli prava ličnosti u tri grupe: 1. prava osobnosti u fizičkom smislu, 2. prava osobnosti u afektivnom smislu i 3. prava osobnosti u društvenom smislu.

[28] Krneta S., op.cit.., strana 908.

[29] Dospjelost naknade nematerijalne štete je različito uređena, počev od trenutka nastanka štete ZOO/78, ZOO BiH(FBiH/RS), podnošenjem pismenog zahtjeva ili tužbe ZOO/05 RH, do danom donošenja prvostepene presude ZOO/08 RM

koristi te pravičnu naknadu neimovinske štete, koju je dužnik u vrijeme sklapanja ugovora morao predvidjeti kao moguću posljedicu povrede ugovora, s obzirom na činjenice koje su mu tada bile poznate ili morale biti poznate.

Prema shvatanju komentatora ZOO/05, ovaj zakon je, uspostavljanjem ugovorne odgovornosti za neimovinsku štetu odbacio dogmu o isključivoj imovinskoj vrijednosti činidbe, prihvatio ugovor kao instrument posredovanja neimovinskih dobara i potreba čovjeka i osigurao jedinstvo odgovornosti za neimovinsku štetu, te se pridružio velikom broju zemalja koje priznaju tu odgovornost i savremenim tendencijama evropskog ugovornog prava iz Landovih načela.[30] Nadalje, komentatori ZOO/05 dodaju, da iako ovaj propis ne govori posebno o predugovornoj odgovornosti za neimovinsku štetu, prihvatanja ugovorne odgovornosti za neimovinsku štetu podrazumjeva i prihvatanje takve predugovorne odgovornosti.[31]

Uz ZOO/05 unekoliko je izmjenjena odredba o tužbi za propuštanje, tj. zahtjevu da se prestane s povredom prava osobnosti koji ima svaka naravna i pravna osoba i uklanjanje njome izazvanih posljedica čime su u odredbi članka 1048. obuhvaćene dvije tužbe za povredu prava ličnosti – tužba na propuštanje i tužba za uklanjanje posljedica radnje kojom se vrijeđa pravo osobnosti. Ovakvo rješenje još ranije je uspostavljeno odredbom člena 134. stav 1. OZ. [32]

IV Zaključak

Putevi razvoja definisanja nematerijalne štete i dosuđivanja njene naknade, kao i u drugim tranzicionim procesima, karakteriše pomjeranje klatna promjena po maksimalnoj amplitudi, iz krajnosti u krajnost. Od pojma nematerijalne štete kao pričinjavanja oštećenom pravno relevantnih bolova ili straha otišlo se u pravcu da je povreda prava ličnosti dovoljna za dosuđivanje naknade. Postavlja se pitanje da li su iscrpljene sve mogućnosti koje pruža subjektivna koncepcija ZOO/78 i da li je njeno radikalno napuštanje neophodno i opravdano. Iz prethodnih izlaganja proizilazi da je sudska praksa, prema ZOO/78, jednodušno restriktivno tumačila odredbe o naknadi nematerijalne štete zbog nastupanja pravno relevantnih fizičkih i psihičkih bolova i straha. Koji su razlozi za ovakav stav sudske prakse, nakon stupanja na snagu ZOO/78, odgovara ona sama u svojim zaključcima, stavovima i odlukama koji su poznati našoj pravničkoj javnosti. Međutim, postavlja se pitanje, kako je sudska praksa, koja je prije stupanja na snagu ZOO/78 krčila put svojim odlukama za usvojena zakonska riješenja, zašto je , poslije stupanja na snagu ZOO/78 stala i postala krajnje restriktivna odnosno konzervativna? Možda je stvorena dogma da je postignut maksimum i da je zakonodavac ugradio sva najbolja rješenja iz ove oblasti, pa nema više potrebe za pronalaženjem novih rješenja, već je samo potrebno i dovoljno dosljedno primijeniti zakon. Izlazi da su svi akteri ove rasprave u pravu i da se svaka opcija može uspješno braniti! Zanimljiva su kretanja u austrijskom pravu. Prema Austrijskom Opštem građanskom zakoniku iz 1811. u paragrafu 1325. priznato je pravo na bolninu, ali ne kao pravilo nego kao izuzetak i to samo za bolove izazvane tjelesnom povredom. Današnje austrijsko pravo ovu odredbu smatra zastarjelo, rigidnom i nedovoljnom. Zbog toga, dugi niz godina u austrijskoj pravnoj nauci, a osobito sudskoj praksi ona se ekstenzivno tumači, tako da je, zahvaljujući sudskoj praksi, i psihička trauma podvedena pod ovu odredbu. Znači da je sudska praksa pribjegla ekstenzivnom tumačenju i

---

[30] Klarić, P., op.cit., strana 33. i 34.

[31] Ibid., 35.

[32] Lampe, Rok., Uređenje prava ličnosti Zakonom o obligacionim odnosima, Zbornik referata , „Bilans tranzicije“, Maribor – Beograd, 2004., str. 361.

prevladala nedostatke odnosno nesavremenost zakonske norme. Zbog toga se navodi da je savremeno austrijsko pravo o naknadi neimovinske štete razvijeno izvan norme paragrafa 1325. ABGB sudsko pravo.[33] Ovakav razvoj sudske prakse u Austriji seže sve do dosuđivanja bolnine i u slučajevima kada ne postoje bolovi, jer ih povrijeđena osoba ne može osjetiti, te da u opravdanim slučajevima nije relevantan intenzitet bolova već se bolnina dosuđuje zbog uništenja ličnosti i obuhvata svaki vid tzv, umanjenja (povrede) ličnosti.[34] Ukoliko bi naučni razlozi opravdali zadržavanje subjektivne koncepcije nematerijalne štete ZOO/78 smatramo da bi se sudska praksa morala osloboditi u pravcu ekstenzivnijeg tumačenja vidova nematerijalne štete koji zaslužuju naknadu uvođenjem odredbe po uzoru na odredbe čl. 47. c) Naknada moralne štete, čl. 49.3. Povreda ličnih interesa i čl. 42. II Utvrđivanje štete, Švajcarskog zakona o obligacijama.[35]

Moramo zaključiti da u noveliranim zakonima o obligacionim odnosima na prostorima bivše Jugoslavije reforma nematerijalne štete i njene naknade ide u pravcu prihvatanja objektivne koncepcije nematerijalne štete.

Rezime

Zakonom o obligacionim odnosima afirmisana je novčana naknada za taksativno navedena lična dobra kada je njihova povreda izazvala nastanak bolova i straha odgovarajućeg intenziteta i trajanja. Time je promovisana objektivno-subjektivna koncepcija naknade nematerijalne štete. U novije vrijeme, u regionalnim okvirima, afirmiše se ideja objektivne koncepcije koja povredu ličnih prava smatra uslovom za dosudivanje novčane naknade nematerijalne štete i ne uslovljava dosudjivanje naknade nastankom bolova ili straha odgovarajućeg intenziteta i trajanja. Preispitivanje ovih rješenja i uporedjivanju sa rješenjima jugoslovenskog Zakona o obligacionim odnosima posvećen je ovaj rad.

---

[33] Aleksandra Vučić-Milovanović, profesor Pravnog fakulteta u Beču, Novine kod instituta naknade bolnine u austrijskom pravu, Zbornik radova-Aktuelna pitanja građanske kodifikacije-,Niš,2008, str.116.

[34] Ibid., str 117.

[35] Švajcarski zakon o obligacijama od 30. marta 1911. godine sa izmenama i dopunama izvršenim do 1. januara 1976. godine (čl. 1 do 551) sa predgovorom prof.dr Mihaila Konstantinovića, Institut za uporedno pravo, Serija E-Broj 57, „Savremena administracija“, Beograd, 1976. čl. 47.c) Naknada moralne štete.-Sudija može, vodeći računa o naročitim okolnostima, dosuditi licu koje nije pretrpelo telesnu povredu ili, u slučaju smrti nekog lica, članovima njegove porodice, pravičnu naknadu na ime moralne štete (zadovoljenje). Čl. 49.3. Povreda ličnih interesa.- Ko pretrpi štetu u svojim ličnim interesima može zahtevati, u slučaju krivice štetnika, naknadu štete,i, osim toga, sumu novca na ime naknade moralne štete kada je to opravdano s obzirom na naročitu težinu pretrpljene štete i krivice štetnika. Umesto ove naknade ili pored nje, sudija može dosuditi drugu vrstu obeštećenja. Čl. 42. II Utvrđivanje štete-Dokazivanje štete pada na onoga ko zahteva njenu naknadu. Kada visina štete ne može tačno da se utvrdi, određuje je sudija pravično s obzirom na redovan tok stvari i s obzirom na mere koje je preduzeo oštećeni.

Prof. dr *Ardian Nuni* i mr *Evgjeni Bashari,* LLM*

DELIKTNA ODGOVORNOST I DIREKTIVE EVROPSKE ZAJEDNICE

1. Uvod

Harmonizacija privatnog prava država članica EU je dugo vremena u samom centru aktivnosti Evropske Zajednice (EZ). Dok su u oblasti ugovornog prava ostvarena neka konkretna dostignuća, prvenstveno Zajednički referentni okvir (*Common Frame of Reference*) [1], o usklađivanju deliktnog prava i odgovarajućih propisa koji se tiču parničnog postupka je i dalje se raspravlja, i taj proces će verovatno trajati još dosta vremena.[2]

Razlike koje postoje u istorijskom, političkom, ekonomskom razvoju država članica, koje su dovele do razlika u njihovim pravnim sistemima, iako mnogi od njih spadaju u države sa građansko-pravnom tradicijom, igraju značajnu ulogu u pokušajima da usklade svoje deliktno pravo. Iako je osnovni princip odgovornosti za štete prouzrokovane namernim ili nemarnim nepropisnim ponašanjem zajednički kod svih, sama praktična primena tog principa je ono što se značajno razlikuje od jednog do drugog pravnog sistema.[3]

Napori za usklađivanjem se mogu podeliti u dve glavne kategorije, s jedne strane, oni od strane institucija EU, kroz donošenje zakonskih akata, uredbi, direktiva, preporuka, a sa druge strane, pokušaji od strane naučno-istraživačkih grupa, kao što je Evropska grupa za deliktno pravo[4] (*European Group on Tort Law)*, ili Studijska grupa za evropski građanski

---

* Originalni tekst je na engleskom jeziku.

[1] Marcos Farncisco i Sanchez Graells Albert, *Towards a European Tort Law? Damages Actions for Breach of the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?,* European Review of Private Law 3-2008 [469-488], Kluwer Law International BV, str. 472.

[2] Zajednički referentni okvir (*Common Frame of Reference*) je dugoročan projekat koji za cilj ima da se Evropskim zakonodavcima (Komisiji, Veću, i Evropskom parlamentu) obezbede „alati" u formi jednog priručnika koji bi se koristio za reviziju postojećih i pripremu budućih zakonskih akata u oblasti ugovornog prava. Ovaj priručnik bi sadržao fundamentalne principe ugovornog prava, definicije ključnih pojmova, kao i model-odredbe. Detaljnije informacije mogu se naći na

http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm, poslednji put stranica posećena 19. aprila 2010.

[3] *Id*. str. 471.

[4] Evropska grupa za deliktno pravo (*European Group of Tort Law*) izradila je nacrt zbornika pod naslovom „Principi evropskog deliktnog prava", slično zborniku „Principi evropskog ugovornog prava", koji je izradila Komisija za evropsko ugovorno pravo (*European Contract Law Commission),* poznatija kao „Lando Komisija" (*"Lando Commission")*, sa ciljem da prepozna zajedničke principe deliktnog prava na evropskom kontinentu, čime bi se postigao viši nivo harmonizacije na osnovu zajedničkog okvira koji predstavlja temelj za sve sagledane pravne sisteme kada je u pitanju pravo delikta. Takođe, nalazi iz ovih Principa već imaju kako vrednost za akademsku zajednicu, tako i praktičnu vrednost, jer će takođe pomoći akademskoj zajednici i praktičarima da steknu uvid u fundamentalna pitanja koja čine osnove prava delikta u konkretnoj državi. Principi se mogu pronaći na zvaničnoj internet stranici Evropske grupe za deliktno pravo: http://civil.udg.edu/tort/

zakonik (*Study Group on a European Civil Code)*, koje imaju za cilj usvajanje i primenu "mekog" evropskog deliktnog prava. Pored toga, razvijaju se neki projekti čiji fokus nije na definitivnom rešenju, već na načinu na koji će se podsticati dijalog između različitih evropskih pravnih kultura, kao što je npr. projekat "Zbornik *Ius Commune* za zajedničko evropsko pravo" (*Ius Commune Casebook for a Common Law Europe)*, ili projekat "Zajedničko jezgro evropskog privatnog prava" *(Common Core European Private Law)*[5].

Pored toga, projekti Instituta za evropsko deliktno pravo i Centra za evropsko privatno pravo koji imaju za cilj da analizira trenutno *acquis communautaire* kako bi se utvrdilo koji su njegovi stavovi prema deliktnom pravu i kako ga ono koncipira.[6]

Trenutno, *acquis communautaire* ne poseduje potpun i nezavisan, samostalan korpus deliktnog prava, kao što to obično postoji u nacionalnim pravnim sistemima, ali se izolovane odredbe mogu naći u različitim nivoima zajedničkog prava[7] i one se mogu kategorizovati kao primarni i sekundarni izvori prava Zajednice.

Odgovornost prema *primarnim izvorima zajedničkog prava* može biti: odgovornost same zajednice na osnovu člana 288 Ugovora o Evropskoj zajednici[8], što je "zatvoren" sistem, jer pravo zajednice uređuje kriterijume za utvrđivanje odgovornosti i posledice za nepridržavanje istoj; odgovornost njenih država članica, na način razvijen od strane Evropskog suda pravde (ESP) u predmetu "Frankovič", što čini "otvoren" sistem, gde sudska praksa na nivou Zajednice utvrđuje isključivo pretpostavke za odgovornost, a pravo država članica DOZP dopunjuje pravne lekove koji su na raspolaganju strankama.[9]

U međuvremenu, odgovornost po sekundarnom zajedničkom pravu rešena je u nekoliko uredbi[10], i direktiva, koje su u celosti ili delimično posvećene pitanjima delikta, ali zbog odvojenosti pojedinačnih odredbi i raznolikosti tema kojima se bave, teško je uočiti dosledan pristup.[11]

---

[5] Infantino Marta, *Making European Tort Law: The Game and Players*, Univerzitet u Trstu, Međunarodni univerzitetski koledž u Torinu, str. 3, dostupno na: http://ssrn.com/abstract =1452804, poslednji put stranica posećena 12. aprila 2010.

[6] Kellner Markus, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, str. 134.

[7] M. Wissink, *Overview, in EC Tort Law, mo.15/9 et seq*, in the Kellner Markus, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, str. 135.

[8] Član 288. UEU navodi da „Ugovorna odgovornost Zajednice određivaće se u skladu sa pravom koji se primenjuje na predmetni ugovor. U slučaju neugovorne odgovornosti, Zajednica će, u skladu sa opštim principima koji su zajednički za pravne sisteme država članica, nadoknaditi sve štete koje izazovu njene institucije, ili njeni službenici u obavljanju svojih dužnosti. Prethodni stav primenjuje se pod istim uslovima za štetu prouzrokovanu od strane ЕЦБ, ili njenih službenika u vršenju svojih dužnosti. Lična odgovornost službenika prema Zajednici utvrđivaće će se u skladu sa propisima datim u Pravilniku o radu, ili Uslovima zaposlenja koji za njih važe".

[9] *Id*.

[10] Uredba EK br. 864/2007 od 11. jula 2007. godine, „o nadležnom pravu za ugovorne obaveze" (Rim II), koja ima za cilj da razreši koliziju prava u situacijama kada postoje neugovorne obaveze u građanskim i trgovinskim stvarima, pri čemu njeno Poglavlje II specifično uređuje delikte, propisujući u Članu 4/1 da "*osim ako ovom Uredbom nije drugačije određeno, nadležno pravo koje se primenjuje na neugovornu obavezu koja je nastala iz delikta biće pravo države u kojoj je šteta nastala bez obzira na to u kojoj se državi štetni događaj desio i bez obzira na državu ili države u kojima su se osetile posredne posledice takvog događaja*".

[11] Kellner Markus, *Tort Law of the European Community?: A Plea for an overarching Pan-European Framework*, European Review of Private Law 2-2009[133-154], Kluwer Law International BV, at 136.

Zakonske mere koje se propisane u sekundarnom pravu Zajednice trpele su kritiku zbog „mekog“ pristupa u pokušaju da stvore zajedničko evropsko materijalno deliktno pravo, jer su, u najvećoj meri, pisane u formi direktiva. Direktive se smatraju za fleksibilne pravne akte, kao što su, na kraju krajeva, fleksibilna i nacionalna zakonodavstva država članica u odabiru načina za implementaciju direktiva, što je često mučan posao zbog tendencija nacionalnih zakonodavaca da ostavljaju tradicionalne karakteristike svojih pravnih sistema u svakom novodonesenom aktu.[12]

Pored toga, problemi nastaju i u vezi sa terminologijom koja se koristi u direktivama, što je, zbog nedostatka zajedničkog vokubulara i jezičkog standarda kojim je moguće objasniti različite pojmove okviru pravnih koncepta, pravila, u svetlu pojedinačnih nacionalnih pravnih konteksta, dovelo do različitog tumačenja, a time i do nejedinstvene primene odredbi.

Uprkos svim teškoćama u toku ovog tekućeg procesa uspostavljanja evropskog deliktnog prava, u nekim oblastima, kao što je odgovornost institucija EU, odgovornosti za proizvode, štete po životnu sredinu, odgovornosti po osiguranju motornih vozila, postignuto je određeno približavanje nacionalnih zakonodavstava, na šta će ovaj rad i usredsrediti. Daćemo jedna opšti pregled glavnih direktiva EU kojima se, direktno ili indirektno, regulišu neki aspekti deliktne odgovornosti, i o njime ćemo raspravljati, naglašavajući trenutnu situaciju, probleme u procesu implementacije, i na kraju dati određenja sopstvena viđenja.

2. Direktive Veća koje se tiču deliktnog prava

2.1. Direktiva o odgovornosti za neispravne proizvode[13]

Sa ciljem da se prevaziđu odstupanja, koja mogu da ugroze konkurenciju i utiču na kretanje robe u okviru zajedničkog tržišta, kao i s ciljem da se pruži bolja zaštita potrošačima u slučajevima štete izazvane neispravnim proizvodom na njihovom zemljištu ili imovini, Evropska ekonomska zajednica usvojila je 25. jula 1985. godine Direktivu Saveta o približavanju zakona, propisa i administrativnih odredbi država članica u vezi sa odgovornosti za neispravne proizvode (*Product Liability Direktiva* /PLD – ili Direktiva o odgovornosti za neispravne proizvode - DOZP)[14]. Takozvani kamen temeljac evropskog deliktnog prava predstavlja prvi pravni akt donesen od strane EEZ, sada EZ, na dugogodišnjem putu evropeizacije deliktnog prava država članica.

Direktiva se bavi slučajevima povrede lica, smrti ili štete na privatnoj imovini potrošača kojima je uzrok isključivo neispravnost nekog proizvoda. Dok za fizičke povrede lica, ili smrt lica, ne postoji ograničenje predviđeno u odredbama Direktive o visini odštete koju bi štetnik trebalo da plati, za imovinu postoji prag od 500 EUC a sama imovina mora da bude

---

[12] Infantino Marta, *Making European Tort Law: The Game and Players*, Univerzitet u Trstu, Međunarodni univerzitetski koledž u Torinu, str. 10, dostupno na: http://ssrn.com/abstract =1452804, poslednja poseta 12. 04. 2010. godine.

[13] Direktiva Veća 85/374/EEC, približavanju zakona, propisa i administrativnih odredbi država članica u vezi sa odgovornosti za neispravne proizvode, objavljena u Službenom glasniku O.J OJ L 210 od 07.08.1995, dostupno na adresi: <http://europa.eu/legislation_summaries/consumers/consumer_safety/l32012_en.htm>, poslednja poseta 23. 04. 2010.

[14] *Id.* Recital 1.

takvog tipa koji je obično namenjen za ličnu upotrebu ili potrošnju i da je korišćena od strane povređenog lica uglavnom za svoju ličnu upotrebu ili potrošnju.[15]

Duge rasprave su se vodile o tome da li DOZP predstavlja potpunu harmonizaciju zakona o odgovornosti za proizvode država članica, obavezuje iste da usklade svoje zakone u skladu sa zahtevima direktive, ili ona samo uspostavlja alternativni sistem zaštite potrošača kod odgovornosti za proizvode, uspostavljajući minimum standarda zaštite, time što će omogućiti nacionalnim zakonodavstvima da pruže bolju zaštitu potrošačima.

Na osnovu terminologije Direktive, može se misliti da se njom ne obezbeđuje puna harmonizacija nacionalnih zakona. U svojoj prvoj preambuli, DOZP navodi da: „što se tiče **približavanja** prava država članica...", što može dovesti do različitih tumačenja, s obzirom na razliku između termina približavanje u odnosu na harmonizaciju. Pored toga, postoji nekoliko opcionih odredbi koje Direktiva predviđa, dozvoljavajući zemljama članicama da ih ili primeni u nacionalnim zakonima, ili da ih odbije. Dakle, svaka država članica može odlučiti da dozvoli ili ne dozvoli odbranu proizvođača koja se tiče stanja naučnih i tehničkih znanja u vreme kada je proizvod stavio u promet, što je moglo da ga spreči da otkrije neispravnost.[16]

Pored toga, svaka država članica može odstupiti od načela neograničene odgovornosti nalažući ograničenje ukupne odgovornost proizvođača za štetu sa smrtnim ishodom ili ličnom povredom koja je proistekla od istog artikla sa istim nedostatkom, pod uslovom da je to ograničenje postavljeno u dovoljno visokom iznosu koji garantuje adekvatnu zaštitu potrošača i ispravno funkcionisanje zajedničkog tržišta, kao i da ograničenje ne bi trebalo da bude manje od 70milion EKU-a.[17]

Čak i član 13. DOZP podržava ideju o postojanju paralelnog sistema, navodeći da to neće uticati na prava koja povređeno lice može imati prema pravilima zakona o ugovornoj i neugovornoj odgovornosti, ili prema posebnom sistemu koji reguliše odgovornost koji je postojao u trenutku donošenja Direktive.

U pokušaju da reši raspravu o minimumu standarda, i dvostrukom sistemu zaštite potrošača kod odgovornosti za proizvode, Evropski sud pravde (ESP) je 2000. godine, u predmetu *Komisija protiv Francuske*[18] utvrdio da član 13. ne znači da države članice mogu da održavaju opšti sistem odgovornosti za proizvode koji bi se razlikovao od onog predviđenog Direktivom. ESP je podržao tumačenje Direktive kao instrumenta maksimalne harmonizacije, DOZP dopuštajući koegzistenciju različitih sistema za zaštitu potrošača od odgovornosti samo za neke vrste proizvoda „zasnovanih na drugim osnovama, kao što su krivica, ili garancija u pogledu latentnih nedostataka, ili u slučaju posebnih sistema koji regulišu odgovornost a odnose na pojedine vrste proizvoda.[19]

Ipak, Evropska komisija (u daljem tekstu: „Komisija") u svom trećem izveštaju o Direktivi i o odgovornosti za proizvode, na osnovu studije Lovelsa (Lovells), prihvatila je gledište da je perspektiva „ukupne harmonizacije" zakona o odgovornosti za proizvode „nije samo nerealna, već i nepotrebna s obzirom na ograničen uticaj (ako i postoji) koje bi njeno odsu-

---

[15] *Id*. Član 8.

[16] *Id*. Član 15/b.

[17] *Id*. Član 16.

[18] Fairgrieve Duncan i Howells Geraint, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report of the European Product Liability Directive*, The Modern Law Review (2007)70(6) 962-978, str. 965.

[19] *Id*.

stvo imati na unutrašnje tržište".[20] Dakle, stav Komisije o nerealnosti ukupne harmonizacije nekako je u suprotnosti sa Evropski sudom pravde (u daljem tekstu: ESP) koji zastupa maksimalnu harmonizaciju, nepostojanje paralelnog sistema, kao i to da standard zaštite koji direktiva daje nije minimalni standard, već standard koji bi trebalo slediti.

Što se tiče obaveza proizvođača, DOZP je zasnovana na principu stroge odgovornosti, što znači da će proizvođač biti odgovoran, bez krivice, ako je potrošač dokaže da je šteta uzrokovana nedostatkom u proizvodu. Teret dokazivanja je stavljen na potrošača, koji bi trebalo da dokaže štetu, nedostatak i uzročne veze između kvara i oštećenja.[21] Pošto se u odnosu proizvođač-potrošač ovaj potonji smatra za slabiju stranu, kojoj je potrebna zaštita, to što je teret dokazivanja stavljen na potrošača smatra se za nepravedan hendikep. Kao što Komisija navodi u svom trećem izveštaju, bilo je slučajeva da su sudovi u jednom broju država zaključivali postojanje krivice iz činjenice da je proizvod neispravan, što je zapravo preinačenje postupka dokazivanja, i takođe zahtevali od okrivljenog da iznese dokaze da nije kriv, bez obzira na neispravnost proizvoda.[22]

Pored toga, DOZP predviđa pojedinačnu i solidarnu odgovornost u slučaju kada su dva ili više lica odgovorni za istu štetu, što daje mogućnost oštećenom da tuži za naknadu štete oba lica, ili bilo koje od njih.[23]

Proizvođač je odgovoran ako je dokazan nedostatak, odnosno greška na proizvodu. Pojam „nedostatak" nije definisan u Direktivi, koja kaže da je „proizvod sa nedostatkom onda kada ne obezbeđuje bezbednost *koju korisnik s pravom očekuje"*.[24] Osim nekih okolnosti koje treba uzeti u obzir, nema jasne definicije o tome šta se podrazumeva pod ovim standardom. Ova situacija dala je povoda za različite interpretacije od strane nacionalnih sudova država članica, pri čemu je Velika Britanija uvela subjektivni kriterijum za „očekivanje potrošača", dok su EU institucije takvu vrstu testiranja proglasile za objektivan kriterijum.[25] Druge pravne instance usvojile su velikodušniji odnos prema podnosiocima zahteva za odštetu, kao na primer francuski sudovi koji primenjuju kriterijume odgovornosti profesionalno angažovanog lica koje je isporučilo neispravan proizvod, bez potrebe da se ustanovi tačno poreklo nedostatka proizvoda, niti postavljaju obavezu potrošaču da dokaže, što je za njega gotovo i nemoguće, da nema eksternih uzroka koji su odigrali ulogu u nedostatku na proizvodu.[26] Sličan pristup primenio je jedan sud u Italiji, a slična tendencija primećena je i u Austriji, gde je u jednom slučaju sud utvrdio da je proizvođač odgovoran za grešku u radu aparata za kafu, uprkos nemogućnosti da precizno utvrdi šta tačno na aparatu nije radilo kako treba.[27]

Odgovornost proizvođača može se umanjiti ili potpuno odbaciti, kada se, imajući u vidu sve okolnosti, dokaže da je šteta nastala kako usled nedostatka na proizvodu tako i krivicom

---

[20] Hibbert Mathew i Lenze Stefan, *Feature- European Commission's Third Report on the Product Liability Directive*, Lib02/D2MJH/2033797.1, dostupno na adresi: http://ca.linexlegal.com/CONTENT/685/40271.pdf, poslednja poseta 15. 04. 2010.

[21] Videti pod 12, član 4.

[22] Videti pod 19, član 4.

[23] Videti pod 12, član 5.

[24] *Id*. član 6.

[25] Predmet C-300/95, *Commission v United Kingdom (Komisija protiv Ujedinjenog Kraljevstva)*, 1997 E.C.R. 1-2649, kod Infantino Marta, *Making European Tort Law: The Game and Players*, Univerzitet u Trstu, Međunarodni univerzitetski koledž Torino, pod 10, dostupno na adresi: http://ssrn.com/abstract =1452804>, poslednja poseta 12.04. 2010.

[26] Videti pod 17, str. 969.

[27] *Id*.

oštećenog ili lica za koje je oštećeni odgovoran.[28] Ipak, proizvođač ne može ograničiti niti izuzeti sebe od odgovornosti ugovornim odredbama o izuzeću odgovornosti.[29]

Prema članu 9. DOZP, oštećeno lice može da zahteva naknadu samo za štete usled smrti ili fizičke povrede, kao i za imovinske štete, što ostavlja zahteve za nadoknadu nematerijalne štete u nadležnosti nacionalnih zakona.

Vremenski rok predviđen u DOZP kao krajnji rok za nadoknadu štete je 3 godine od dana kada tužilac sazna, ili je razumno da je morao saznati, da je da je šteta nastala, da postoji nedostatak na proizvodu, kao i podatak o identitetu proizvođača.[30]

2.2. Direktiva o opštoj bezbednosti proizvoda[31]

U situaciji kada horizontalna zakonodavstva država članica nametnu različite standarde za tržišne subjekte o načinu na koji se promoviše bezbednost proizvoda, a u okviru cilja Evropske komisije da se postigne bolja zaštita zdravlja i bezbednosti potrošača, ocenjeno je kao potrebno usvajanje Direktive o opštoj bezbednosti proizvoda (DOBP), koja će uneti opšte uslove bezbednosti proizvoda, obaveze proizvođačima i distributerima, brz sistem razmene informacija i preduzimanje mera na nivou Zajednice.[32]

Odredbe se primenjuju u skladu sa članom 2./A „na proizvode namenjene potrošačima i one koji će, pod razumno predvidivim uslovima, verovatno biti korišćeni od strane potrošača, čak i ako nisu njima namenjeni, a koji se isporučuju ili stavljaju na raspolaganje, uz naknadu ili bez nje, u sklopu komercijalne delatnosti, bez obzira da li su novi, polovni ili reparirani". Iako pojam „usluge" nije ušao u definiciju „proizvoda", opšte je prihvaćeno da predmeti koji se isporučuju ili stavljaju na raspolaganje u smislu pružanja usluga uz njihovu upotrebu, na primer, opreme za teretanu, kolica koja se koriste u supermarketima, potpadaju pod definiciju proizvoda.

Pored toga, iz opsega primene DOBP isključeni su proizvodi koji su namenjeni za profesionalnu upotrebu, uz uslov da ako ovi proizvodi naknadno budu premešteni na potrošačko tržište, moraju da zadovolje uslove o bezbednosti, zbog rizika kojima mogu izložiti potrošače, odnosno njihovo zdravlje i bezbednost.[33]

Proizvod će se smatrati kao bezbedan ako ispunjava uslove, koji su, u nedostatku pravila Zajednice, propisani u nacionalnim pravnim aktima koji regulišu bezbednost proizvoda o kojima je reč, kao i ako je proizvod u skladu sa specifičnim propisima nacionalnog zakonodavstva države članice na čijoj teritoriji se prodaje, u slučaju da su ti nacionalni propisi su u skladu sa članovima 28 i 30 Ugovora o EZ, i propisuju uslove o bezbednosti i zaštiti zdravlja koje proizvod mora da zadovolji.[34]

Osim toga, proizvod se smatra kao bezbedan ako je u skladu sa evropskim standardima, što procenjuje nadležni organ kao što propisuje član 4. DOBP, ili alternativno u skladu sa

---

[28] Videti pod 12, član 8/2.

[29] *Id*. član 12.

[30] *Id*. član 10.

[31] Direktiva Evropskog parlamenta i Veća 2001/95/EC, o opštoj bezbednosti proizvoda, objavljena u Službenom glasniku EU OJ, 15. 01. 2002. L11/4, dostupna na adresi:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0095:EN:NOT>, poslednja poseta 12. 04. 2010.

[32] *Id*. Deklamacija 4-5.

[33] *Id*. Deklamacija 10.

[34] *Id*. Član 3.

nacionalnim standardima koji preslikavaju relevantne evropske standarde, zatim sa preporukama Komisije kojima se postavljaju smernice za procenu bezbednosti proizvoda, kodeksima o bezbednosti proizvoda koji utvrđuju pravila dobre prakse koji su na snazi u pogledu vrste proizvoda o kome je reč, s trenutnim stanjem tehnološkog razvoja, kao i razumnim očekivanjima potrošača u pogledu bezbednosti.[35]

Režim bezbednosti koji predviđa DOBP omogućava nacionalnom telu za sprovođenje propisa da preduzme mere izrečene u njenim odredbama, među kojima je obaveza proizvođača da povuče proizvoda od tržišta i da ga uništiti.[36]

Ova mera bi trebalo da se koristi kao poslednje sredstvo, kada su radnje preduzete od strane proizvođača i distributera u ispunjavanju njihovih obaveza nezadovoljavajuće ili nedovoljne. Zbog značaja ove mere, troškova, finansijskih nefinansijskih, koje snose proizvođači i distributeri, ovakva odluka nadležnog organa treba da bude dobro obrazložena, a država članica treba da obavesti Komisiju o razlozima za nju, o čemu će, tokom procene da li je takva odluka u skladu sa zakonima Zajednice, Komisija obavestiti druge države članice.[37] Cela procedura za donošenje mera i njihovu implementaciju je ostavljena da bude regulisana na nacionalnom nivou.

Iako odredbe DOBP ne predviđaju izričito obavezu proizvođača i distributera u slučaju kršenja propisa, ili povreda prouzrokovanih zbog nedostatka bezbednosnih uslova, može se zaključiti da se odštetni zahtevi u sklopu deliktnog prava mogu podneti na osnovu DOBP. S jedne strane, postoje proizvođači i distributeri, koji mogu da podnesu zahteve za nadoknadu pred domaćim sudovima[38], u slučajevima kada su nacionalne vlasti prekršile odredbe DOBP. To može biti slučaj kada nacionalne vlasti donesu neku meru koja nije u skladu sa principom predostrožnosti[39], naročito kada je takva mera od velike važnosti, kao što je slučaj kod opoziva i uništenja proizvoda, a proizvođači tuže za naknadu štete nastale tim činom. Takva situacija nije regulisana u DOBP, pa ostaje na nacionalnim sudovima da upravljaju takvim postupcima i propisuju odštete u skladu sa nacionalnim propisima, kao i a nacionalnim instrumentima izvršenja.

Tako, britanska uredba kojom se sprovodi DOBP predviđa pravo na nadoknadu za gubitak ili štetu pretrpljenu usled nezakonite suspenzije, povlačenja, ili opoziva, gde proizvod zapravo nije bio opasan proizvod[40]. Zakonske odredbe o odgovornosti za nacionalne vlasti sročene su veoma široko, pri čemu uključuju i odgovornost za bilo kakav gubitak ili štetu nastale zbog odluke o suspenzije ili opoziva bez dokazivanja krivice nacionalnih vlasti.[41]

S druge strane, postoji problem zahteva potrošača u slučajevima kada je proizvod ne nije u skladu sa zahtevima DOBP. Iako se u članu 17. navodi da „Ova Direktiva ne utiče na prime-

---

[35] *Id*. Član 3/2.

[36] *Id*.. Član 8/1/f(ii).

[37] *Id*. član 11.

[38] Na osnovu člana 18./2 DOBP, zahteva se od država članica da se postaraju da svaka mera koju preduzmu nadležni organi u vezi sa plasmanom proizvoda na tržište ili u vezi sa naredbom da se proizvod povuče ili suspenduje sa tržište može da se ospori pred nadležnim sudom.

[39] Prema članu 8./2 DOBP „*…. Kada nadležni organi država članica preduzmu mere poput onih navedenih u stavu 1, a naročito oni navedeni u tačkama od (d) do (f), to rade u skladu sa Ugovorom, a pogotovo članovima 28. i 30. istog, na takav način da mere budu proporcionalne ozbiljnosti rizika, uzimajući u obzir princip predostrožnosti"*.

[40] Duncan Fairgrieve i Geraint Howlles, *General Product Safety – Revolution Through Reform?*, Modern Law Review, Zbirka 69, Br. 1, str. 59-69, januar 2006, str. 67.

[41] *Id*. str. 68.

nu Direktive 85/374/EEC", i dalje može nastati problem u slučajevima kada proizvođači i distributeri imaju mogućnosti da iskoriste odredbe DOBP kao odbranu kod tužbi podnetih od strane potrošača u vezi sa odgovornošću za proizvod. Što se tiče člana 7./d Direktive 85/374/ EES, proizvođač može da se u svoju odbranu pozove na taj član i ustvrdi da je proizvod u skladu sa propisanim standardima, i da dokaže da ne postoji odgovornost za neispravan proizvod. Šta će biti shvaćeno kao propisani standardi, i da li će se standardi DOBP smatrati da spadaju u ovaj pojam bilo je predmet diskusije i različitih pristupa sa strane nacionalnih sudova.

Tako je jedan komentator primetio: „*Takva odbrana bila bi na raspolaganju proizvođačima koji su u potpunosti postupali u skladu sa svim važećim propisima koji regulišu bezbedan plasman svojih proizvoda na tržište i koji bi zastupali viđenje da ako su konkretni bezbednosni aspekti njihovog proizvoda uređeni u skladu sa propisima o bezbednosti, takav proizvod se ne može smatrati 'neispravnim'.... U predmetu koji se tiče odgovornosti za proizvod, sud po ovoj Direktivi ne može nametnuti proizvođaču standard bezbednosti koji je viši nego što je propisano važećim propisima o bezbednosti*".[42]

Uprkos ovome, države članice su usvojile različite pristupe prema odbrani proizvođača „u skladu sa regulatornim pravilima". U implementacionim odredbama u francuskom pravu unet je dodatni tekst kojim se naglašava da je moguće da nedostatak na proizvodu postoji čak i kada je relevantni proizvod u skladu sa standardima bezbednosti.[43] U Velikoj Britaniji, u predmetu *Tesco Stores Ltd vs. Pollard,* Apelacioni sud preinačio je odluku okružnog suda kojom je ovaj presudio da su proizvođač, i lanac prodavnica koji je brendirao proizvod pod svojim imenom, odgovorni za telesnu povredu deteta od 13 meseci nastalu od flašice deterdženta, pošto je dete bilo u mogućnosti da skine bezbednosni poklopac sa flašice. Osnovni sud je primenio Britanski standard, obrazlažući da javnost ima pravo da očekuje da je bezbednosni poklopac teže otvoriti nego običan poklopac na odvrtanje.[44] S druge strane, u Nemačkoj je Okružni sud u Dizeldorfu zaključio da bi kršenje standarda bezbednosti moglo da predstavlja uverljiv dokaz o neispravnosti proizvoda.

2.3. Direktive o osiguranju motornih vozila[45]

Evropska komisija donela je nekoliko direktiva u oblasti motornih vozila, sa ciljem da se stvori ceo korpus pravnih akata koji će obezbediti bolju zaštitu i nadoknadu za lične i imo-

---

[42] M. Hibbert i S. Lenze, *European Commission's third report on the Product Liability Directive' (2006) European Product Liability Review 6*, kod D. Fairgrieve and G. Howells, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report of the European Product Liability Directive*, The Modern Law Review (2007)70(6) 962-978, str. 972.

[43] Videti pod 17, str. 972.

[44] *Id.* str. 973.

[45] Postoji pet direktiva koje je donela Evropska zajednica na polju osiguranja motornih vozila, Direktiva 72/166/ EEC, objavljena u Službenom glasniku EU OJ L 103 od 02.05.1972. (Prva direktiva); Direktiva 84/5/ EEC, objavljena u Službenom glasniku EU OJ L 008 od 11.01.1984. (Druga direktiva); Direktiva 90/232/ EEC, objavljena u Službenom glasniku EU OJ L 129 od 19.05.1990. (Treća direktiva); Direktiva 2000/26/ EC, objavljena u Službenom glasniku EU OJ L 181 od 20.07.2000. (Četvrta direktiva); Direktiva 2005/14/EC Evropskog parlamenta i Veća od 11 maja 2005. kojom se izmenjuju i dopunjuju Direktive Veća 72/166/EEC, 84/5/EEC, 88/357/EEC, 90/232/EEC i Direktiva 2000/26/EC Evropskog parlamenta i Veća o osiguranju od građanske odgovornosti u pogledu upotrebe motornih vozila (Peta direktiva o osiguranju motornih vozila), dostupno na adresi:

http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, poslednja poseta 17. 04. 2010.

vinske štete za oštećene u nezgodama u kojima učestvuju motorna vozila, i koja se dogode u njihovim državama članicama, ili teritoriji bilo koje druge države članice.[46]

S prve tri direktive EK je uspela da pripremi neophodni okvir za jedinstveno tržište time što je uvela obavezu da sva motorna vozila u zajednici moraju biti osigurana od odgovornosti trećih lica (obavezno osiguranje motornih vozila), kao i time što je utvrdila minimalni fiksni iznos koji takvo osiguranje pokriva; u celoj Zajednici uveden je jedinstven sertifikat o osiguranju, koji garantuje slobodu kretanja motornih vozila, čime je prestala potreba graničnih provera posedovanja osiguranja. Oštećenima u nezgodama (uključujući i one koje su izazvala nepoznata ili neosigurana vozila) obezbeđena je bolja zaštita kroz osnivanje u svim državama članicama državnih tela koja su odgovorna za odštete.[47]

Pored toga, u četvrtoj direktivi, EK je propisala da obavezno osiguranje pokriva sve putnike u vozilu (uključujući i porodice vozača) pokriva; mehanizam za brzo rešavanje zahteva kada se nesreća dogodi van države članice gde je boravište oštećenog („oštećeni u poseti"), kojim se nadoknađuju lokalni oštećeni u nezgodama u kojima učestvuju vozila iz druge države članice; oštećeni u nezgodama imaju direktno pravo na tužbu protiv osiguravajućeg društva koje pokriva odgovorno lice od građanske odgovornosti; u cilju olakšavanja kontakta oštećenih sa osiguravajućim društvima, osiguravači su u obavezi da u svakoj od država članica imenuje predstavnika, koji će biti odgovoran za rukovanje i naknadu potraživanja koja nastanu iz nezgode.

Peta direktiva[48], menja jedan deo prethodne direktive i ima za cilj pre svega da modernizuje i poboljša zaštitu oštećenih obaveznim osiguranjem, da poveća konvergenciju u pogledu tumačenja i primene direktiva od strane država članica, kao i da pruži rešenja za najčešće probleme. Pored toga, prag obaveznih osiguranja je povećan na 1.000.000 evra, po oštećenom, u slučaju lične štete, ili 5.000.000 evra po odštetnom zahtevu, bez obzira na broj oštećenih, kao i 1.000.000 evra po zahtevu, u slučaju imovinskih šteta, bez obzira na broj žrtava, uz obavezno revidiranje ovih iznosa svakih pet godina, kako bi se ovi iznosi uskladili sa promenama Evropskog indeksa potrošačkih cena.[49]

U posebnu kategoriju smešteni su pešaci i biciklisti, jer osiguranje motornih vozila pokriva lične štete po njih, kao i štete po druge nemotorizovane korisnike puteva.[50] Obezbeđeno je i pravo na pristup informacijama oštećenih, pod uslovom da, formiranjem informativnih centara koji će biti u obavezi da bilo kom licu, koje je pretrelo povredu ili štetu na imovini, pruži informacije koje su potrebne da bi bili u mogućnosti da zatraže naknadu štete zbog gubitka imovine ili zadobijenih povreda, odnosno konkretno registarsku tablicu i podatke o polisi osiguranja vozila koje je učestvovalo u nezgodi.[51]

---

[46] *Summary of the European Legislation, in Motor vehicles liability insurance***,** dostupno na adresi: http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, poslednja poseta 17. 04. 2010.

[47] *Remarks on the motor insurance,* dostupno na adresi: www.tsrsb.org.tr/NR/rdonlyres/.../MOTORINSURANCE.doc>, poslednja poseta 18. 04. 2010.

[48] *Id.*

[49] Videti pod 44, Deklamacija 10 i član 1. Pete direktive o osiguranju motornih vozila.

[50] *Id*. Član 1/a.

[51] *Summary of the European Legislation, in Motor vehicles liability insurance***,** dostupno na adresi: http://europa.eu/legislation_summaries/internal_market/single_market_for_goods/motor_vehicles/interactions_industry_policies/l22028_en.htm>, poslednja poseta 18. 04. 2010.

2.4. Direktiva o naknadama za žrtve krivičnih dela[52]

U nameri da ostvari jedan od svojih glavnih ciljeva, što je slobodno kretanje ljudi i usluga, u skladu sa odlukom ESP u predmetu *Cowan,* prema kome bi zaštita lica od opasnosti na teritoriji države članice trebalo da bude ista ona koja se pruža državljanima i licima koja borave u toj državi članici, što je neophodni preduslov za slobodu kretanja, Evropska Zajednica usvojila je Direktivu o naknadama za žrtve krivičnih dela (*DCCV* - DOKD)[53].

DOKD uspostavlja sistem saradnje između država članica kako bi se pomoglo žrtvama krivičnih dela u postupku traženja odštete za povrede bez obzira na to gde u EZ je krivično delo izvršeno. Sistem bi trebalo da omogući lak pristup od samog početka postupka, pa sve do razmatranja odštetnog zahteva i dodeljivanja naknade. Svaka država članica bi trebalo da imenuje telo za pružanje pomoći, koje će pomagati žrtvama u vezi sa svim potrebnim informacijama, formularima, propratnom dokumentacijom, opštim smernicama, kao i da ceo predmet prosledi organu države članice u kojoj je počinjen zločin koji je nadležan za odlučivanje[54]. Nadležni organ, ako smatra potrebnim, može da sasluša podnosioca zahteva, u skladu sa zakonskim propisima države članice, u saradnji sa telom za pružanje pomoći i na dobrovoljnoj bazi, bez mogućnosti nadležnog organa da vrši mere prinude prema podnosiocu odštetnog zahteva.[55]

S obzirom da iznos naknade često neće biti moguće uzeti od počinioca, usled nedostatka potrebnih mera za izvršenje presude o odšteti, ili zbog nemogućnosti da se vinovnik identifikuje i goni, odšteta se isplaćuje od strane nadležnog organa države članice.[56] Pravila o mogućnostima dobijanja odštete važiće u skladu sa propisima vezanih za programe na naknadu, ali su sve države članice u obavezi njihova nacionalna pravila omogućavaju programe za naknadu koji su pošteni i dovoljni da zadovolje potrebe.[57]

DOKD je uspostavila minimum standarda zaštite i nadoknade za žrtve krivičnih dela, pri čemu je omogućeno državama članicama da uvede ili održe povoljnije odredbe za korist žrtve ili bilo koje druge osobe pogođene krivičnim delom. [58]

2.5. Direktiva o odgovornosti za životnu sredinu [59]

Direktiva o odgovornosti za životnu sredinu (*ELD* - DOŽD) uspostavlja zajednički okvir za odgovornost sa ciljem da spreči i otkloni štetu koju mogu trpeti životinje, biljke, prirodna staništa i vodni resursi, kao i oštećenja koja utiču na zemljište. Program odgovornosti

---

[52] Direktiva Veća 2004/80/EC od 29. aprila 2004. godine, u vezi sa naknadom za žtrve krivičnih dela, objavljena u Službenom glasniku EU *OJ L 261, 6.8.2004*, str. 15–1*8*, dostupno na: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0080:EN:NOT, poslednja poseta 17. 04. 2010.

[53] *Id*. Deklamacija 1 i 2.

[54] *Id*. Član 4-5.

[55] *Id*. Član 9.

[56] *Id*. Član 2.

[57] *Id*. Član 12.

[58] *Id*. Član 17/a.

[59] Direktiva Evropskog parlamenta i Veća 2004/35/EU, o zakonitosti postupanja u životnoj sredini u pogledu sprečavanja i ispravljanja šteta po životnu sredinu, objavljeno u Službenom glasnik OJ L 143 od 30.4.2004, dostupno na adresi: http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm>, poslednja poseta 15. 04. 2010.

se odnosi na neke navedene profesionalne aktivnosti i na druge aktivnosti u slučajevima kada je vršilac snosi krivicu, ili je delo izvršio iz nehata.[60]

DOŽD predviđa dva programa odgovornosti. U okviru prvog programa, odgovornost se odnosi na opasne ili potencijalno opasne profesionalne aktivnosti navedene u Aneksu III, zbog kojih vršilac može biti pozvan na odgovornost, čak i ako ne snosi krivicu za događaj. Drugi program odgovornosti se primenjuje na sve profesionalne aktivnosti, osim onih navedenih u Aneksu III Direktive, ali samo tamo gde postoji šteta, ili neposredna opasnost od štete prema prirodnim biljnim i životinjskim vrstama ili prema prirodnom staništu koga štiti zakonodavstvo Zajednice, i prema tom programu, vršilac je za štete odgovoran samo ako je događaj njegova krivica, ili je urađen iz nehata.[61]

Osnovni princip Direktive je da „zagađivač plaća", prema kome vršilac aktivnosti čija je delatnost prouzrokovala ekološku štetu ili neposrednu opasnost od štete je taj koji je finansijski odgovoran, kako bi se vršioci takvih aktivnosti podstakli da usvoje mere i razvije praksu kojim bi se takvi rizici sveli na najmanju moguću meru.[62]

Osim nadležnih organa u državama članicama, koje treba da preduzmu odgovarajuće mere za sprečavanje ili otklanjanje štete, ili neposredne opasnosti od štete, Direktiva daje mogućnost i fizičkim i pravnim licima, koja imaju dovoljan interes u postupku odlučivanja o zaštiti životne sredine koje se odnosi na naknadu štete, ili alternativno, koja su pogođena ili mogu biti pogođena štetom, i koja tvrde da im je neko pravo ugroženo, kada to upravni propisi država članica to zahtevaju, da postavljaju zahteve pred nadležnim organima da preduzmu odgovarajuće mere. Pored toga, imaju pravo na pristup sudu ili drugom nezavisnom i nepristrasnom javnom organu nadležnom da odlučuje o aktima, odlukama, ili propustima nadležnog organa da deluje.[63]

Osim od mogućnosti da zatraži od nadležnih organa da reaguju u slučaju štete ili neposredne opasnosti od štete, nijedna od odredbi ne utvrđuje pravo fizičkih ili pravnih lica da zahtevaju naknade za lične ili imovinske štete. Mnogo toga ostaje nacionalnim zakonodavstvima i sudova da odlučuju skladu sa svojim materijalnim i proceduralnim propisima.

2.6. Direktiva o nepoštenim trgovinskim praksama[64]

Direktiva o nepoštenim poslovnim praksama (DUCP – DNPP), iako sama po sebi ne predstavlja „Direktiva o deliktima, i sama navodi da se ograničava na poslovnu praksu između privrednika i potrošača, neke od država članica odabrale da je sprovedu, delimično kao varijaciju svojih pravila o deliktnoj odgovornosti, a iznad svega ona je važna jer stvara panevropsku platformu za rešavanje tzv. „ekonomskih delikata".[65]

---

[60] *Summaries of the EU Legislation on Environmental Liability Directive*, dostupno na adresi: http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm, poslednja poseta 19. 04. 2010.

[61] *Id*.

[62] Videti pod 58, kod Deklamacije 2.

[63] *Id*. Član 12.

[64] Direktiva Evropskog parlamenta i Veća 2005/29/EC, Direktiva o nepoštenim trgovinskim praksama (*The Unfair Commercial Practices Directive*), objavljena u Službenom glasniku - *O.J L149/22 - L149/39*, dostupna na adresi:
http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>, poslednja poseta 17. 04. 2010.

[65] W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (urednik), European Private Law Beyond the Common Frame of Reference- Essays in Honour of Reinhard Zimmermann, Europa Law Publishing 2008, str.133-149, pod 8. dostupno na adresi http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152788>, poslednja poseta 23. 04. 2010.

Glavni cilj DNPP, imajući u vidu ciljeve Zajednice za ukidanje bilo kakvih prepreka za slobodno kretanje dobara, usluga i ljudi, jeste usklađivanje zakona, propisa, upravnih postupaka zemalja članica u oblasti nepoštenih trgovinskih praksi kako bi se bolje zaštitili ekonomski interesi potrošača.[66] Za nepoštene trgovačke prakse smatraju se sve one prakse koje dovode u zabludu ili koje su agresivno osmišljene, što je definicija od strane same DNPP.

U procesu procene da li će se neka praksa smatrati za nepoštenu ili ne, polazi se od prosečnog potrošača, koji je prilično dobro informisan i razumno je pažljiv i oprezan, uzimajući u obzir sve socijalne, kulturne i jezičke faktore. Pored toga, za pojedine grupe potrošača, koji su podložni nepoštenoj praksi, tojest proizvodu koji se njom promoviše, usled svoje mentalne ili fizičke bolesti, starosti ili lakovernosti, i to na način koji bi trebalo da trgovac može razumno očekivati, reper za procenu je zamišljeni prosečan član takve grupe potrošača.[67]

Da bi se postigao glavni cilj DNPP, što je zaštita ekonomskih interesa potrošača, države članice obezbeđuju neophodne pravne lekove za lica i organizacije, koje imaju legitimni interes da pokrenu postupak protiv nepoštene trgovinske prakse, bilo pred sudom ili pred upravnim organom, koji su nadležni da odlučuju o žalbama ili nadležni za pokretanje odgovarajućeg pravnog postupka. Nacionalni sudovi ili upravni organi trebalo bi da imaju mogućnost da od trgovaca zahtevaju dokaze o tačnosti konkretnih tvrdnji koje su iznose, kao i da primene efikasne, proporcionalne i destimulativne kazne za kršenje odredbi ove Direktive[68].

Deliktna odgovornost po direktivama EZ je u ovom trenutku otvoreno pitanje koje će zahtevati još intervencija u cilju postizanja kompletnog korpusa zakonskih akata, koji će biti u stanju da prevaziđu razlike u nacionalnim zakonima, sa krajnjim ciljem – harmonizacijom na evropskom nivou deliktnog prava država članica.

Ovaj opšti pregled glavnih postojećih direktiva u ovoj oblasti je pokazao da je deo pitanja koja se odnose na deliktnu odgovornost ostavljen u nadležnost nacionalnim pravnim sistemima i njihovim sudovima. Pored toga, u procesu implementacije direktiva, države članice zauzimaju stavove koji su više u skladu sa svojim pravnim tradicijama, a ponekad nerado menjaju standarde koje su prethodno prihvatile.

Čak i kod Direktive o pouzdanosti proizvoda, koja je kamen temeljac cele materije, koja se neposredno bavi pitanjem odgovornosti u slučaju delikta, i predstavlja prvu inicijativu u procesu harmonizacije, u ovom trenutku postoje problemi u jednoobraznoj primeni njenih odredbi.

Dakle, problemi su nastali bez obzira da li, na osnovu jezičkog tumačenja njenih odredbi, Direktiva ima za cilj potpuno usklađivanje, ili samo približavanje nacionalnih zakonodavstava u oblasti odgovornosti za proizvod, ili šta će se razumeti pod izrazom „nedostatak", kao da li će se princip stroge odgovornosti primenjivati i u slučajevima kada proizvođač dokaže, u skladu sa odredbama o njegovom pravu na odgovor, da je postupao u skladu sa svim regulatornim propisima, ili da je tehnologija u vreme kada proizvod plasiran na tržište bila takva da nije bilo moguće da se predvidi nedostatak proizvoda.

Pored toga, DOZP postavlja pitanja o tome šta će biti standard zaštite potrošača, kada prema nacionalnim zakonima imaju pravo na bolju zaštitu, da li bi trebalo da postoji dvostru-

---

[66] W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (urednik), *European Private Law Beyond the Common Frame of Reference- Essays in Honour of Reinhard Zimmermann*, Europa Law Publishing 2008, str. 133-149, pod 8. Dostupno na adresi: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152788, poslednja poseta 23. 04. 2010.

[67] *Id*. Član 5.

[68] *Id*. Deklamacija 21-22.

ki standard, ili samo standard koji propisuju njene odredbe. Komisija i Evropski sud pravde su zauzeli različite stavove, Komisija u svom trećem kontrolnom izveštaju ističe da je „potpuna harmonizacija nerealna...“, a Sud je u svojoj sudskoj praksi je utvrdio da Direktiva predstavlja potpunu harmonizaciju, i da postoji samo jedan pristup pitanju usaglašenosti sa regulatornim pravilima. Dok neki od njih, u slučajevima odgovornosti za proizvod, prihvataju odbranu proizvođača da je postupao u skladu sa zahtevima koji se tiču bezbednosti proizvoda, drugi primenjuju potpuno drugi pristup, smatrajući da će se proizvod može smatrati za neispravan, bez obzira da li je u skladu ili nije sa regulatornim standardima, otkuda proizilazi i proizvođačeva odgovornost za štetu.

Direktiva o osiguranju motornih vozila uspostavila je neophodni zakonski okvir na evropskom nivou kako bi se olakšala dobijanje naknada za povrede koje trpe oštećeni u saobraćajnim nezgodama, gde god da se nezgoda dogodi na teritoriji država članica. To je sistem koji je poboljšavaju tokom godina, sa celih pet direktiva, kroz ukidanje graničnih provera posedovanja polise osiguranja, kroz uspostavljanje državnih tela za isplatu odšteta u svim državama članicama, obavezu osiguravača da imenuju stalnog predstavnika u svakoj državi članici koji je dužan da pruža pomoć oštećenima u procesu traženja naknade, kao i kroz povećanje praga za obavezno osiguranje za lične povrede ili materijalne imovinske štete. Iako je primena odredbi, kao i odlučivanje po predmetima ostavljeno nadležnim nacionalnim organima, odgovarajuća harmonizacija i jednoobrazni sistem zaštite uspostavljeni su na nivou zajednice.

U istoj perspektivi nalazi se mogućnost da žrtve zločina, gde god se na teritoriji država članica nalazili, imaju pravo na istu zaštitu kao i rezidenti i državljani date države, i mogu da zahtevaju naknadu štete za nastale lične povrede. Od država članica se zahteva da uspostave nadležne centre za pomoć, koji su u mogućnosti da obezbede žrtvama krivičnih dela sve neophodne informacije, od pokretanja postupka, do odluke. Međutim, standardizovan program naknada ne postoji, što postupak ostavlja u nadležnost državnih organi, koji, pored toga, imaju pravo da primene sopstveni sistem nadoknade onda kada je to povoljnije za oštećenog ili drugo lice pogođenom krivičnim delom.

Bibliografija

I. Direktive Evropskog parlamenta i Veća

1. Direktiva Veća 85/374/EEC, o približavanju zakona, propisa i administrativnih odredbi država članica u vezi sa odgovornosti za neispravne proizvode, objavljena u Službenom glasniku EU *O.J OJ L 210* od 07.08.1995.

2. Direktiva Evropskog parlamenta i Veća 2001/95/EC, o opštoj bezbednosti proizvoda**,** objavljena u Službenom glasniku EU OJ L11/4 15. 01. 2002.

3. Direktiva 72/166/ EEC, objavljena u Službenom glasniku O. J L 103 02.05.1972 (Prva direktiva); Direktiva 84/5/ EEC objavljena u Službenom glasniku OJ L 008 11.01.1984 (Druga direktiva); Direktiva 90/232/ EEC objavljena u Službenom glasniku OJ L 129 19.05.1990 (Treća direktiva); Direktiva 2000/26/ EC objavljena u Službenom glasniku OJ L 181 20.07.2000 (Četvrta direktiva); Direktiva 2005/14/EC Evropskog parlamenta i Veća 11. 05. 2005, kojom se izmenjuje i DOZP dopunjuje Direktive Veća 72/166/EEC, 84/5/EEC, 88/357/ EEC, 90/232/EEC i Direktiva 2000/26/EC Evropskog parlamenta i Veća u pogledu osiguranja od građanske odgovornosti u vezi sa upotrebom motornih vozila (Peta direktiva o osiguranju motornih vozila)

4. Direktiva 2004/80/EC Evropskog parlamenta i Veća, u vezi sa odštetom žrtvama krivičnih dela, objavljena u Službenom glasniku *OJ L 261, 6.8.2004, str. 15–18.*

5. Direktiva Evropskog parlamenta i Veća 2004/35/EU, o zakonitosti postupanja u životnoj sredini u pogledu sprečavanja i ispravljanja šteta po životnu sredinu, objavljeno u Službenom glasnik OJ L 143 od 30.4.2004

6. Direktiva Evropskog parlamenta i Veća 2005/29/EC, Direktiva o nepoštenim trgovinskim praksama, objavljena u Službenom glasniku - O.J L149/22 - L149/39

II. Pravni članci

1. W.H. van. Boom, *European Tort Law, An integrated or compartmentalized approach?*, Antoni Vaquer (urednik), *European Private Law Beyond the Common Frame Reference- Essays in Honour Reinhard Zimmermann*, Europa Law Publishing 2008, str. 133-149.
2. Fairgrieve Duncan i Howlles Geraint, *General Product Safety- a Revolution Through Reform?*, Modern Law Review, Vol. 69, No. 1, pp. 59-69, January 2006, at 67.
3. Marta Infantino, *Making European Tort Law: The Game and Players*, Univerzitet u Trstu, Međunarodni univerzitetski koledž Torino.
4. Mathew Hibbert and Stefan Lenze, *Feature- European Commission's Third Report on the Product Liability Directive*, Lib02/D2MJH/2033797.1.
5. Duncan Fairgrieve, Geraint Howells, *Rethinking Product Liability: A Missing Element in the European Commission's Third Report the European Product Liability Directive*, The Modern Law Review (2007)70(6), str. 962-978.
6. Markus Kellner, *Tort Law the European Community?: A Plea for an overarching Pan-European Framework*, European Review Private Law 2-2009[133-154], Kluwer Law International BV, str. 136.
7. Farncisco Marcos, Albert Sanchez Graells, *Towards a European Tort Law? Damages Actions for Breach the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?,* European Review Private Law 3-2008 [469-488], Kluwer Law International BV, at 472.

Dr *Miodrag V. Orlić*,* profesor Univerziteta

SUBJEKTIVNA DELIKTNA ODGOVORNOST U SRPSKOM PRAVU

(Razvoj i perspektive)

I Deo. Opšte napomene o razvoju srpskog obligacionog prava

A. Uvod

1. Na raskršću pravnih uticaja po završetku Drugog svetskog rata, posle neuspelih pokušaja revizije srpskog Građanskog zakonika[1] u drugoj polovini devetnaestog[2] i u prvim godinama dvadesetog veka[3], kao i razočarenja koje je za sobom ostavila Predosnova Građanskog

---

* Originalni tekst je na lokalnom jeziku.

[1] Srpski Građanski zakonik donesen je 25. marta 1844. godine i bio je na snazi više od sto godina. Posle prvih pokušaja da se nacrt pripremi po ugledu na Francuski Građanski zakonik, koji nisu urodili plodom, rad na Zakoniku preuzeo je Jovan Hadžić, doktor prava Peštanskog univerziteta koji je nacrt izradio sledeći u značajnoj meri austrijsko pravo. Srpski Građanski zakonik predstavljao je većim delom skraćenu verziju austrijskog Građanskog zakonika iz 1811. godine (u oblasti Stvarnog i Obligacionog prava) dok se u Porodičnom i Naslednom pravu oslanjao na običajno pravo koje je do tada važilo u Srbiji. Videti podrobnije: Istorija nastajanja građanskog zakonodavstva u Srbiji, (u daljem tekstu: Istorija) u knjizi: Rad na izradi Građanskog zakonika Republike Srbije I, Beograd, novembar 2007, str. 31 i sl.

[2] Misao da bi bilo poželjno izvršiti temeljitu reformu Građanskog zakonika počela je da sazreva u drugoj polovini devetnaestog veka. Ministar pravde (S. Veljković) pokrenuo je inicijativu za rad na reviziji Zakonika i poverio ga Nikoli Krstiću sudiji Kasacionog suda. Inicijativa je ostala bez rezultata, jer se Državni savet izjasnio protiv iole zamašnije reforme, predlažući samo modifikacije osnovnog teksta u skladu sa do tada učinjenim izmenama, dopunama i objašnjenjima.

Uporediti: Istorija, str. 53-54.

[3] Novu inicijativu za reformu Građanskog zakonika pokrenuo je na početku dvadesetog veka Dragoljub Aranđelović, profesor Beogradskog Pravnog fakulteta. Polazna tačka u njegovom razmišljanju bila je, da je promena Građanskog zakonika neophodna zbog njegovih nedostataka i nezadovoljavajućeg kvaliteta. U daljim razmatranjima Aranđelović je najpre isključio mogućnost da se u Srbiji pristupi izradi jednog originalnog Zakonika, nego se opredelio za ugledanje na neki od evropskih građanskih zakonika, koji bi poslužili kao uzor pri izradi novog Zakonika. Pošto je analizovao vrline i slabosti francuskog, nemačkog, opšteg imovinskog Zakonika za Crnu Goru i austrijskog Građanskog zakonika, on se opredelio za ovaj potonji. Po njegovom mišljenju, tako bi se sačuvao kontinuitet jer bi se naš pravni život kretao po istom putu kojim se kretao od 1844. godine samo što bi sada taj put bio ravan i bez prepreka koje su bile posledica jednog rđavog i skraćenog pravca. Kako ova inicijative nije imala većeg odjeka, Vlada Kraljevine Srbije je 1908. godine donela odluku da se pristupi reformi Građanskog zakonika. Komisija koja je bila formirana u ovom cilju, odlučila je da za osnovu svoga rada uzme nemački Građanski zakonik. Ali ni ovaj pokušaj nije doveo do rezultata. Može se samo pretpostaviti da je rad obustavljen zbog balkanskih i Prvog svetskog rata. Videti Istorije, str. 54-58.

zakonika za Kraljevinu Jugoslaviju[4] i uopšte posle iskustava sa austrijskim pravom[5] među srpskim pravnicima sazrevalo je uverenje da treba tragati za originalnim rešenjima prilikom izrade Građanskog zakonika.[6] Ideje o samostalnim putevima razvoja bile su izražene osobito u pravnoj teoriji pre svega na Pravnom fakultetu u Beogradu i u Institutu za uporedno pravo, ali su se mogle uočiti i u odlukama viših sudova. U razdoblju zakonskog vakuuma, sudovi su po prirodi stvari bili oslobođeni dužnosti da postupaju ratione auctoritatis (legis) i upućeni da tragaju za najboljim i najpravičnijim rešenjima auctoritate rationis. Pri tome oni su imali u vidu ne samo primere sa drugih pravnih područja unutar Jugoslavije nego su svoj

---

[4] Stvaranje države Srba, Hrvata i Slovenaca posle Prvog svetskog rata označila je samo političko ujedinjenje Jugoslavije. U pravnom pogledu ostale su znatne razlike osobito u oblasti Građanskog prava. Otuda se s razlogom moglo govoriti da i pored jedinstvene državne teritorije šest velikih pravnih područja. U razdoblju između dva svetska rata činjeni su pokušaji da se zakonodavstvo izjednači. Predosnova Građanskog zakonika Kraljevinu Jugoslaviju izrađena na osnovu Austrijskog Građanskog zakonika označavala je završni izraz nastojanja da se donese jedinstveni zakonik za celu zemlju. Tekst Predosnove objavljen je 1934. godine u Beogradu, ali ona nikad nije postala zakon.

[5] Dok je starija generacija pravnika Živojin Perić, Dragoljub Aranđelović, Đorđe Nestorović, a od mlađih, Lazar Marković imala pozitivan stav prema austrijskom pravu, novi naraštaj pravnika: Čeda Marković, Mihailo Konstantinović i Božidar Marković odbijao je svaku pomisao da Predosnova izrađena prema AGZ-u, pa time i austrijsko pravo treba i dalje da važi u Jugoslaviji pa time i u Srbiji. Prema njihovom stanovištu kao osnov za novi jugoslovenski Građanski zakonik trebalo je uzeti Opšti Imovinski zakonik za Crnu Goru, izuzetno ostvarenje Valtazara Bogišića, a ne austrijsko pravo. Uporediti: Mihailo Konstantinović, Jugoslovenski Građanski zakonik (Austrijski ili Crnogorski zakonik?) Pravni zbornik (Podgorica) br. 2-3) 1933 str. 69 i sl; Božidar S. Marković, Reforma našega Građanskog zakonodavstva, Beograd 1939, passim.

[6] Izjašnjavajući se protiv ideje da se austrijski Građanski zakonik uzme za osnov novog zakonodavstva u Kraljevini Jugoslaviji, M. Konstantinović je još 1933. godine u pomenutom članku: Jugoslovenski Građanski zakonik, izložio svoje gledanje na to kakav karakter treba da ima budući Zakonik: „Pri izrađivanju zakonika vodi se na prvom mestu računa o *idejama običajima i potrebama sredine* za koju se on stvara (str. 70); „Usvajanje austrijskog građanskog prava prestavlja *nacionalno-politički jednu pogrešku. Jugoslavija treba da ima jugoslovenski zakonik prema potrebama Jugoslovena.* On treba da je jedno sredstvo za stvaranje jugoslovenstva". (str. 74); „Pitanje je prosto i ono se svodi na to da li mi želimo da Jugoslavija bude imitacija Austrije, ili zemlja koja će imati sopstveni duh i sopstvenu fizionomiju" (str. 74). Pošto je u drugom delu razmotrio prednosti i mane Austrijskog Građanskog zakonika sa stanovišta pravne teorije, pisac je izveo sledeći zaključak: „Austrijski građanski zakonik nije za našu zemlju. I sa tačke gledišta nacionalno političke i sa gledišta naučno-pravnog, kao i sa gledišta sudske prakse njegovo usvojenje imalo bi štetnih posledica". (str. 77).

U sličnom tonu pisao je još jedan ugledan mladi pravnik u to doba. Pošto je izložio da je duh austrijskog prava suprotan mentalitetu našeg demokratski raspoloženog čoveka i potrebama naše zemlje, (str. 27), B.S. Marković je za budući Građanski zakonik preporučio metod koji je Valtazara Bogišića upotrebio pri izradi OIZ za Crnu Goru. „Što znači da bi se kao materijal imalo uzeti u obzir sve pravo, i pisano i običajno, koje se danas praktikuje u našoj zemlji, i *da se ono zatim sistematski složi po načelima savremene teorije u jedan kodeks.* Na taj način svakako u budući zakonik bi ušao i veliki deo austrijskog prava, onaj koji odgovara našim današnjim potrebama i shvatanjima i koji se kod nas na velikom: delu teritorije već odomaćio. Zatim bi tu imao da uđe i dobar deo srećno kodifikovanih domaćih ustanova iz Opšteg imovinskog zakonika. U njemu bi najzad imalo da nađe odgovarajuće mesto i ostalo naše vrlo razvijeno i interesantno običajno pravo koje, iako zanemareno od države, još uvek intenzivno živi u narodu koji se po njemu vlada, *pošto odgovara i njegovim stvarnim potrebama i zadovoljava njegovo shvatanje pravde,* običajno pravo čiju nam vitalnost i bogatstvo poslednjih godina naročito otkriva g. Sreten Vukosavljević". B. S. Marković, Reforma našega građanskog zakonodavstva, Beograd, 1939, str. 41-41.

pogled upućivali i izvan njenih granica.[7] Otuda, nastojanje da se ide sopstvenim putem nije niukoliko isključivalo obaziranje na strane pravne izvore, jedino je sada metod njihovog korišćenja bio drugačiji. Umesto potpune recepcije jednog od pravnih sistema, ili prihvatanja stranog prava kao preovlađujućeg uzora, novi pristup sastojao se u tome što su najpre postavljena opšta pravna načela, i to ona za koja se moglo utvrditi da su prihvaćena u pravnoj svesti srpskog društva, a zatim su, na osnovu građe, koju je pružala sudska praksa i odabranih elemenata iz velikih pravnih sistema pripremani nacrti za zakone u oblasti Građanskog prava. Otuda i naš Zakon o obligacionim odnosima ne predstavlja potpuno samostalno delo, ali je kao sinteza sastavljena od raznovrsnih elemenata, svakako originalno ostvarenje u svojoj vrsti.

2. Za razumevanje načina na koji je došlo do nastanka novog srpskog (i jugoslovenskog) obligacionog prava potrebno je reći nekoliko reči najpre ličnosti njegovog duhovnog staraoca, a zatim o metodu stvaranja.

Za razliku od mnogih svojih kolega, profesora prava, Konstantinovića[8] nije privlačila želja za stvaranjem sistema Građanskog prava u obliku univerzitetskog udžbenika. Njega je zaokupljala ideja o stvaranju zakona kao najplemenitijeg cilja u pravničkom pozivu. U martu 1941. godine zabeležio je u svom dnevniku: "U 8 časova primio Milivoja Markovića i sa njim govorio o izradi Građanskog zakonika. Složili se da pravimo originalno delo, on, B. Marković, Begović i ja."[9] Misao o Zakoniku koja ga je neprestano pratila nije ga napuštala ni u predvečerje preteće katastrofe. Valja dobro zapaziti datum: 4. mart 1941. godine. Za manje od mesec dana doći će do državnog udara, nedugo zatim vojska će kapitulirati, država će se raspasti a Vlada će se naći u emigraciji. A o čemu je razmišljao mini-

---

[7] Zakonom od 20. oktobra 1946. godine proglašeno je između ostalog da su zakoni i drugi pravni propisi doneseni pre Drugog svetskog rata izgubili pravnu snagu (među njima i srpski Građanski zakonik). Ipak u nedostatku novih propisa, sadržina predratnih zakona nije izgubila svaki pravni značaj, te su sudovi mogli da je primenjuju u vidu tzv. *„pravnih pravila"*. Uslovi pod kojima su mogli da postupaju na takav način bili su: 1. da u određenoj materiji nema novih propisa, 2. da pravna pravila nisu u suprotnosti sa Ustavom federacije, ustavima republika i drugim pozitivnim propisima i 3. da nisu u suprotnosti sa ustavnim načelima. U ovakvoj situaciji sudovi su mogli, ali nisu morali da primenjuju predratno pravo, što im je ostavljalo velike mogućnosti da svojim odlukama *stvaraju pravo.*

[8] Mihailo Konstantinović rođen je u Čačku 10. marta 1897. Školovanje je započeo u Srbiji, a poslednja dva razreda gimnazije u Francuskoj. Na Pravnom fakultetu Univerziteta u Lionu diplomirao je 1920, a doktorirao 1923. godine sa tezom Le „periculum rei venditae" en droit romain. Docent, a zatim vanredni profesor u Subotici, potom u Beogradu, bio je ministar bez portfelja u vladi Dragiše Cvetkovića. Posle povratka iz emigracije 1945. godine, u dugom razdoblju bio je profesor i šef Katedre za Građansko pravo na Pravnom fakultetu u Beogradu. Pored knjige Obligaciono prvo (prema beleškama sa predavanja), više izdanja, autor je niza studija i članaka i last but not least pisac prednacrta za čitav niz zakona. Osnovni zakon o braku, Osnovni zakon o odnosima roditelja i dece, Osnovni zakon o starateljstvu, Zakon o usvajanju, Zakon o zastarelosti potraživanja, Zakon o nasleđivanju i najvažniji među njima Zakon o obligacionim odnosima potekli su iz njegovog pera. Na taj način njima je bilo obuhvaćeno bračno i porodično pravo, nasledno, obligaciono pravo sa delom trgovačkog prava (o trgovačkim ugovorima) i pravo osiguranja. Razume se, prvobitno doneseni zakoni, menjani su i dopunjavani docnije u više navrata, najpre u nekadašnjim republikama, a posle odvajanja, u samostalnim državama. Ali se i posle svih promena u pomenutim oblastima građanskog zakonodavstva mogu uočiti i danas bez velikog truda, Konstantinovićeve ideje. Uporediti: Božidar S. Marković, Mihailo Konstantinović, kodifikator jugoslovenskog prava, Pravni život br. 7-8/1990, str. 1157 i sl.

[9] Konstantinović, Politika sporazuma, Dnevničke beleške 1939-1941, Londonske beleške, 1944-1945, Agencija „Mir", Novi Sad 1998, str. 306-307.

star Konstantinović u tom času opšteg rasula? Pozvao je kolegu profesora da se sa njim dogovori o početku rada na pisanju Građanskog zakonika, složili su se oko toga da to treba da bude originalan Zakonik (a ne kopija tuđih uzora) i odabrali kolege profesore srodnih pogleda na koncepciju Zakonika sa kojima će moći sarađivati. Ali, zar nije uzaludan posao, spremati izradu Zakonika, kada je rat na pragu i kada je gotovo izvesno da će se raspasti država za koju spremaju Zakonik? U Konstantinovićevoj koncepciji, program izgradnje države bio je jednostavan: putevi, gimnazije, zakoni. Naročito ovo treće: zakoni i najvažniji među njima Građanski zakonik, jer se na njemu zasniva organizacija društva i gradi država. Stoga, ako se i desi da se država razgradi, Zakonik je neophodan, jer kada se država bude ponovo stvarala, ako se želi da bude dugotrajna, moraće da se osloni na uređeni poredak pravnih odnosa.

3. U državi koja je posle rata ponovo izgrađena, Konstantinović više neće biti ministar, ali će mu poći za rukom da ostvari svoju zamisao o izradi Građanskog zakonika. Istina, Zakonik neće biti urađen iz jednog komada, svi delovi neće biti promulgovani u isto vreme, neće biti dovršeni u potpunosti i neće opstati država za koju je on, ubeđeni Jugosloven, pripremao i pisao nacrte zakona. Ali, zakonodavstvo u oblasti Građanskog prava, po svojoj unutrašnjoj strukturi, po usklađenosti sastavnih delova, po neprotivrečnosti pravnih ustanova i pojmova, jedinstvu stila i jezika već danas obuhvata značajan deo materije koju inače sadrže građanski zakonici i čini duhovnu celinu, iako se ne nalazi povezano među koricama iste knjige. I zato će ga izdvojene republike iz nekadašnje Jugoslavije poneti sa sobom gotovo u celini, kao izuzetno vrednu intelektualnu tekovinu.

B. Oslanjanje na rezultate sudske prakse

4. Konstantinović je kao i Valtazar Bogišić pre njega, smatrao da velike kodifikacije treba da budu izraz pravne svesti određene društvene zajednice za koju se donose[10] Zakonici izrastaju na osnovima postojećeg prava. Zbog toga izradi zakonski nacrt treba da prethodi dugo i brižljivo ispitivanje zatečene pravne građe. Saglasni u metodu, dvojica redaktora imali su pred sobom različitu situaciju: dok je za Bogišića pravna građa za izradu Opšteg Imovinskog zakonika za Crnu Goru bila sadržana u pravnim običajima, Konstantinović ju je nalazio u sudskoj praksi. Prema njegovom gledištu u jednom dugom razdoblju, u stotinama i hiljadama presuđenih sporova postepeno se kristalisalo shvatanje društvene zajednice o tome šta je u konkretnoj situaciji pravo, a šta ne. Zbog toga je on u toku niza godina svoje profesorske karijere poklanjao posebnu pažnju izučavanju sudske prakse. Opšti seminar za Građansko pravo na Pravnom fakultetu u Beogradu, kojim je rukovodio od svog dolaska u glavni grad Srbije, bio je jedna vrsta laboratorije u kojoj su brižljivo ispi-

---

[10] Konstantinović koji je bio veliki poštovalac dela Valtazara Bogišića, u studiji posvećenoj tvorcu Opšteg imovinskog zakonika za Crnu Goru, na sledeći način je posmatrao odnos između zakonskog prava i prava koje živi u narodu.

„Na polju zakonodavne politike, prva dužnost koja se nameće zakonodavcu je da temeljno prouči postojeće ustanove narodnog prava; tek onda se može korisno pristupiti proučavanju potrebnih i mogućih promena. Bez toga najbolje namere mogu ostati bez korisnih posledica. Zato je Bogišić pre izrade Opšteg imovinskog zakonika brižljivo proučio narodno pravo u Crnoj Gori. Iz istoga razloga on je propustio da kodifikuje porodično i nasledno pravo, ostavljajući ih i dalje u oblasti običajnog prava; te oblasti pravnog života imale su biti prethodno još bolje proučene". Konstantinović, Ideje Valtezara Bogišića o narodnom i zakonskom pravu, Sociološki pregled, knjiga I, Beograd 1939, str. 274.

tivana i kritički razmatrana shvatanja sudova i naročito razlozi na kojima su se ta shvatanja zasnivala.[11]

5. Kada je sazrelo vreme za redigovanje nacrta zakonskih tekstova, Konstantinović je primenio isti metod oslanjanja na odluke sudova, koji je ranije upotrebljavao u naučnoj obradi prava. Evo kako je on sam o tome govorio kada je obrazlagao nacrt Zakonika o obligacijama i ugovorima: (pod nazivom Skica).

"Prilikom izrade nacrta Zakonika o obligacijama rukovodeća misao pri izboru materijala i kriterijum pri traženju rešenja pojedinih pitanja bili su potrebe naše prakse. Stalno se imalo u vidu da zakonik treba da sadrži pravila za pravno kanalisanje prometa dobara i usluga. Zbog toga je glavni deo materijala uzet iz našeg pravnog života poglavito iz naše sudske prakse. Taj materijal je obrađivan i prenesen u članove zakonskog nacrta". U nekim slučajevima u nacrtu se odstupilo od naše prakse. To su mahom slučajevi u kojima se praksa voljno ili nevoljno držala ranijih pravnih pravila, a koja su i u zakonodavstvu i u teoriji napuštena i zamenjene drugim.[12]

Sudska praksa omogućavala je postepeno izjednačavanje prava u nas. Bilo je mišljenja i posle oslobođenja da sudovi i dalje treba da na svakom području primenjuju samo pravna pravila koja su važila na tom području. Profesor Konstantinović se suprotstavljao tom shvatanju. On je isticao da činjenica što sudovi mogu da primenjuju pravna pravila predratnog prava kao mekši materijal može biti iskorišćena u jednom višem cilju, u cilju stvaranja jedinstvenog pravnog sistema u našoj zemlji.[13]

Po njegovom mišljenju "oslabljena snaga pravnih pravila i ustavna težnja ka jedinstvenom pravnom sistemu dozvoljava sudiji da vodi računa ne samo o pravnim pravilima svog područja, veće i o pravnim pravilima drugih područja. Nije preterano reći da ga one upućuju na to da ako su pravna pravila raznih područja protivrečna, izabere ono koje najbolje odgovara našim potrebama."[14]

6. Što je još važnije sudska praksa je predstavljala gipki oblik stvaranja prava. U njoj su mogle da dođu do izražaja nove težnje u pravu, još pre nego što su bile formulisane u pozitivnim zakonskim tekstovima Ona je takođe omogućavala da se sagledaju i uporede različita rešenja i da se među njima traže najbolja i najpogodnija pravila za naše novo pravo.

Naravno, to nije bio nimalo jednostavan posao. U hiljadama odluka koje su donosili sudovi bilo je dosta lutanja i grešaka. Zasluga profesora Konstantinovića je u tome što je u ovom razuđenom i fluidnom pravnom materijalu uspevao da nađe čvrst oslonac. Taj oslonac predstavljala su opšta pravna načela i ona su mu poslužila kao kriterijum prema kome je ispi-

---

[11] Uporediti: „Otuda, kroz više desetina godina, nije bilo nijedne značajnije odluke naših sudova koja bi izmakla njegovoj pažnji i kritičkom osvrtu. Stotine radova čitanih na Opštem seminaru za Građansko pravo na Pravnom fakultetu u Beogradu imali su upravo za predmet analizu i ocenu - rešenja i obrazloženja - sudskih odluka, i to na jedan način koji je bio jedinstven na našem fakultetu i koji je godinama okupljao mnoge pravnike koji su dolazili da koriste tu prof. Konstantinovića svojstvenu metodu rada. A posle svakog takvog rada njegovih postdiplomskih i doktorskih kurseva - sledilo je izvanredno teorijsko produbljeno izlaganje problematike na koju se odnosila obrađivana sudska odluka, tako da je takav rad predstavljao jedno specifično uopštavanje i teorijsko obrazlaganje, po pravilu kritičkog karaktera, naše pravne prakse sagledavane i izražavane kroz sudske odluke." Borislva T. Blagojević, predgovor (u knjizi: M. Konstantinović, Obligacije i ugovori, Skica za Zakonik o obligacijama i ugovorima) str. 5-6.

[12] Konstantinović, op cit. str. 7.

[13] Konstantinović, Stara „Pravna pravila" i jedinstvo prava, Anali Pravnog fakulteta u Beogradu, br. 4/1957. str. 434 - 435.

[14] Konstantinović, Stara „pravna pravila" i jedinstvo prava, Anali Pravnog fakulteta u Beogradu, br. 4/1957, str. 435.

tivao stanovišta izražena u sudskoj praksi. Tako je činio kada je, kritikujući pojedine delove obrazloženja, u jednoj odluci Vrhovnog suda Srbije isticao da je njena "doktrina inače saglasna sa osnovima našeg prava.[15]

Isto tako je činio i kad se nije slagao sa stanovištem suda kao na primer u ovom slučaju: "Ono što je naročito u ovoj presudi to je da se u njoj podvlači da ni po posebnim propisima ni po opštim pravilima verenik koji je raskinuo veridbu svojom krivicom i time prouzrokovao štetu drugom vereniku ili njegovim roditeljima ne može odgovarati za tu štetu... To bi značilo da na ovome terenu ne važi jedno od najvećih i najvažnijih načela našeg prava". I onda je dolazila značajna konstatacija: "Srpski građanski zakonik prestao je da važi kao zakon, ali načelo odgovornosti za prouzrokovanu štetu nije prestalo da važi".[16]

Tako su se tokovi sudske prakse sve više usklađivali sa opštim načelima našeg prava. Zahvaljujući toj praksi sudova lagano su nastajala nova pravna pravila koja su sve više odgovarala našim novim potrebama.

V. Oslanjanje na dostignuća u ugovornom pravu

7. Da bi zakonik mogao da u svakom pogledu bude na dostojnoj visini, nije dovoljno da izražava pravna shvatanja sredine u kojoj je nastao. Dešava se naime, da ta shvatanja nisu uvek na visini rezultata do kojih je doveo razvoj prava u drugim zemljama. Potrebno je, stoga, da zakonik ispuni i drugi uslov za postizanje visokog kvaliteta, a to će reći da redaktori prate dostignuća u uporednom pravu i da uzmu u obzir rešenja iz najmodernijih zakonika.

Kao i Bogišić pre njega, profesor Konstantinović je bio svestan te potrebe i on ju je u više navrata naglašavao i pre nego što je pristupio izradi Nacrta Zakonika. U Skici je oslanjanje na rezultate uporednog prava izrečeno navedeno kao izvor predloženih rešenja i izraženo na sledeći način:

"Naša pravna praksa nije jedini izvor materijala koji je služio za izradu ove skice. U novim zakonodavstvima i, opštije rečeno, u uporednom zakonodavstvu neka pitanja iz ove oblasti rešena su na način koji više odgovara potrebama praktičnog života nego naša stara pravna pravila. Zbog toga se u ovoj skici nalazi veći broj pozajmica iz uporednog zakonodavstva. Neke od njih su preuzete otud u obliku koji imaju u originalu, kad god je izgledalo da je tako nađena jasna i precizna formula. Tim povodom *potrebno je podvući da se nije težilo za originalnošću u svakom pogledu i po svaku cenu.* Osnovna svrha celog posla bila je da se posle studije cele materije formulišu pravila kojima će biti uređeni obligacioni odnosi na način koji bi najbolje odgovarao našim prilikama. I zbog toga, ako se u nekom pravu našlo neko pravilo koje se u praksi pokazalo kao pogodan instrument da se postigne određena svrha, nije se oklevalo da se ono prihvati i unese u tekst skice, kad god se došlo do zaključka da rešenje sadržano u njemu odgovara našim potrebama".[17]

---

[15] Konstantinović, Priroda ugovorne kazne - smanjenje od strane suda. Anali Pravnog fakulteta u Beogradu, br. 2/1953, str. 215.

[16] Konstantinović, Pravna dejstva veridbe, Anali Pravnog fakulteta u Beogradu, br. 3/1954. str. 326.

[17] Konstantinović, Skica za Zakonik o obligacijama i ugovorima, str. 7. Uporediti: „S druge strane, imajući uvek u vidu stvarnost našeg pravnog života, prof. Konstantinović je ovo svoje delo zasnovao i na savremenim teorijama u oblasti obligacionog prava, kao i na uporednom proučavanju najnovijih i najznačajnijih građanskih zakonika pojedinih zemalja. Na taj način, održavajući stvarnost našeg pravnog života, ovo delo prof. Konstantinovića sadrži i ono što je najsavremenije u današnjoj pravnoj teoriji i postojećim zakonodavstvima, tako da ono, u svojoj celini, svakako predstavlja jedan model savremene tehnike izrade zakona o obligacijama i savremene sadržine normi obligacionog prava. A ovakva dela koja imaju takvu osobinu su vrlo retka, posebno kad ih je pripremio i izradio jedan čovek". Blagojević, Predgovor, str. 6

Ali to nije sve. Pisac Skice se nije zaustavio na razmatranju i analizi zakonodavnih rešenja, nego je proučavao i teorijska istraživanja i sudsku praksu te je pojedine stavove takođe unosio u predloženi tekst. Jedini uslov je bio da njihovi zaključci odgovaraju potrebama prometa u našoj zemlji.[18]

8. Kad je reč o sadržini pravila, pravnici iz evropskih zemalja prepoznaće u mnogim rešenjima iz Skice karakteristične pravne pojmove i institucije iz svojih pravnih sistema. Tako će francuskim pravnicima biti blisko osnovno pravilo o odgovornosti za sopstveni čin (subjektivnoj deliktnoj - odgovornosti)[19] način na koji je definisan pojam krivice,[20] pravilo o osnovu ugovora (cause),[21] pravila o poveriočevom vršenju dužnikovih prava,[22] o sudskim penalima[23] i td.

9. Nemački pravnici pronaći će u tekstu Skice brojne ustanove iz svog prava. Među njima su: pravila o istovremenom ispunjenju obaveza kod sinalagmatičnih ugovora (*zug um zug*) i o prigovoru neispunjenosti ugovora,[24] o delimičnom neispunjenju ugovora,[25] o pogoršanju imovinskih prilika druge strane,[26] o nemogućnosti ispunjenja,[27] o naknadnom roku kod raskida ugovora zbog neispunjenja (Nachfrist),[28] o zelenaškom ugovoru,[29] o konverziji[30] o preuzimanju duga,[31] o tome da prodaja ne krši zakup (Kauf bricht nicht Miete),[32] o tome što obuhvata naknada štete u slučaju smrti lica,[33] koja lica imaju pravo na naknadu u slučaju izgubljenog prava na izdržavanje[34] kao i šta obuhvata naknada u slučaju telesne povrede i oštećenja zdravlja[35] i niz drugih.

10. Italijanski Građanski zakonik mogao je inspirisati tvorca Skice da u jednom tekstu izloži pravila i građanskog i trgovačkog prava o ugovorima (mada je moguće da je u istu svrhu poslužio kao primer i švajcarski Zakonik o obligacijama), kao i da predvidi pravila o raskidu i izmeni ugovora zbog promenjenih okolnosti[36] i pravilo o ustupanju ugovora.[37]

11. Sistem postavljen u Skici duboko se razlikuje od prava koje je bilo sadržano u srpskom Građanskom zakoniku i u njegovom izvorniku, austrijskom Građanskom zakoniku.

---

[18] Konstantinović, op. cit. str. 8.

[19] Skica čl. 123, str. 1; francuski Građanski zakonik (u daljem tekstu FGZ) član 1382.

[20] Skica čl. 127; Mazeand - Tunc, Traité de la responsabilité civile, T. I, 6 ème édition, str. 504 n◦ 439.

[21] Skica, čl. 31-32; FGZ, čl. 1108, 1131-1133.

[22] Skica, čl. 226; FGZ čl. 2266.

[23] Skica, čl. 242; ustanova les astreintes stvorene u suskoj praksi u francuskom pravu.

[24] Skica, čl. 90; nemački Građanski zakonik (u daljem tekstu NGZ), § 320 i § 322.

[25] Skica, čl. 91; NGZ § 320, st. 2

[26] Skica, člo. 92; NGZ § 321.

[27] Skica, čl. 205 i 106; NGZ §§ 323-325.

[28] Skica, čl. 96; NGZ § 326.

[29] Skica, čl. . 208; NGZ, § 138, st. 2.

[30] Skica, čl. 83; NGZ, § 140.

[31] Skica, čl. 371-375; NGZ §§ 415-417.

[32] Skica, čl. 550 NGZ, § 571.

[33] Skica, čl. 155; NGZ, § 844, st. 1.

[34] Skica, čl. 156; NGZ, § 844, st. 2.

[35] Skica, čl. 157; NGZ, §§ 842 i 843.

[36] Skica, čl. 103-104; italijanski Građanski zakonik (u daljem tekstu IGZ), čl. 1467-1469.

[37] Skica, čl. 112-114; It. GZ, čl. 1406-1410.

Ipak u tragovima, mogu se naći pravila izrađena po ugledu na austrijsko pravo, ali najčešće modifikovana pod uticajem savremenih shvatanja. Kao primeri mogu se navesti: opšte pravilo o mogućnosti raskidanja ugovora zbog neizvršenja,[38] pravilo o odgovornosti iz obzira pravičnosti[39] i pravila o asignaciji.[40]

12. Uticaj Common Law-a i engleske pravne terminologije, delom posredstvom Haških jednoobraznih zakona o međunarodnoj prodaji telesnih pokretnih stvari i o zaključenju ugovora o prodaji takvih stvari[41]a delom i neposredno, ogleda se u pravilima o raskidu ugovora zbog neizvršenja pri čemu se razlikuje slučaj kada neispunjeni o roku označava bitnu povredu ugovora od slučaja nebitne povrede,[42] u pravilu o ugovornoj odgovornosti dužnika koja se ograničava na naknadu predvidljive štete,[43] i u prihvatanju standarda razuman, i pažljiv čovek (reasonable and prudent man)[44] kao merila po kome se prosuđuje krivica u oblasti deliktne odgovornosti.

13. Na kraju, ali ne na poslednjem mestu, može se zapaziti značajan uticaj švajcarskog prava. U Skici su kao i u švajcarskom zakoniku o obligacijama predviđena pravila ne samo građanskog nego i trgovačkog prava o ugovorima.[45] Pored opštih pravila koja važe za sve, postoje posebna pravila koja se primenjuju na ugovore u trgovini. Uostalom, i sama činjenica da je u oba slučaja materija obligacionog prava izložena u posebnom zakoniku odvojeno od drugih zakona, ukazuje na njihovu spoljašnju sličnost. No pored svih obeležja, uticaj švajcarskog prava može se uočiti i kad je reč o redigovanju pojedinih delova Skice. Niz pravila o zaključenju ugovora,[46] ili pojedinih odredaba o određivanju naknade po pravičnosti,[47] ili o sniženju naknade za prouzrokovanu štetu,[48] kao i pravila o zastarelosti,[49] uređen je na isti, ili

---

[38] Skica, čl. 93; austrijski Građanski zakonik (u daljem tekstu AGZ), § 913.

[39] Skica, čl. 134; AGZ § 1310.

[40] Skica čl. 1042-1054; AGZ §§ 1400-1404.

[41] Uporediti: „Ovde je potrebno istaći posebno pozajmice iz dveju međunarodnih konvencija, izrađenih na diplomatskoj konferenciji u Hagu 1964. godine, zauzimanjem rimskog Instituta za izjednačenje privatnog prava: Konvencija o jednoobraznom zakonu o zaključenju ugovora o prodaji telesnih pokretnih stvari i Konvencija o jednoobraznom zakonu o prodaji telesnih pokretnih stvari, obe od 1. jula 1964. godine. Na ovoj konferenciji učestvovala je i naša država, a prevode ovih konvencija na naš jezik objavio je Institut za uporedno pravo u Beogradu (1966, Serija E - Broj 44). Obligaciona prava pojedinih država, pored svih razlika među njima, sve više se međusobno približavaju. Tradicionalne razlike među njima sve više nestaju, i na mesto ranijih pravila stupaju nova, među kojima je sve manje razlika. Navedenim haškim konvencijama ide se za istim ciljem smišljenom akcijom država. U njima se nalaze rešenja velikog broja pitanja iz oblasti ugovora o prodaji, najvažnijeg pravnog instrumenta prometa, ali se mnoga od tih rešenja mogu generalisati. Tako je upravo urađeno u ovoj skici, u kojoj je prihvaćen izvestan broj odredaba haških uniformnih zakona i proširen na sve ili još neke druge ugovore“, Konstantinović, op. cit. str. 7.8.

[42] Skica, članovi 94-96; Jednobrazni zakon o međunarodnoj prodaji telesnih pokretnih stvari, članovi 26-27.

[43] Skica čl. 211; U engleskom pravu, Case Hadley v. Baxendale (1854) 9 Ex. str. 341; FTZ, čl. 1150;

[44] Skica, čl. 127; U engleskom pravu, Case Blyth v. Birmingham Waterworths Co (1856) 11 Ex. str. 781 i dalje (str. 784).

[45] Konstantinović, Predgovor Švajcarski zakonik o obligacijama, prevod, Beograd 1976, str. 8.

[46] Skica, članovi 8 i dalje, Švajcarski zakonik o obligacijama (u daljem tekstu ŠvZ0) članovi 2-10.

[47] Skica, članovi 151; Šv30, čl. 42. st. 2.

[48] Skica, čl. 153; Šv30 čl. 44. st. 2.

[49] Istina pravila o zastarelosti se ne nalaze u Skici nego u ranije donesenom Zakonu o zastarelosti potraživanja iz 1953. godine (odakle su ih redaktori Zakona o obligacionim odnosima preuzeli), ali je i njihov duhovni tvorac bio Konstantinović.

veoma sličan, način kao što je to učinjeno u švajcarskom Zakoniku o obligacijama. Uz to metod izrade (iznad svakog člana nalazi se naslov koji čitaoca upućuje na sadržinu materije, svaki stav sastoji se samo od jedne rečenice, nema upućivanja na druge članove zakona itd.) i struktura građe najbliži su švajcarskom uzoru. Otuda se može reći, da su francuski pojmovi (osnov ugovora, struktura deliktne odgovornosti sa samo tri uslova, bez protivpravnosti) u samom temelju Skice, da su elementi nemačkog prava možda najbrojniji, ali da po svojoj strukturi i spoljnom izgledu, Skica najviše podseća na švajcarski Zakonik o obligacijama.[50]

G. Zaključak

14. Na osnovu izloženog pregleda metoda i sadržine (u meri u kojoj je mogao da se prilože u ograničenom prostoru) može se steći utisak o ostvarenim rezultatima. Početna ideja profesora Konstantinovića bila je da Građanski zakonik trba praviti kao originalno delo,[51] oslonjeno na osnovna načela našeg prava. Još pre Drugog svetskog rata naglašavao je zahtev da se pri izradi zakonika mora voditi računa o idejama, običajima i potrebama sredine za koju se stvara.[52] Te ideje su označavale otpor prema zamislima redaktora Predosnova da se u modifikovanom obliku nastavi sa dominacijom modernizovane verzije austrijskog prava. I kada je posle više od trideset godina pristupio ostvarenju ovog poduhvata on je kao ideju vodilju imao istu misao: "Osnovna svrha celog posla bila je da se posle studije cele materije formulišu pravila kojima će biti urađeni obligacioni odnosi *na način koji bi najbolje odgovarao našim prilikama"*.[53]

15. Smisao ovog nastojanja bio je da se razvoj srpskog (Konstantinović je govorio jugoslovenskog) prava postavi na sopstvene osnove, tako da ne bude ni recepcija ni imitacija tuđeg prava. Strana sudska praksa i teorija, ako se podržavaju, [54] sputavaju inventivnost sudija u domaćem pravu i sužavaju horizont teorijskim pogledima. U takvoj situaciji nesamostalni pravnici se priklanjaju autoritetima, koji svoju snagu crpe iz svog položaja u zatvorenom sistemu, a ne iz slobodnog rasuđivanja o argumentima iznesenim u uporednom pravu i pravnoj teoriji nezavisno od pravnog sistema u pitanju. Stoga je u rešenjima u Skici implicitno izražen otpor prema jednom sistemu prava, a istovremeno otvorenost prema svim evropskim pravnim sistemima, iz kojih su uzimane pozajmice, kad god je to odgovaralo potrebama našeg prometa. "Sve je rađeno isključivo u tom cilju bez ikakvog predubeđenja ili unapred izabrane dogme."[55]

16. Broj preuzetih elemenata iz velikih pravnih sistema i njihov značaj u formiranju novog srpskog (i ranijeg jugoslovenskog) prava, pokazuju koliku su ulogu strano zakonodavstvo, pravna teorija i uporedno pravo uopšte, imali u tome procesu. U Skici gotovo da nema ustanove koja ne bi vodila poreklo iz nekog od evropskih prava. Isto tako u Skici nema ničeg

---

[50] Uporediti: „U tom pogledu Švajcarski zakonik o obligacijama, kao i Švajcarski Građanski zakonik, ovaj naročito, podseća na Francuski građanski zakonik od 1804, koji je primer jasnog i preciznog stila, jer izražava jasne i precizne misli, a koji je jedan od majstora stila, Stendal, čitao svakog jutra da bi unapredio svoj stil. To pored ostalih njegovih kvaliteta, daje ovom Zakoniku naročito mesto u uporednom zakonodavstvu i preporučuje ga osobitoj pažnji svih pravnika, a naročito redaktorima zakona". Konstantinović, Predgovor str. 10.

[51] Konstantinović Politika sporazuma, str. 306-307.

[52] Konstantinović Jugoslovenski građanski zakonik, Pravni zbornik br. 2-3/1933 str. 70.

[53] Konstantinović Skica za Zakonik o obligacijama i ugovorima, str. 7.

[54] Konstantinović, Jugoslovenski građanski zakonik Pravni zbornik, br. 2-3/1933, str. 72.

[55] Konstantinović, Skica za Zakonik o obligacijama i ugovorima, str. 8.

što bi bilo samoniklo, nepoznato u drugim pravnim sistemima, ili novo po svaku cenu. U tom pogledu ona sigurno ne predstavlja originalno delo. Uistinu, originalno je to što je u njoj ostvarena sinteza elemenata preuzetih iz stranih prava. Francuski, Nemački, Italijanski, Austrijski, Common Law, i Švajcarski pravni pojmovi, pravila i ustanove, uz veće ili manje modifikacije, stoje naporedo, jedni uz druge, sliveni u jednu neprotivrečnu celinu. Sklad i harmonija raznorodnih elemenata u skici svedoče da je njen autor u tančine poznavao velike pravne sisteme, novije tokove u uporednom pravu i presude sudova (koje su obeležavale preokret u pravnim shvatanjima), i raspolagao retkom sposobnošću da od postojećih elemenata stvori novo delo, i da mu da osobenu fizionomiju.

Po svemu Skica ostavlja utisak o jednom zakoniku koji je iznikao iz najbolje tradicije evropskog zakonodavstva, a ne o nekom bizarnom delu koje je nastalo na periferiji pravne civilizacije.

II Deo. Promene u sistemu deliktne odgovornosti

A. Osnov odgovornosti

17. Razvoj srpskog Obligacionog prava (koji se odvijao u okviru jugoslovenskog prava, ali i vršio uticaj i davao podsticaje za njegovu evoluciju) karakterišu duboke promene u svim njegovim delovima. Izgleda da se sa mnogo osnova može reći da su najizrazitije i najdalekosežnije bile upravo u oblasti odgovornosti za prouzrokovanu štetu. Na evoluciju prava uticale su značajne promene u privrednom životu i društvenim odnosima, porast industrijske proizvodnje, koji je uticao na povećanje broja povreda na radu, razvoj saobraćaja, koji je fatalno dovodio do velikog broja povređenih u saobraćajnim udesima itd. Pre Drugog svetskog rata Jugoslavija je bila srazmerno nerazvijena zemlja, i slučajevi prouzrokovanja štete nastajali su uglavnom pod dejstvom čovekove snage. Sada su u upotrebi sve češće bile sile koje su višestruko prevazilazile čovekovu moć da spreči ili otkloni njihovo neželjeno dejstvo. Porast broja šteta svake vrste neminovno je morao uticati na povećani značaj pravnog uređenja njihovih dejstava.

18. Evolucija u pravilima o deliktnoj odgovornosti imala je i unutrašnje, pravne uzroke. Oslobođeni zakonskog autoriteta (koji ih posle Zakona o nevažnosti pravnih propisa od 1946. godine nije više vezivao), sudovi na jednoj i pravni pisci na drugoj strani, postepeno su menjali shvatanja, pojmove i najzad i sama pravna pravila predratnog prava. U sudskoj praksi su u početku ti pokušaji bili skromniji i svodili se uglavnom na korekcije unutar pojedinih pravila. Sa vremenom, ohrabrivani podsticajima koji su dolazili iz postupanja vrhovnih sudova i podržavani od strane pravne teorije, sudovi su počeli da svojim presudama bez mnogo ustezanja menjaju pravna pravila i uspostavljaju nova.[56] Manje je zapažen i istraživan fenomen, ali je neosporno da je u jednom relativno dugom razdoblju (od 1946. pa i ranije do 1978. godine kada je donesen Zakon o obligacionim odnosima) u Srbiji (i Jugoslaviji) Obligaciono pravo tvorio Judge made Law.

19. Delovanjem ovih dveju vrsta uzroka izmenjen je najpre položaj deliktne odgovornosti u sistemu Obligacionog prava. U predratnom pravu prouzrokovanje štete imalo je skro-

[56] Uporediti: „Nove generacije pravnika nisu naučene da se služe potpunim građanskim ili imovinskim zakonikom“. Konstantinović, Skica za Zakonik o obligacijama i ugovorima, str. 10.

mno mesto[57] u posebnom delu posle imenovanih obligacionih ugovora, javnog obećanja nagrade nezvanog vršenja tuđih poslova i pravno neosnovanog obogaćenja.[58] Zakonski tekstovi su bili šturi, sudska praksa oskudna,[59] a pravnoteorijski radovi mogli su se izbrojati na prstima jedne ruke. Posle Drugog svetskog rata prouzrokovanje štete dobilo je mesto, koje mu po značaju i pripada, u opštem delu Obligacionog prava u kome se govori o izvorima obligacija i to odmah posle ugovora. Nezaustavljivi porast broja svakovrsnih šteta uticao je da se razvije bogata sudske praksa[60] koja je sa svoje strane inspirisala i podsticala pravnoteorijska istraživanja.

20. Drugu novinu u odnosu na predratno pravo označilo je razgraničenje oblasti subjektivne odgovornosti na jednoj i objektivne odgovornosti na drugoj strani. U predratnom pravu mišljenje o osnovu deliktne odgovornosti, ili kako se još govorilo o načelu (principu) krivice (*culpae*) i načelu uzročnosti (principu *causae*) bila suprotstavljena do isključivosti. Tako je, na primer, u srpskoj pravnoj teoriji, D. Aranđelović smatrao da se odgovornost i dalje zasniva na načelu krivice, dok su slučajevi odgovornosti bez krivice izuzeci[61], a na drugoj strani B. Blagojević je tvrdio da objektivna odgovornost postaje pravilo, a krivica izuzetak[62].

21. Razmatranje o osnovu odgovornosti, trebalo je da omogući polazne tačke u ostvarivanju novog sistema deliktne odgovornosti. Rasprava na teorijskom planu vođena je početkom pedesetih godina, kada je izrađen prvi Nacrt zakona o naknadi štete (1951) i kada su

---

[57] U predavanjima iz Obligacionog prava profesora Živojina Perića o deliktima se u Opštem delu govori na dvema stranama (57-58), a u Specijalnom na stranama 225-228. Specijalni deo Građanskoga prava po predavanjima Živojina Perića, štampano kao rukopis, Beograd, bez oznake godine.

[58] Uporediti: Borislav T. Blagojević, Posebni deo Obligacionog prava, Beograd, 1939, str. 271-312.

[59] U razdoblju od 1932. do 1939. godine objavljeno je svega pedeset odluka koje se odnose na prouzrokovanje štete (od broja 792 do 841) što ukazuje na njihovu relativno malu zastupljenost, kada se ima u vidu da ukupan broj iz ostalih delova Obligacionog prava iznosi 227 odluka. Tihomir M. Ivanović, Sudska praksa 1932-1939, Beograd 1940.

[60] U prvom zborniku važnijih pravnih stavova, na prouzrokovanje štete odnosi se 315 odluka (314-629), a na preostali deo Obligacionog prava 212 odluka (101-313). Videti: Zbirka sudskih odluka iz oblasti Građanskog prava, Beograd, 1972. U drugom zborniku o prouzrokovanju i naknadi štete evidentirane su 293 odluke, a o ostalim pitanjima obligacija 287 odluka. Videti: Zbirka sudskih odluka iz oblasti Građanskog prava 1973-1986, Beograd 1986; slična je srazmera između odluka koje se odnose na prouzrokovanje štete (strane 200-226) i onih posvećenih ugovorima (strane 366-374) evidentiranih u Registru sudskih odluka objavljenih u knjigama I-XV zbirke sudskih odluka, Beograd 1973.

[61] "S obzirom na sve ovo, sasvim je prirodno, što je i u nauci privatnog prava, a i u najmodernijim građanskim zakonima i njihovim projektima preovladalo mišljenje da se u pogledu regulisanja pitanja o odgovornosti za naknadu štete ima *ostati kod principa krivice*. Međutim, s obzirom na promenjene privredne i saobraćajne odnose modernog života, a s pogledom i na zahtev pravičnosti, da se dopuste *izuzeci* od ovoga principa, tj. da se zakonom ustanovi odgovornost i za onu štetu koju je neko prouzrokovao bez svoje krivice."

[62] "Shvatajući ovu osnovnu ideju kao pravičnu i društveno korisnu, savremeno privatno pravo se odlikuje sve većom prevlašću objektivne odgovornosti nad subjektivnom. Time se na mesto ranijeg pravila: krivica, stavlja novo pravilo: rizik. Pa ipak ova promena nije apsolutna. Objektivna odgovornost postaje pravilo, ali ni subjektivna odgovornost ne iščezava niti bi trebalo da potpuno iščezne. Rizik postaje pravilo, a krivica ostajući i dalje u pravnom sistemu, postaje samo izuzetak.", Borislav T. Blagojević, Posebni deo Obligacionog prava, str. 276. Istina, na ovom mestu Blagojević govori o odnosu dve odgovornosti načelno, imajući u vidu opšte težnje u razvoju. Nekoliko stranica kasnije, reći će da pravni poredak, kao pravilo usvaja subjektivnu teoriju o određivanju štetnika, tj. teoriju krivice, ali da od ovog pravila postoji sve više izuzetaka (str. 288).

objavljeni referati M. Konstantinovića[63] i S. Jakšića[64] sa četvrte interfakultetske konferencije pravnih fakulteta u Sarajevu (maj 1952). Posebno je značajan u tom pogledu prvi referat o osnovu odgovornosti za prouzrokovanu štetu, s obzirom da je njegov autor bio na čelu Komisije stručnjaka koja je izradila pomenuti Nacrt zakona. Napomenuvši da u našem savremenom pravu, nijedno od načela (ni načelo krivice, ni načelo objektivne odgovornosti) na kojima se zasniva odgovornost, ne može i ne treba da bude proglašeno za isključivi osnov odgovornosti, autor se založio za prihvatanje oba načela, jer svako od njih ima svoje polje primene. Osvrnuvši se na rasprave, koje su vođene u javnosti i u Komisiji o osnovu odgovornosti, autor je naglasio da ni načelo odgovornosti zasnovane na krivici, ni načelo objektivne odgovornosti zasnovane na stvorenom riziku, ne može i ne treba da bude proglašeno za jedini i isključivi osnov odgovornosti.[65] U našem pravu, pisao je on, ima mesta i za subjektivnu i za objektivnu odgovornost. Oba načela su prihvatljiva. Među njima ne postoji odnos pravila i izuzetka, nego svako od njih ima svoje polje primene.[66] Potrebno je samo utvrditi liniju razgraničenja među njima. Odgovornost po osnovu krivice zadovoljava zahtev pravičnosti i moralna osećanja u jednom društvu.[67] Kad god je moguće dokazati štetnikovu krivicu, odgovornost će biti čvrsto zasnovana.[68] Ali, ova vrsta odgovornosti može se primeniti samo u oblasti, u kojoj se primenjuju relativno male snage, čovekove i one koje je čovek u stanju da u potpunosti kontroliše.

22. U modernom društvu u kome je došlo do razvoja industrije i upotrebe velikog broja mašina i drugih uređaja u kojima su koncentrisane ogromne sile (koja višestruko prevazilazi običnu ljudsku snagu) ne može se zadržati krivica kao isključivi osnov odgovornosti. Naime, usled upotrebe ovih uređaja (velika saobraćajna sredstva, električna energija, industrijski pogoni, gasovodi, naftovodi i sl., oružje, hemijska sredstva itd.) štete nastaju gotovo neminovno i pojedinac ih ne može izbeći ni sa najvećom pažnjom.[69] Njihovo nastajanje može se utvrditi statističkom zakonitošću (velikih brojeva),[70] i njima zajednica plaća danak društvenom napretku. Otuda ne bi bilo nepravično da odgovornost snosi onaj ko se zatekao na mestu i u vreme kada je (do kojih je došlo delovanjem ovakvih sila) udes nastao, nego odgovornost treba da pogodi onoga ko je stavio u pokret opasne stvari i njima upravlja[71]. U tim slučajevima odgovornost treba da se zasniva na stvorenom riziku, a ne na krivici[72]. Što se tiče odnosa ovih slučajeva prema oblastima u kojima se odgovara za krivicu, valja napomenuti da tu nije reč o izuzecima. Prvi razlog je što bi takvih izuzetaka bilo mnogo[73] (usled čega bi trpela vrednost

---

[63] Mihailo Konstantinović, Osnov odgovornosti za prouzrokovanu štetu, Arhiv za pravne i društvene nauke, br. 3/1952, str. 296. i dalje.

[64] Stevan Jakšić, Osnovni principi naknade štete u našem pravu, Arhiv za pravne i društvene nauke, br. 4/1952, str. 420. i dalje.

[65] Konstantinović, Osnov odgovornosti, Arhiv br. 3-1952, str. 296.

[66] Mihailo Konstantinović, Obligaciono pravo (prema beleškama sa predavanja profesora M. Konstantinovića), Beograd, 1959, str. 106.

[67] Konstantinović, Osnov odgovornosti, Arhiv 3/1952, str. 297.

[68] Ibidem.

[69] Konstantinović, Arhiv, op. cit., str. 299.

[70] Ibidem.

[71] Ibidem.

[72] Ibidem.

[73] Ibidem.

pravila). Drugi razlog je još važniji: ti izuzeci su unutrašnje povezani[74] i otuda oni ukazuju na to da je reč o jednom principu, koji ima svoje polje primene. Stoga je u našem pravu delom prihvaćena i objektivna odgovornost i to u vidu odgovornosti za opasne stvari u Skici,[75] ili odgovornosti za opasne stvari i opasne delatnosti u Zakonu o obligacionim odnosima.[76]

23. Pored tradicionalno uređene objektivne odgovornosti za štetu od životinja[77] u Skici su uvedene dve novine u ovoj oblasti. Prva se tiče odgovornosti za štetu od građevine, druga predviđa odgovornost proizvođača stvari sa nedostatkom.

24. Za razliku od ranijih rešenja u našem i u uporednom pravu, u kojima je odgovornost sopstvenika (i svojinskog držaoca) građevine uspostavljena na načelu pretpostavljene krivice,[78] u Skici je predložena objektivna odgovornost i to strožija nego što je odgovornost za opasne stvari. Dok se prema opštim pravilima o odgovornosti za opasne stvari, sopstvenik može osloboditi odgovornosti ako dokaže: 1) da šteta potiče od nekog uzroka koji se nalazio van stvari, a čije se dejstvo nije moglo predvideti ili se nije moglo sprečiti ili izbeći; 2) ako dokaže da je šteta nastala isključivo krivicom oštećenika koju on nije mogao predvideti i čije posledice nije mogao izbeći; 3) ako dokaže da je šteta nastala isključivo krivicom trećeg lica koju on nije mogao predvideti i čije posledice nije mogao izbeći,[79] prema pravilima o odgovornosti za štetu od zgrade i svake druge građevine, sopstvenik (i svojinski držalac) se oslobađa odgovornosti samo ako dokaže da se šteta dogodila usled više sile ili krivicom oštećenika.[80] Dakle, sopstvenik se nije mogao osloboditi odgovornosti, ako se šteta dogodila krivicom trećeg lica. Njemu je samo ostajala mogućnost da se, pošto naknadi štetu oštećeniku, obrati trećem licu koje je skrivilo štetu i da od njega traži naknadu isplaćenog iznosa.[81]

25. Zanimljivo je i to je bila velika novina za naše pravo da je u Skici bilo predviđeno pravilo o odgovornosti proizvođača stvari sa nedostatkom. Ono je bilo formulisano na sledeći način: „Ko stavi u promet neku stvar koju je proizveo, a koja zbog nekog nedostatka, za koji on nije znao, predstavlja opasnost štete za lica ili stvari, odgovara za štetu koja bi nastala zbog tog nedostatka".[82] Odgovornost proizvođača stvari sa nedostatkom imala je karakter objektivne odgovornosti, (proizvođač je odgovarao za prouzrokovanu štetu bez obzira na svoju krivicu) i kao takva počela se primenjivati od kada je 1969. godine objavljena Skica, kao pravno pravilo,[83] a od 1978. godine, kada je donesen Zakon o obligacionim odnosima[84] i zvanično, auctoritate legis. (Direktiva Saveta evropskih zajednica donesena je znatno kasnije, 25. jula 1985. godine, istina sa mnogo produbljenijim i razrađenijim skupom pravila)

---

[74] Ibidem.

[75] Skica za Zakonik o obligacionim odnosima, čl. 136 i dalje. Uporediti: S. Mihajlović, Pojam opasne stvari, Glasnik advokatske komora u SAP Vojvodini, br. 2/1971, str. 1-11; i br. 3/197, str. 3-12.

[76] Zakon o obligacionim odnosima, čl. 173-174.

[77] Skica, članovi 142-144; Redaktori Nacrta nisu uvrstili ova pravila u Zakon o obligacionim odnosima. Materija je bila ostavljena za republičko zakonodavstvo, koje nikad nije bilo doneseno.

[78] Austrijski Građanski zakonik § 1319; francuski Građanski zakonik čl. 1386; nemački Građanski zakonik § 836.

[79] Skica, čl. 137, st. 1 i 2.

[80] Skica, čl. 145, st. 2.

[81] Skica, čl. 145, st. 3.

[82] Skica, čl. 141.

[83] Mnogi sudovi (naročito u Srbiji) počeli su da primenjuju odredbe iz Skice (čim je bila objavljena) kao „pravna pravila" u smislu Zakona iz 1946. godine.

[84] Zakon o obligacionim odnosima, čl. 179.

B. Pravilo o potpunoj naknadi štete

26. Uvođenje pravila o potpunoj (integralnoj) naknadi štete označava preokret u odnosu na ranije važeće pravo. Prema novom pravilu predloženom u Skici[85] i potvrđenom u Zakonu o obligacionim odnosima oštećeni ima pravo da zahteva da mu štetnik (odgovorno lice) naknadi svu štetu koju je pretrpeo, a to znači i običnu štetu (damnum emergens) i izmakli dobitak (lucrum cessans).[86] Pravilo je prihvaćeno u modernom pravu i izražava osnovno načelo građanskopravne odgovornosti da sankcija treba da se sastoji u popravljanju štete (da ima karakter reparacije). Da bi se u pravom smislu moglo govoriti o popravljanju štete potrebno je da oštećeni dobije naknadu tačno onoliko, koliko je iznosila šteta, ne manje, ali ni više.[87] Samo na taj način se može uspostaviti stanje u imovinskoj masi oštećenika koje je postojalo pre nego što je šteta bila prouzrokovana. Ako bi iznos naknade bio manji od visine štete, naknada ne bi postigla svoj cilj, jer bi šteta u preostalom nenaknađenom delu, pogađala oštećenog. Ali, naknada (načelno) ne treba da bude ni veća nego što je bila šteta, jer bi se oštećeni obogatio za višak iznad iznosa štete, a za to nema osnova.

27. Zanimljivo je da je iste godine kada je u Skici predloženo pravilo o potpunoj naknadi, proglašeno istovetno rešenje kao stav sudske prakse. Naime, na savetovanju sudija Građanskog odeljenja Vrhovnog suda Jugoslavije i sudija, predstavnika građanskih odeljenja republičkih i pokrajinskih sudova u junu 1969. godine utvrđen je stav da „u slučaju oštećenja ili uništenja stvari oštećeni ima pravo na potpunu naknadu štete (proste štete i izmaklog dobitka) bez obzira na stepen krivice štetnika izuzev ako je propisom drukčije uređeno".[88] Da li je u pitanju bila čista koincidencija, ili je pak pravilo predloženo u Skici, uticalo na sudije vrhovnih sudova da usvoje istovetno stanovište, ne možemo znati pouzdano, jer je objavljen lakonski tekst bez obrazloženja i pripremljenih referata za Savetovanje, ali je verovatno da je takvog uticaja bilo. Verovatno je da je takvog uticaja ipak bilo.[89]

28. Na ovaj način ujedinjenim naporima pravne teorije i sudske prakse, izvršena je možda najdublja promena u oblasti deliktne odgovornosti i u pogledima na smisao naknade. Sve do tada, a to će reći do kraja šezdesetih godina u nas se primenjivao austrijski sistem pravila (zasnovan na načelu proporcionalnosti stepena krivice i obima naknade) koji se sastojao u sledećem: a) ako je štetnik prouzrokovao štetu namerno ili krajnjom nepažnjom oštećeni ima

---

[85] Skica, čl. 150.

[86] Zakon o obligacionim odnosima, čl. 189.

[87] Uporediti: „Was als Schadensersatz geschuldet wird, das richtet sich nicht nach dem Sandktions- oder dem Präventionsprinzip, sondern nach dem Ausgleichsgedanken. Er bedeutet, daß dem Geschädigten – sehen wir wieder zuerst einmal von § 254 ab – sein gesamter Schaden, nicht weniger und nicht mehr – ersetzt werden soll, daß er durch die Ersatzleistung so gestellt werden soll, wie er ohne das die Ersatzpflicht des Schädigers begründende Ereignis jetzt stehen würde". Karl Larenz, Lehrbuch des Schuldrechts, Band I Allgemeiner Teil, 14. Auflage, München, 1987, str. 424.

[88] Pravni stavovi savetovanja sudija Građanskog odeljenja Vrhovnog suda Jugoslavije i sudija – predstavnika građanskih odeljenja republičkih i pokrajinskih sudova od 26. i 27. juna 1969. godine, *Zbirka sudskih odluka,* knjiga XIV, sv. 3, br. X, tačka 6, str. 114.

[89] Ne može biti sumnje da je novo gledište u pravnoj teoriji prethodilo preokretu u sudskoj praksi. Naime, profesor Konstantinović je još pre konačnog kristalizovanja svojih stavova i njihovog objavljivanja u Skici, 1969. godine, u tekstu (koji je nazvao Prednacrt Zakonika o obligacijama) iz 1966. godine, formulisao pravilo o potpunoj naknadi, na isti način u čl. 133 tog Prednacrta. Uporediti: „Visina naknade odmerava se po pravilu prema pretrpljenom gubitku i izmaklom dobitku, dakle bez obzira na težinu krivice štetnikove". M. Konstantinović, Obrazloženje Prednacrta zakonika o obligacijama, Opšti deo, juli, 1966, Beograd, str. 17.

pravo na naknadu i stvarne štete (damnum emergens) i naknadu izmakle dobiti (lucrum cessans);[90] b) ako je štetnik prouzrokovao štetu običnom nepažnjom, oštećeni ima pravo samo na naknadu stvarne štete. U ovom drugom slučaju sud će odbiti oštećenikov zahtev da mu se naknadi izmakla dobit.

Načelo proporcionalnosti, između krivice i obima naknade imalo je veliku snagu uverljivosti i to objašnjava njegovo trajanje u našem pravu. Ono je odgovaralo prirodnom osećaju pravičnosti,[91] koji je urođen kod velikog broja ljudi. Nasuprot tome, moderno pravilo o potpunoj naknadi štete bez obzira na stepen krivice,odgovara jednom racionalnijem pristupu naknadi štete, koji više odgovara njenoj pravoj prirodi. Ovo se zasniva na strogom razdvajanju kazne kao sankcije u krivičnom pravu na jednoj strani i naknade kao reparacije u građanskom pravu. Ali, ono podrazumeva viši stepen racionalnosti u rasuđivanju, i zbog toga je put njegovog afirmisanja u nas bio tako dug.

29. Na prvi pogled, naime, moglo bi se reći da je do preokreta došlo odjednom pod uticajem teorijske kritike ranijih pravnih pravila. Ali taj utisak ne odgovara stvarnom stanju. Ne samo da je i u pravnoj teoriji[92] i u sudskoj praksi bilo otpora novoj doktrini, nego su se i sami pobornici novog pristupa kolebali u relativno dugom razdoblju o tome koji je sistem bolji: stari ili novi. Tako je na primer, M. Konstantinović u svom udžbeniku iz Obligacionog prava iz pedesetih godina u odeljku o naknadi štete, *de lege lata* izlagao pravila onako kako su ona bila postavljena u austrijskom sistemu i srpskom Građanskom zakoniku,[93] dok je samo *de lege ferenda,* govorio o potpunoj naknadi štete, prema pravilima koja važe u nemačkom i francuskom pravu. Sticao se utisak, da se autor na tome mestu izjašnjavao u prilog modernijem pravilu o integralnoj naknadi.[94]

30. Kada sa današnje tačke gledanja posmatramo celo pitanje, izaziva jedno mesto, u članku o osnovu odgovornosti, (objavljenom u isto vreme) u kome je Konstantinović sa izvesnom vrstom unutrašnjeg uverenja, navodio razloge u prilog ranijeg pravila o većem obimu naknade u slučaju zlonamernog prouzrokovanja štete.[95]

31. Ideja o postavljanju novog osnovnog pravila u oblasti deliktne odgovornosti, koja će se zasnivati na potpunoj naknadi štete sazrevala je postepeno i uz mnoga kolebanja. Ovako značajnu promenu, koja je označila prekid sa čitavim sistemom ranijeg prava, nije bilo lako

---

[90] SGZ § 819; AGZ § 1324.

[91] Uporediti: J. Radišić, Imovinska odgovornost i njen doseg, Beograd, 1979, str. 54.

[92] Uporediti: M. Vuković, Odgovornost za štete, Zagreb, 1971, str. 251, nº 506, str. 251 nº 510 i str. 252, nº 512.

[93] Konstantinović, Obligaciono pravo, (prema beleškama sa predavanja) Beograd, 1952, str. 103.

[94] Uporediti: „I zaista, ako naknada ne treba da bude izvor bogaćenja za oštećenika, ne vidi se zašto on načelno ne bi imao pravo na potpunu naknadu, tj. kako na naknadu stvarne štete, tako i na naknadu izgubljenog dobitka u svakom slučaju. Jer, po definiciji „izgubljeni dobitak" je takođe gubitak, a da bi se uspostavilo ranije stanje, trebalo bi da se naknadi svaki gubitak. Od tog pravila mogu se praviti odstupanja u oba smisla, ali bi trebalo da ono važi kao opšte". Konstantinović, op. cit., str. 104.

[95] Uporediti: Povišena naknada u slučaju teže krivice štetnikove opravdana je. Oštećeniku nije svejedno da li mu je šteta prouzrokovana omaškom ili zlonamerno. Mi osećamo teže štetu koja nam je prouzrokovana zlonamerno. Kad je zlonamerna šteta prouzrokovana nekim krivičnim delom, kazna i naknada potpuno vaspostavljaju poremećenu ravnotežu. Ali šteta može biti prouzrokovana zlonamerno, a da se štetnik ne ogreši o krivični zakon. U tom slučaju naknada proste štete ne bi bila dovoljna. Ostalo bi nezadovoljeno osećanje povređeno zlom namerom. Pravično je da se o toj zloj nameri, o težoj krivici štetnika, takođe vodi računa, i da se iznos naknade poveća". Konstantinović, Osnov odgovornosti za prouzrokovanu štetu, Arhiv za pravne i društvene nauke, br. 3/1953, str. 301.

izvesti jer je iza pravila o proporcionalnosti stajalo stogodišnje iskustvo koje je dalo i mnoge pozitivne rezultate. Posle dugog razmatranja i odmeravanja razloga za i protiv, odluka je konačno donesena, po svoj prilici početkom šezdesetih godina. Od tog trenutka, razvoj našeg prava je krenuo u suprotnom pravcu od austrijskog sistema, u skladu sa novijim težnjama u uporednom pravu.

V. Pitanje krivice

a) Prosuđivanje krivice in concreto

32. Najviše rasprave u našoj pravnoj teoriji, pored pitanja o obimu naknade vođeno je o pojmu krivice i njenom mestu u sistemu deliktne odgovornosti. Te rasprave su počele davno pre donošenja Zakona o obligacionim odnosima i nastavljaju se i posle njegovog stupanja na snagu.

U starijoj pravnoj teoriji krivica je bila definisana kao psihički odnos štetnika prema radnji i prema šteti kao posledici.[96] Skup psihičkih odnosa na koje se misli sastoji se iz dva-ju fenomena: svesti i volje[97] (ponekad se ima u vidu samo volja,[98] ili samo svest).[99] U tom smislu, u Krivičnom pravu, polje krivice se deli na dve velike oblasti: umišljaj i nehat, pri čemu volja i svest u određenim kombinacijama određuju stepen krivice. Tako se umišljaj deli na direktni (kada je učinilac bio svestan svog dela i hteo njegovo izvršenje)[100] i eventualni

---

[96] Uporediti: "Vinost (tzv. Subjektivni, psihološki, intelektualni, spiritualistički, unutarnji, "moralni" element, u Biparticiji krivičnog dela, u Triparticiji krivca) je (u enciklopedijskom smislu) skup psihičkih odnosa, koje izvršilac treba da ima sa svojim delom uopšte ili kod ovog ili onog određenog krivičnog dela, da bi bio krivac. Ti psihički (subjektivni) odnosi se pojavljuju, sami za sebe posmatrani, kao određeni psihički akti (procesi). No kao što se je videlo, ovi akti dovoljni su za krivičnu odgovornost samo onda, ako su se ispoljili u spoljnom svetu određenim delima, t.j. samo onda ako su od subjekta takva dela izvršena i ova se pojavljuju kao objekat tih akata. Na taj način pomenuti psihički akti ulaze u krivično pravo, da zasnuju krivičnu odgovornost, samo onda, ako se pojavljuju kao psihički odnosi izvršioca s njegovim delom, i u tom smislu je data gornja definicija vinosti.", Toma Živanović, Osnovi krivičnog prava Kraljevine Jugoslavije, Opšti deo, II knjiga (II. Krivac - III. Krivična sankcija), 3. izdanje, Beograd, 1937, str. 26.

[97] "Skup psihičkih odnosa (koji se izražavaju u svesti i volji učinioca) prema određenom delu naziva se vinost.", Nikola Srzentić, Aleksandar Stajić, Krivično pravo FNRJ, Opšti deo, 3. izdanje, Beograd, 1961, str. 205. Uporediti za građansko pravo, Dimitar Pop Georgiev, Obligaciono pravo, Opšt del, Skopje, 1976, str. 154.

[98] "A pod krivicom u širem smislu, razume se onaj momenat u volji izvršioca protivpravnoga dela, po kojem se ovaj pokazuje kao vinovnik pravne povrede, kao uzročnik ili počinitelj protivpravnog učinka", Andra Đorđević, Sistem Privatnoga (Građanskoga) prava Kraljevine Srbije u vezi sa Međunarodnim privatnim pravom, Prva knjiga: Opšti deo (druga polovina), Beograd, 1896; str. 184. U istom smislu: "Jer od njegove je volje zavisilo, da preduzme ili ne preduzme postupak, koji je štetu prouzrokovao. Prema tome o nekoj volji, koja je na preduzimanje neke radnje ili neradnje upravljena, pa prema tome ni o krivici ne može biti pre svega govora kod lica, čija se volja u pravu ignorira.", Dragoljub Aranđelović, O odgovornosti za naknadu štete, 2. izdanje, Beograd, 1923, str. 18.

[99] Za razliku od njegovih prethodnika (A. Đorđević, D. Aranđelović) koji su u prvi plan stavljali volju, Blagojević je pod uticajem Tome Živanovića svodio krivicu na fenomen svesti i na taj način definisao krivicu u Građanskom pravu, na sličan način na koji ju je Živanović izložio u Krivičnom pravu. "Sadržina ovog psihičkog odnosa, pisao je Blagojević, zavisi od svakog konkretnog slučaja, odnosno od svake kategorije slučajeva, no ona se uvek sastoji u gradaciji svesti lica u pitanju i dejstvu njegove radnje", Borislav T. Blagojević, Posebni deo Obligacionog prava, Ugovori, jednostrani pravni poslovi, građansko-pravni delikti, Beograd, 1939, str. 289.

[100] Srzentić, Stajić, op. cit., str. 212. U istom smislu, Ljubiša Lazarević, Krivično pravo, Opšti deo, Beograd, 2000, str. 214.

(kad je učinilac bio svestan da usled njegovog činjenja ili nečinjenja može nastupiti zabranjena posledica, pa je pristao na njeno nastupanje).[101] Na sličan način nehat se stepenuje na svesni (kad je učinilac bio svestan mogućnosti nastupanja posledice)[102] i nesvesni nehat (kada učinilac nije bio svestan te mogućnosti, ali je mogao i bio dužan da bude svestan).[103]

33. Ovakvo poimanje krivice[104], pojedini pravni pisci prihvataju i za Građansko pravo. Po njihovom mišljenju krivica i u Građanskom pravu treba da se prosuđuje na subjektivan način. To znači da, kada neko lice svojom radnjom prouzrokuje drugome štetu, sud treba da se upita da li je štetnik prema svojim subjektivnim svojstvima i sposobnostima mogao da shvati domašaj svoje radnje i mogućnost nastupanja štete, kao i da izbegne njeno prouzrokovanje. Sud je, dakle, dužan da ispituje psihičko stanje učinioca i da, imajući u vidu lična svojstva i sposobnosti učinioca, utvrđuje da li je on imao mogućnost da se ponaša drugačije. Pri tome, sud treba da uzme u obzir okolnosti kao što su sposobnost za rasuđivanje, starosno doba, stanje zdravlja i eventualno određene fizičke nedostatke (kao što su invalidnost, slabovidost ili slepilo, gluvoća i slično), i druge lične osobine kao što su: snaga, inteligencija, iskustvo, veština, obučenost, snalažljivost, brzina reagovanja, itd. Tako bi se nebrižljivost starije osobe, pri prelaženju ulice blaže prosuđivala, nego ponašanje lica u punoj snazi. Krivicu neiskusnog vozača, ili nevičnog zanatlije trebalo bi blaže prosuđivati nego ponašanje iskusnog vozača ili veštog majstora. Ovaj način ocenjivanja krivice naziva se prosuđivanje *in concreto*, zato što uzima u obzir svojstva konkretnog štetnika, kao meru poređenja.

34. Prosuđivanje krivice *in concreto* znatno je pogodnije za Krivično, nego za Građansko pravo. Da bi se osuđujuća presuda izrekla prema okrivljenom, potrebno je, ispitati sve subjektivne okolnosti, pogotovo njegovo psihičko stanje. To zahtevaju razlozi društvene odbrane od teških povreda pravnog poretka, kao i razlozi zaštite ljudskih prava okrivljenog. Okrivljenom preti lišavanje slobode, ili neka druga kazna, pa je neophodno da se sud uveri da li je prilikom izvršenja krivičnog dela okrivljeni postupao svesno i voljno. U Krivičnom pravu, po pravilu, se odgovara za umišljaj, kod kojeg su psihički elementi posebno naglašeni. Za nehat se odgovara izuzetno, samo kad je to izričito predviđeno u krivičnom zakoniku. U Građanskom pravu za oštećenog je od bitne važnosti da se utvrdi krivica štetnikova i to njen donji prag. Manje je važno koji stepen krivice je u pitanju. U načelu, za postizanje svrhe građanskopravne sankcije, a to je naknada štete, dovoljno je da štetnik postupa i sa najblažim stepenom krivice, a to će reći nebrižljivo. Kako je u našem pravu prihvaćeno da štetnik duguje potpunu naknadu štete bez obzira na stepen krivice, glavna svrha oštećenikovog zahteva postignuta je čim se utvrdi ma i najblaži stepen krivice. Otuda je, sasvim, moguće da neko lice bude oslobođeno krivične odgovornosti, a da u Građanskom pravu bude proglašeno za krivo i da odgovara za prouzrokovanu štetu. Rečju, u Građanskom pravu se krivica prosuđuje strožije nego u Krivičnom pravu.

b) Prosuđivanje krivice in abstracto

35. Strožije merilo krivice bilo je predloženo u Skici za zakonik o obligacijama i ugovorima. U članu 127. koji nosi naziv: "Kada postoji krivica", rečeno je sledeće:

---

[101] Srzentić, Stajić, Ibidem. Lazarević, Ibidem.

[102] Srzentić, Stajić, op. cit., str. 219. Lazarević, op. cit., str. 221.

[103] Srzentić, Stajić, op. cit., str. 221, Lazarević, op. cit., str. 223.

[104] Uporediti: Dimitar Machiedo, Osnov odgovornosti za prouzrokovanu štetu, Zbornik Građanska odgovornost, Beograd, 1966, str. 31 passim, naročito str. 40. Slično: Pop Georgiev, op. cit., str. 154.

"Pri prosuđivanju da li je lice koje je štetu prouzrokovalo krivo ili ne, to jest da li se ponašalo kako je trebalo, sud vodi računa o redovnom toku stvari i o tome šta se od razumnog i pažljivog čoveka moglo osnovano očekivati u datim okolnostima."

Prema pravilu sadržanom u Skici, u središtu pojmovnog određenja krivice nalazi se *ponašanje* učinioca štete, a ne njegov psihički odnos prema ponašanju i šteti kao posledici. Otuda se i ne pominje podela krivice na nameru i na nepažnju. Naime, u okviru predloženog sistema, bitno je odrediti donji prag krivice, zato što je za oštećenog od presudnog značaja da je štetnik kriv, a ne koliki je stepen njegove krivice. Drugo obeležje, u novom pristupu, ogleda se u tome što se krivica određuje kao *pogrešno postupanje*. Za nekoga ćemo reći da je kriv, ako nije postupao onako kako je trebalo, a to znači kada njegovo ponašanje odstupa od ponašanja, koje se moglo osnovano očekivati od razumnog i pažljivog čoveka.

36. Određivanje krivice u ovom sistemu, sastoji se iz dve faze. U prvoj, sud treba da činjenično utvrdi, kako se u konkretnom slučaju, ponašalo lice čijom radnjom je prouzrokovana šteta, a zatim, u drugoj fazi, da uporedi štetnikovo postupanje sa ponašanjem kakvo je trebalo da bude. Sudija je upućen da izgradi jedan zamišljeni standard ponašanja (više ili manje apstraktan), razumnog i pažljivog čoveka, koji će služiti kao merilo poređenja. Ako poređenjem utvrdi da lice koje je štetu prouzrokovalo, nije postupalo, onako, kako bi se ponašao razuman i pažljiv čovek, sudija će izvesti zaključak da je to lice krivo za prouzrokovanu štetu. Otuda se. za ovakvo shvatanje krivice, kaže da predstavlja objektivizovano gledanje na krivicu (prosuđivanje krivice *in abstracto*). Pri tome valja naglasiti da krivica ostaje subjektivni element deliktne odgovornosti (jer je reč o ljudskom ponašanju, a ono jeste subjektivni fenomen), ali je merilo po kome se krivica prosuđuje objektivizovano. Objektivizacija krivice (a ne objektivna krivica, što bi bila protivrečnost), ogleda se u tome što se krivica ne prosuđuje prema unutrašnjem stanju svesti i volje, nego prema ponašanju kao rezultatu psihičkih procesa u spoljnom svetu.

37. Da je prihvaćeno pravilo, predloženo u Skici, naše pravo je moglo jednostavnije da rešava pitanje krivice. Naime, predloženo pravilo polazi od štetnikovog ponašanja, kakvo se ispoljilo u stvarnom događaju, a ne od psihičkog doživljavanja onoga što se dogodilo u stvarnosti. Razume se da je prvo, lakše dokazati nego drugo, čime se otklanjaju kritike upućene sistemu dokazane krivice, koje ciljaju na teškoće prilikom dokazivanja krivice štetnika.

38. Sa ovakvim poimanjem krivice, izlišno je unositi protivpravnost kao četvrti element odgovornosti. Protivpravnost je neophodna kao uslov odgovornosti u sistemima posebnih delikata, kao što je krivično pravo (i kao što je bilo u rimskom građanskom pravu, u kome nije postojalo opšte pravilo o prouzrokovanju štete nego četiri delikta *ius civile-a: iniuria, furtum, damnum iniuria datum* i *rapina* i tri pretorska delikta: *dolus, metus i fraus creditorum)*. Protivpravnost u tim sistemima služi da obeleži polje nedozvoljenog ponašanja i da ga izdvoji iz prostora slobode (dozvoljenog ponašanja). Kada se odgovornost formuliše u vidu opšteg pravila: "Ko drugome prouzrokuje štetu svojom krivicom dužan je naknaditi je", protivpravnost postaje izlišna.[105]

39. Primenjujući metod prosuđivanja štetnikove krivice *in abstracto,* naše pravo je usaglašeno sa težnjama u velikim sistemima u uporednom pravu.[106] Prosuđivanje krivice prema

---

[105] Uporediti: "Sa ovako shvaćenom krivicom nepotrebno je isticati protivpravnost kao zaseban uslov odgovornosti", Konstantinović, Obrazloženje Prednacrta Zakonika o obligacijama, Beograd 1966, str. 15.

[106] Uporediti: Bogdan Loza, Obligaciono pravo, Opšti dio, četvrto izdanje, Beograd, 2000, str. 208-211; Marija Karanikić Mirić, Krivica kao osnov vanugovorne odgovornosti, doktorska disertacija, daktilografisano, Beograd, 2008, passim.

ponašanju razumnog i obazrivog čoveka *(personne avisée)* predstavlja preovlađujuće shvatanje u francuskom pravu.[107] Standard ponašanja razumnog čoveka *(reasonable man)* je široko prihvaćen kao merilo krivice u engleskom pravu.[108] Slično merilo, o pažnji koja se zahteva u prometu, prihvaćeno je u Građanskom zakoniku Nemačke, u § 276.[109] Jedini izuzetak predstavlja austrijsko pravo, u kome se i dalje primenjuje shvatanje o krivici koje se prosuđuje *in concreto*.[110]

40. Postepeno prodiranje novog shvatanja o krivici može se pratiti i u našoj sudskoj praksi. Istina, taj proces se nije razvijao ravnomerno i sudska praksa nije sasvim ustaljena. Bilo je odstupanja, povremenih kolebanja, pa čak i trenutaka kada je izgledalo da će se afirmisati suprotno, čisto subjektivističko shvatanje krivice. Čini se ipak, da shvatanje o krivici kao odstupanju od ponašanja razumnog i pažljivog čoveka, preovlađuje u odlukama sudova.

Procena krivice osobito je značajna u slučajevima kada se radnje štetnika i oštećenog uzajamno prožimaju, pa je teško utvrditi ko je, od njih dvojice, pogrešno postupao. Zanimljivo je da se kao ilustracija tvrđenja da se u našoj sudskoj praksi krivica posmatra *in abstracto,* uzimaju primeri u kojima je upravo reč o međuzavisnom delovanju dva lica.

41. U jednom slučaju činjenice su bile sledeće: tužilac, koji je tvrdio da se razume u posao, predložio je da se bačva od 500 litara zapremine, puna vina spusti u podrum. Tuženi je na to pristao. Rad je organizovao tužilac i svakome odredio ulogu u poslu. Tuženi se nalazio ispred bačve a tužilac i još jedno lice Š.M. su je pridržavali sa strane. U jednom trenutku, tužilac je rekao tuženom da izvuče polugu kako bi se bačva mogla spustiti sa gornje stepenice na nižu. Kad je tuženi postupio na taj način, bačva je poletela nadole. Tuženi se spasao, ali je bačva, koja se iskrenula u stranu, u kotrljanju niz stepenice, prešla preko noge tužioca i on je tom prilikom zadobio povredu. Zbog toga je podneo tužbu i tražio naknadu štete. Prvostepeni sud je smatrao da do štete nije došlo krivicom tuženog, da su svi, koji su učestvovali u poslu, činili to na sopstveni rizik, jer su morali znati da se nesrećan slučaj može dogoditi, te da je reč o nezgodi koja je nastala slučajno, zbog čega pogađa isključivo tužioca. Istog mišljenja je bio i drugostepeni sud, koji je prihvatio ove razloge i na njima zasnovao svoju presudu.

42. Savezni vrhovni sud rasuđivao je drugačije. Prema njegovom shvatanju na osnovu okolnosti, koje je utvrdio prvostepeni sud ne mora se izvesti zaključak, da tuženi nije učinio ništa što je moglo dovesti do štete. Svoje stanovište Sud je izrazio na sledeći način:

> "Tuženi može biti i kriv za nastalu štetu ako pri ovom poslovanju nije postupio onako kako se u takvim okolnostima osnovano očekuje od razumnog čoveka i pažljivog građanina i ako je tako svesno ili nepažnjom pričinio štetu. Ako bi iz okolnosti proizilazilo da je tuženi preduzeo jednu radnju tešku i opasnu za one koji je izvode pod neuobičajenim i nepovoljnim, riskantnim okolnostima, sa nestručnim ili nevičnim licima ili i nedovoljnim brojem lica, i toga mogao ili morao biti svestan, onda bi to ukazivalo na njegovu krivicu za nastalu nezgodu i bez obzira na to što se tužilac sam ponudio da

---

[107] Henri, Léon Mazeaud, André Tunc, Traité théorique et pratique de la rasponsabilité civile, délictuelle et contractuelle, Tome premier, sixième édition, Paris, 1965, str. 504.

[108] Winfield & Jolowitz on Tort, 16th Edition, W.V.H. Rogers, London, 2002, str. 190 i dalje.

[109] "Nepažnja postoji, ako lice ne postupa sa brižljivošću koja se zahteva u prometu", § 276, st. 2., Nemačkog građanskog zakonika; Uporediti: Erwin Deutsch, Haftungsrecht, I Band, Allgemeine Lehren, Köln, 1976, str., 282 i dalje.

[110] Helmut Koziol, Oesterreichisches Haftpflichtrecht, Band I, Allgemeiner Teil, Wien, 1973, str. 98-100.

pomogne spuštanju bačve i rukovodio tim spuštanjem i tuženi po njegovom nalogu pravilno izvukao polugu, jer je za štetu odgovoran i onaj koji štetu prouzrokuje nepropisnim rukovanjem i manipulisanjem svojom ili poverenom mu stvari."[111]

Na ovu odluku oslanjali su se niži sudovi u nizu odluka koje su kasnije bile donesene. Iako je doneta pre gotovo pola veka, stanovište izraženo u presudi zadržava svoju vrednost i danas.

v) Primena subjektivnog merila o krivici kao izuzetak od ustaljene sudske prakse

43. U jednom kratkom razdoblju izgledalo je da će se Vrhovni sud Jugoslavije prikloniti subjektivnom, psihološkom pojmu krivice. Nasuprot preovlađujućem shvatanju u pravnoj teoriji i dotadašnjoj ustaljenoj sudskoj praksi najviši sud se u jednom slučaju o krivici izrazio na sledeći način:

"Naime, krivnja je uvijek subjektivna kategorija i to u svim stupnjevima: namjeri, grubom i lakom nehatu. Zato se, bez obzira na objektivizirane (opće, apstraktne), kriterije koji služe da bi se upoređenjem utvrdilo o kome je stupnju nehata riječ u nekom konkretnom štetnom ponašanju, subjektivne osobine učinioca štete ne mogu uvijek i sasvim zanemariti. Prije svega, očevidno je da se ne mogu zanemariti osobine koje utiču na sposobnost rasuđivanja, a zatim, naročito u određenim situacijama, ni neke druge lične osobine van navedene sfere, kao što su iskustvo, snalažljivost, snaga i sl. Kao primjer gdje će čisto subjektivna osobina doći u obzir, mogu se navesti izuzetne i iznenadne saobraćajne situacije u koje vozač nije doveden svojom krivnjom, a u kojima će uspješno ili neuspješno razriješavanje opasnosti vrlo često ovisiti o snalažljivosti, iskustvu i "prirođenim" kvalitetima refleksnog djelovanja. Nema nikakve sumnje da se kod ocjene da li se u takvoj situaciji radi o običnom ili grubom nehatu moraju uzeti u obzir, osim općih kriterija, izvjesna subjektivna svojstva učinioca."[112]

U nastojanju da afirmišu tzv. subjektivističko shvatanje krivice, ili shvatanje o krivici *in concreto*[113] redaktori Nacrta zakona o obligacionim odnosima izostavili su odredbu iz čl. 127. Skice o pojmu krivice, kao odstupanju od ponašanja, kakvo je trebalo da bude. I doista, u opštim odredbama Zakona o obligacionim odnosima u kojima se govori o subjektivnoj odgovornosti, nema pomena o ponašanju razumnog i pažljivog čoveka. Ali, izostavljen iz opštih pravila, standard o ispravnom ponašanju kao merilu krivice, našao se na drugom mestu. Naime, u pravilima o odgovornosti za drugog, rečeno je da preduzeće odgovara za štetu, koju zaposleni prouzrokuje trećem "osim ako dokaže da je zaposleni u datim okolnostima postupao onako kako je trebalo."[114]

44. Pošto su krivicu štetnika shvatili kao psihički odnos štetnika, što po prirodi stvari predstavlja veliku, ponekad i nesavladivu teškoću za oštećenog da je u takvom obliku kao tužilac dokaže, redaktori su učinili jedan još dalekosežniji korak. Umesto pravila: Ko drugome prouzrokuje štetu svojom krivicom dužan je naknaditi je, koje je bilo predviđeno u Ski-

---

[111] Rešenje Saveznog vrhovnog suda, Rev. 49/58 od 25. februara 1958. g. Zbirka sudskih odluka, knjiga III, sveska 1, Odluka br. 59.

[112] Presuda Vrhovnog suda Jugoslavije, Rev. 109/71 od 28. maja 1971. g., iz arhive suda.

[113] Uporediti: Dimitar Machiedo, Osnov odgovornosti za prouzrokovanu štetu, Zbornik, Građanska odgovornost, Beograd, 1966, str. 37. i dalje. Ž. Šmalcelj, Pojam nepažnje u Građanskom pravu, Naša zakonitost 1-2/1963, str. 12 i dalje.

[114] Čl. 170. stav 1. Zakona o obligacionim odnosima.

ci,[115] oni su formulisali osnovno pravilo o subjektivnoj odgovornosti na sledeći način: „ko drugome prouzrokuje štetu dužan je naknaditi je ukoliko ne dokaže da je šteta nastala bez njegove krivice".[116] Na taj način je u naše pravo uveden sistem pretpostavljene krivice,[117] za koju koncepciju su se pojedini pravni pisci odranije zalagali.[118] Ovakvo pravilo koje rešava jedan problem praktične prirode otvorilo je niz drugih problema[119] i narušilo ceo sistem deliktne odgovornosti.

g) Povratak na prosuđivanje krivice in abstracto

45. Stanovište o krivici kao psihološkom pojmu nije uspelo da prevlada u Građanskom pravu (za razliku od Krivičnog prava) ni u sudskoj praksi ni kad je reč o pravnoj teoriji. U pogledu sudske prakse, može se reći, da je ona i pre i posle pomenutog *interregnum*-a, u nizu odluka govorila o krivici kao pogrešnom postupanju, bez ulaženja u analizu psiholoških pa čak i fizičkih mogućnosti i sposobnosti štetnika.

Primer koji je pružio priliku Vrhovnom sudu Jugoslavije da se izjasni o ovom pitanju, veoma je zanimljiv. U saobraćajnom udesu vozač automobila povredio je na drumu putara, koji je obavljao svoju redovnu delatnost. U postupku je utvrđeno da je vozač zvučnim signalima upozoravao putara, ali ga ovaj zbog nagluvosti nije čuo te tako je došlo od udesa. prvostepeni (okružni) sud je smatrao da je odgovornost podeljena, a republički Vrhovni sud da je isključivo kriv vozač. Vrhovni sud Jugoslavije ukinuo je odluku drugostepenog suda, dao za pravo prvostepenom sudu i povodom ovog slučaja izložio svoje stanovište o poimanju krivice:

> "Po mišljenju Vrhovnog suda Jugoslavije svaki čovek koji ima neku telesnu manu (slep, gluv, i tako dalje) mora kad se nađe na cesti preduzeti za vlastitu bezbednost sve potrebne mere i biti krajnje oprezan, pošto se u savremenom saobraćaju ne može tražiti od vozača vozila da unapred znaju za sve lične osobine korisnika puteva i da prema njima podese vožnju. U konkretnom slučaju tužilac nije preduzeo sve što bi trebalo da ne dođe do nesreće. Vrhovni sud Jugoslavije zato usvaja razloge i zaključak prvostepenog suda o sukrivnji tužioca za štetni događaj u kome je tužiocu nastala šteta koja je predmet ovog spora."[120]

U slučaju o kome je reč, gluvom putaru ne može se zameriti što nije čuo približavanje automobila, jer on to po svojim svojstvima i sposobnostima jednostavno nije bio u stanju. Ali, Sud nije primenjivao shvatanje o krivici posmatranoj *in concreto*, nego je posmatrao kao pogrešno ponašanje, on je poredio putarevo ponašanje sa ponašanjem, koje se moglo osnovano očekivati od razumnog i pažljivog čoveka u datim okolnostima. U tom smislu, Sud je zamerio putaru što nije izašao na put sa pomoćnikom, koji bi ga upozorio na nailazak vozila,

---

[115] Skica, čl. 123, st. 1.

[116] Zakon o obligacionim odnosima, čl. 154, st. 1.

[117] Todor Ačanski, Pretpostavljena krivica, doktorska disertacija, Novi Sad, 1980.

[118] Uporediti: M. Vuković, Odgovornost za štete, str. 167 i sl. (naročito str. 173 i dalje); S. Jakšić, Obligaciono pravo, Sarajevo, 1962, str. 251-252.

[119] Sudovi su morali odmah po donošenju Zakona da preciziraju da se pretpostavka krivice odnosi samo na običnu nepažnju. Videti Zaključci XIV Zajedničke sednice Saveznog suda republičkih vrhovnih sudova, pokrajinskih vrhovnih sudova i Vrhovnog vojnog suda održane 25. i 26. marta 1980. godine. Zbirka sudskih odluka, (nova serija) knjiga V, sveska prva, str. 20.

[120] Presuda Vrhovnog suda Jugoslavije, Rev. 153/67 od 20. jula 1967. g. Zbirka sudskih odluka, knjiga XII, sveska 2, Odluka br. 181.

što je ranije činio i što su sudovi utvrdili u postupku. Odgovornost putara nije objektivna, on odgovara prema pravilima o subjektivnoj odgovornosti, ali se njegova krivica objektivizuje. To potvrđuje da se odgovornost u Građanskom pravu lagano pomera od krivice, shvaćene potpuno subjektivistički, do pogreške shvaćene gotovo u objektivnom smislu.

46. Potvrda shvatanja o pogrešnom ponašanju kao merilu krivice, nalazi se i u jednoj od novijih odluka Vrhovnog suda Srbije u Beogradu. Jedno lice nalazilo se na izdržavanju kazne zatvora u trajanju od dve godine i šest meseci u KPD u Požarevcu. Iz zdravstvenih razloga (da bi se lečio na slobodi) osuđeniku je bio dozvoljen prekid kazne od 6. marta 1989. god. do 6. juna 1989. god. Osuđeni se nije vratio na vreme u KPD i desilo se da je 7. juna, noću oko 22 časa ubio jednog grčkog državljanina koji je bio na proputovanju kroz Srbiju. U toku krivičnog postupka (novog), osuđenik je umro. Otuda se postavilo pitanje da li država odgovara za prouzrokovanu štetu, s obzirom da se naknada nije mogla dobiti od štetnika. Izjašnjavajući se o ovom pitanju Vrhovni sud Srbije je izložio sledeće shvatanje:

> "Pri takvom stanju stvari i pri takvim okolnostima sudovi nižeg stepena su zakonito postupili kada su na napred izloženi način uvažili zahtev tužilaca. Naime, iz konkretnih okolnosti slučaja nesumnjivo proizilazi da stoji osnov odgovornosti tužene države za štetu koju je prouzrokovao njen organ u vršenju funkcije (čl. 172. stav 1. Zakona o obligacionim odnosima) jer je štetni događaj ubistvo oca tužilaca bio 07. juna 1989. god. noću oko 22 časa u vreme kada je osuđeno lice već trebalo da bude na izdržavanju kazne zatvora. Ova šteta se mogla sprečiti blagovremeno preduzetim radnjama vođenjem kontrole osuđenog lica na slobodi odnosno prekidu izdržavanja kazne zatvora i preduzimanjem interventnih mera nadležnih organa države u vršenju svoje funkcije, što nije bilo učinjeno, pa je tužena građanskopravno skrivila i prouzrokovala tužiocima spornu štetu na koju tužioci imaju građanskopravno ovlašćenje da traže da se tužena obaveže da im isplati."[121]

47. Kao i u prethodnom slučaju, Sud je krivicu posmatrao kao propust u ponašanju. Taj propust ima obeležja gotovo objektivne odgovornosti. Državni organi, po mišljenju suda bili su dužni da po svaku cenu obezbede da se osuđeni nađe u zatvoru, onog dana kada je to trebalo da bude. Otuda za učinjeni propust nema izvinjenja. Sud ne govori o prigovorima, koje je tužena strana mogla iznositi, ali mi ih možemo zamisliti. Tužena država se mogla braniti navodeći da nisu svi policajci bili u stanici, jer su neki od njih imali intervenciju na terenu, moglo se reći da je starešina opravdano bio odsutan, ili da je niži službenik propustio da kontroliše kojeg dana je osuđeni trebalo da se vrati na izdržavanje kazne itd. Ali, nijedan od ovih prigovora ne bi naišao na prihvatanje od strane Suda, koji je očigledno smatrao da Država raspolaže sredstvima, kojima može da izdejstvuje povratak osuđenog na izdržavanje kazne, pod bilo kojim uslovima i u bilo kojim okolnostima. Time se propust državnih organa, iako obeležen kao krivica ("osuđeno lice" trebalo je da bude na izdržavanju "kazne"), približava i gotovo dodiruje sa objektivnom odgovornošću.

G. Zaključak

Posle Drugog svetskog rata, srpsko Obligaciono pravo razvijalo se pod dvostrukim uticajem oslanjanja na sudsku praksu i ugledanja na rešenja u uporednom pravu. Evolucija u shvatanjima, pojmovima i ustanovama sve više je udaljavala novi sistem deliktne odgovornosti od predratnog prava koje je bilo sadržano u srpskom Građanskom zakoniku i oslonjeno

---

[121] Presuda Vrhovnog suda Srbije Re. 3113/94 od 25. januara 1995. godine, iz arhive suda.

na austrijsko pravo. Mnoge nove ustanove među kojima naročito pravilo o potpunoj naknadi štete obeležile su razvoj u pravcu modernih rešenja. U svom završnom obliku sadržanom u Zakonu o obligacionim odnosima, novo srpsko Obligaciono pravo predstavlja konzistentan i razvijen sistem pravila na visini najmodernijih kretanja u uporednom pravu.

Međutim, i posle donošenja Zakona o obligacionim odnosima ostalo je nedovršeno pitanje poimanja krivice i u vezi sa tim sistema dokazane ili pretpostavljene krivice. U Skici za Zakonik o obligacijama i ugovorima krivica je bila posmatrana kao standard ponašanja razumnog i pažljivog čoveka i zato se opšte pravilo o subjektivnoj deliktnoj odgovornosti zasnivalo na sistemu dokazane krivice. Nasuprot tome, redaktori su izostavili definisanje krivice što je značilo implicitno prihvatanje stanovišta da se krivica svodi na psihički odnos. Kako je tako shvaćenu krivicu teško dokazati u sporu, redaktori su uveli princip pretpostavljene krivice i na taj način poremetili inače konzistentan sistem obligacionog prava.

Prosuđivanje krivice *in apstracto* znatno olakšava dokazivanje. Naime, sud ne mora da se upušta u ispitivanje zamršenih pitanja psihičkih procesa i neretko, nedokučivih tajni duševnog stanja učinioca sa neizvesnim rezultatima. On jednostavno utvrđuje kako se tuženi štetnik, uistinu, ponašao i poredi štetnikovo postupanje sa ponašanjem razumnog i pažljivog čoveka. Valja napomenuti, da će sudija u nedostatku drugih uzora, uzeti kao standard, ponašanje onako kako ga on (sudija) zamišlja.

Treće, na ovaj način se podstiče društveni napredak. Ponašanje razumnog i pažljivog čoveka nije ponašanje ljudi prosečne marljivosti. To je ponašanje veoma brižljivih ljudi. U tom smislu čak i ponašanje, koje je uobičajeno u praksi može biti ispod nivoa koji se traži, kad se kao merilo uzima ponašanje razumnog i pažljivog čoveka.

Nije naodmet reći da ovakvo poimanje krivice čini nepotrebnim da se, u pravni sistem subjektivne deliktne odgovornosti, unosi opšta pretpostavka o krivici nekog lica, na osnovu činjenice što je ono prouzrokovalo štetu. Ovakva pretpostavka u okvirima materijalnog (Građanskog) prava menja karakter odgovornosti, a na planu procesnog prava remeti primenu osnovnog načela da tužilac treba da dokaže sve što tvrdi.

Rečju, prosuđivanje *in abstracto* objektivizuje krivicu, uvođenje pretpostavke o krivici objektivizuje odgovornost. Otuda je Komisija za pripremu i izradu Građanskog zakonika Republike Srbije predložila da se u novi tekst Zakona o obligacionim odnosima unese pojam krivice (koji je ranije bio predviđen u Skici) u čl. 171, st. 1, a u jednoj od varijanti za izmenu osnovnog pravila o subjektivnoj odgovornosti predloženo je ponovno uspostavljanje načela dokazane krivice.

Prof. Dr. *Slobodan Perović**
Predsednik Saveza Udruženja
pravnika Srbije i Republike Srpske

OBJEKTIVNA ODGOVORNOST ZA PROUZROKOVANU ŠTETU

Uvodna napomena

Istorija pravne civilizacije stoji pred jednom istinom: ugovor i delikt dve su grane istog drveta života. Akt voljni i akt nevoljni, čin dozvoljen i čin nedozvoljen, sastavni su delovi čitavog horizonta ljudskih obaveza.

Za Gajeve Institucije, ugovor i delikt su *summa divisio* svih izvora obaveza.[1] Svih onih odnosa koji se, po načinu matematičke proporcije, izražavaju juristočkom formulom pravne veze koja jednu stranu ovlašćuje da zahteva od druge strane, da ova nešto preda, učini ili se uzdrži od nekog činjenja.[2]

Pravičnost kao jednakost odnosa u oblasti ugovorne i deliktne odgovornosti ima svoju, ne samo juristočku prošlost i sadašnjost, već i snažnu komponentu etičke i filozofske opservacije. Jer, ugovor kao saglasnost volja i delikt kao akt prouzrokovanja štete, nisu samo pravne kategorije. Oni su istovremeno i norme pravičnosti kojima se iskazuje i označava i određeni moralni stav. Svest o obaveznosti ispunjenja date reči zasniva se kumulativno na moralnosti i propisanoj legalnosti u materiji ugovorne odgovornosti. U stvari, svako htenje ugovorne volje, da bi došlo do stepena moranja, potrebno je da prati neka moć prinude. Ta prinuda može biti heteronomna, spoljašnja (ad alterum) i propisana snagom pravne norme, a može biti i autonomna, unutrašnja (ab agenti) i ubeđujuća u smislu osude sredine ili griže savesti.[3] Prema tome volja ugovornika, bez moći pravne ili moralne prinude, ne može da stvori ugovornu obavezu. Ona može samo da osnuje jednu situaciju, da stvori jedan fakt u spoljnjem svetu, koji, za sobom povlači pravnu ili moralnu sankciju za slučaj neispunjenja datog obećanja. Drugim rečima, izvan moralne i pravne prinude, ne postoji drugi osnov osećanja obaveznosti da zadatu reč treba održati.[4] Kada su te dve moći prinude podudarne i izražene pravnom dogmatikom, onda je to znak visokog stepena primerenosti pravne norme moralnom

---

* Originalni tekst je na lokalnom jeziku.

[1] Gai, Inst. 3, 88 (Nund transcamus) ad obligationes. Quarum summa divisio in duas species diducitur, omnis enim obligatio vel ex contractu nascitur vel ex delicto.

[2] Just., Inst. 3, 13, pr-1. Obligatio est iuris vinculum, quo necessitate adstringimur, alicuius solvendae rei secundum nostrae civitatis iura.

[3] Saiget, Le contrat immoral, Paris, str. 82; Radbruh, Filozofija prava, Beograd, 1980, str. 60.

[4] Živanović, Osnovni problemi etike, Beograd, 1935; Marković, Poštenje i moral u pravu, Arhiv za pravne i društvene nauke, 1932, str. 322; Cardahi, Droit et moral, t. I, Paris, 1950; Perović, Moralizovanje ugovora, Pravni život, 1971, br. 10, str. 3–18; Pravičnost i princip integralne naknade ugovorne i deliktne štete, Aktuelna pitanja savremenog zakonodavstva, Zbornik radova, Budvanski pravnički dani 2000, str. 9–39.

faktoru. Tada prinudna pravna norma istovremeno izražava i moralni imperativ te dolazi do njihovog integriteta. U toj pretpostavci, svest o tome da ugovor treba ispuniti zasniva se na pravnoj normi kao „etičkom maksimumu“, te se dalje ponašanje stranaka upravlja i procenjuje po tom sjedinjenom dvojstvu prinude.[5]

Kao što se vidi, poštovanje date reči u jednom ugovoru, a to znači, njegovo izvršenje ili neizvršenje, u velikom stepenu zavisi od usklađenosti pravnog i moralnog poretka. Kada se ta usklađenost kreće u granicama društvene tolerancije, onda je to prvi znak pravnog sistema koji je u mogućnosti da obezbedi vladavinu načela legitimiteta i legaliteta u ugovornom pravu. Otuda princip *pacta sunt servanda* i njegova povreda povlači za sobom i odgovornost za štetu koja treba da odgovori zahtevu integralne naknade.

U suštini, isto pitanje se postavlja i kod deliktne štete. Prouzrokovanje štete nedozvoljenom radnjom ili propuštanjem, takođe ima svoju pravnu i moralnu dimenziju. Jer, svako je dužan da se uzdrži od postupka kojim se može drugome prouzrokovati šteta. Princip *alterum non laedere* bio je postavljen još u rimskoj stoičkoj školi. Prema tome, sve strane u obligacionom odnosu, bez obzira da li je u pitanju ugovorni ili deliktni odnos, dužne su da izvrše svoje obaveze i odgovorne su za njihovo ispunjenje. Integralnost naknade, i ovde, kao i kod ugovora, podrazumeva potpunu naknadu koja treba poverioca da dovede u ono materijalno stanje u kome bi se on nalazio da nije bilo štetne radnje ili propuštanja.

Međutim, princip integralne naknade, iako postavljen kao prvo slovo azbuke u materiji ugovorne i deliktne odgovornosti, u savremenom pravu, pod uticajem socijalizacije obligacionog prava i shodne primene komutativne i distributivne pravde, trpi izvesna odstupanja zavisno od konkretne pravne situacije.

Dva vida pravičnosti

Za helensku filozofsku misao, pre svih, za Aristotela, pravedno se uvek nalazi u nekoj proporciji, a proporcija znači jednakost odnosa. Sa tog stanovišta, pravičnost može biti ili komutativna ili distributivna – *iustitia commutativa i iustitia distributiva*[6].

Kada se pravičnost postiže apsolutnom sredinom putem aritmetičke proporcije, kada se, dakle, od štetnika oduzima upravo onoliko koliko iznosi šteta i ta vrednost prenosi na oštećenog, onda je to komutativna pravda[7].

Međutim, kada se pravičnost postiže putem geometrijske proporcije koja uzima u obzir prirodu i osobenost ličnosti, kada se, dakle, članovima zajednice uvažava njihova vrednost, zasluga ili neka druga individualnost (veći stepen priznate individualnosti znači i veće pripadanje), onda je to distributivna pravda[8]

Komutativna pravda zasnovana je na etičkom principu jednakog postupanja sa jednakim stvarima odnosno nejednakog postupanja sa nejednakim stvarima, srazmerno njihovoj nejednakosti. Postupajući po zakonu formalne logike, sve što je u skladu sa ovim principom predstavlja pravdu i sve što odstupa od njega kvalifikuje se kao nepravda. To znači da jedna-

---

[5] “Etički maksimum“ (Gustav Šmoler), “etički minimum” (Georg Jelinek), vidi Radbruh, navedeno delo, str. 60; Morin, La révolte des faits contre le code, Paris, 1920; Perović, Pravna država i kriza pravnog sistema, u knjizi Pravna država, Beograd, 1991, str. 77–112.

[6] Aristotel, Nikomahova etika (prevela sa starogrčkog R. Šalabalić), Beograd, 1970, knjiga V, str. 111. i sl.; ili, u prevodu T. Ladana, Zagreb, 1982, knjiga V, str. 87. i sl.

[7] Aristotel, navedeno delo, str. 120.

[8] Aristotel, navedeno delo, str. 117.

ko postupanje sa nejednakim stvarima, kao i nejednako postupanje sa jednakim stvarima, predstavlja nepravdu. U postupku primene pravnih pravila, to znači, da na jednake slučajeve treba primeniti isto pravilo, a na nejednake, drugo pravilo koje je primereno tim nejednakostima[9]

Ovako koncipirana pravda, izražava se aritmetičkom proporcijom i svaka strana u određenom pravnom odnosu dobija podjednako, ostvarujući jednakost onoga što daje sa onim što prima. U stvari, suština je u ekvivalentnosti prestacija, ono što će se u rimskom pravu izraziti formulom „do ut des"[10]

Pošto je svaka stvar ravna samoj sebi, to se komutativnom pravdom postiže jednakost u međusobnim odnosima na taj način što vrednost jednog stoji u odgovarajućoj srazmeri sa vrednošću drugog.

Ovako shvaćena pravda, primenjena na ugovor i delikt, znači sledeće: kod svih dvostranih ugovora, obaveze stranaka postavljene su u odnos jednakosti (napr. kupac dobija onoliko, koliko dobija i prodavac); kod svih deliktnih radnji, gde je faktom prouzrokovanja štete, povređen princip postojeće imovinske ravnoteže između štetnika i oštećenog, ista mora biti ekvivalentno nadoknađena (npr. lice koje je drugom prouzrokovalo štetu, dužno je da je naknadi u integralnom smislu).

Sa stanovišta komutativne pravde, među strankama, vrši se tada određena korektura, zbog čega se komutativna pravda, naziva još i korektivnom ili izjednačujućom pravdom[11]

Međutim, ono što je kod ove vrste pravde naročito značajno, to je , da ona ne uzima u obzir individualna svojstva aktera konkretnog odnosa, bez obzira da li je u pitanju dobrovolj-

---

[9] Aristotel, navedeno delo, str. 120. Aristotelove kategorije komunikativne i distributivne pravde nadživele su 23 stoleća i uvek ostale aktuelne i nezaobilazne prilikom proučavanja pojma pravde i pravičnosti. Pomenućemo samo neke studije koje su nam prostorno i vremenski bliže. Tako, Božidar S. Marković, Pravičnost kao misao i kao pravno iskustvo, Arhiv za pravne i društvene nauke, septembar 1937, str. 219–229; Essai sur les rapports entre la notion de Justice et l'élaboration du Droit privé positif, Pariz 1930. godine; Jelena Danilović, Pravičnost kao merilo pri sudskom odlučivanju, Pravni život, br. 10–12 za 1988, str. 1349; Perelman Ch.: Droit, morale et philosophie, Paris, 1968 (pet predavanja o pravdi) i izdanje Nolita iz 1983; Sauer W.: Die Gerechtigkeit, Berlin, 1959; Del Vecchio G.: Philosophie du droit, Paris, 1953; De Page H.: A propos du gouvernement des juges, L'équité en face du droit, Bruxelles–Paris, 1931; Rümelin M.: Die Gerechtigkeit, Tübingen, 1920; za rimsko pravo, v. Voigt M.: Die Lehre vom ius naturale, aequum et bonum, und ius gentium der Römer, Leipzig, 1856; Senn H.: De la justice et du droit, Paris 1927.

[10] Tako, prema Horvatu, Justinijanova kompilacija deli raznolike kontrakte, prema prirodi činidbe i protivčinidbe, na četiri skupine: a) do ut des, b) do ut facias, c) facio ut des, i d) facio ut facias (Horvat M.: Rimsko pravo, Zagreb 1958, str. 332 i sl.; prema Stojčeviću, veliki broj bezimenih kontrakta, svrstala je Bejrutska škola (prvi put u jednom papirusu kraja V i početkom VI v.n.e, v. Collinet, Historie de l'école de Beyrouth, str. 284) u četiri kategorije: slučajevi u kojima su obe strane obavezne na uzajamna davanja (do ut des), slučajevi u kojima jedna stranka daje nešto da bi joj druga stranka nešto učinila (do ut facias), slučajevi u kojima jedna stranka čini nešto drugoj s tim da joj ona nešto dâ (facio ut des), slučajevi u kojima se obaveze obe stranke sastoje u činjenju (facio ut facias). Opširnije, v. Stojčević D.: Rimsko obligaciono pravo, Beograd 1960, str. 100.

[11] "Pravedno se postiže izjednačavanjem. Ono dolazi do izražaja u poslovnim odnosima, dobrovoljnim i nedobrovoljnim. Pravedno u tom smislu ima sasvim različit karakter od pravednog u distributivnom smislu. Distributivno pravedno, naime, pri dodeljivanju opštih dobara, sastoji se uvek u postupku saobrazno geometrijskoj proporciji. Međutim, pravedno koje se javlja u poslovnim odnosima znači doduše neku jednakost, a nepravedno povredu jednakosti, ali ne u smislu one vrste proporcije koja se naziva geometrijskom, nego u smislu aritmetičke proporcije" (Aristotel, navedeno delo, str. 120).

ni odnos (ugovor) ili nedobrovoljni (delikt). Bitno je da se ovde pravda postiže izjednačavanjem ili vaspostavljanjem.[12]

I zato, prema Aristotelu, kada dođe do spora, ljudi pribegavaju sudiji koji ponovo uspostavlja jednakost, tražeći po aritmetičkoj proporciji, sredinu između „prevelikog i premalog".

S toga, „ići sudiji znači ići pravdi, jer sudija želi da bude oličenje pravednosti. Zato ljudi traže nepristrasnog sudiju, tj. onog koji se drži sredine i mnogi ga zato nazivaju posrednikom, u ubeđenju da će postići ono što je pravedno ako budu pogodili ono što je srednje. Pravedno je, dakle, sredina, iako je to u drugom smislu i sudija".[13]

Kao što je već istaknuto, Aristotelova filozofija, pored komutativne, poznaje i distributivnu pravdu, kao posebnu vrstu pravde.

Za razliku od komutativne, distributivna pravda se ostvaruje u odnosima između zajednice i pojedinaca, prema kojoj svako dobija onoliko koliko mu pripada prema njegovim individualnim zaslugama i doprinosa društvu. To je pravda koja se primenjuje u oceni postupka nekog lica sa stanovišta ustaljenih principa određene zajednice kojoj pripada to lice, a sve prema njegovim zaslugama i njegovom položaju. Suština ove pravde je u deljenju po načinu geometrijske proporcije: prema zajedničkom dobru, svako dobija srazmerno svojim zaslugama, zaslužniji više od onoga koji je manje zaslužan.[14]

Ideja distributivne pravde, prema kojoj, svakome treba dati onoliko koliko mu pripada, našla je mesta i u izvorima rimskog prava Ulpianusovog doba. Inspirisani ovom filozofijom, pravda je u Digestama, definisana kao neprekidno i trajno nastojanje da se svakome dâ ono što mu po pravu pripada,[15] a odredba *„suum cuique tribuere"* predstavlja jednu od tri zapovesti rimskog prava.[16]

Međutim, da bi dobili odgovor na pitanje koliko kome pripada, potrebno je obratiti se drugim granama znanja i prakse, koja su izvan normi pozitivnog prava, jer je pravda opšta vrednost i jedan od „najsjajnijih pojmova našeg duhovnog univerzuma".[17]

To znači, da kategorija distributivne pravde nije nepromenljiva i jednom za svagda data, već ona samo „direktivno ukazuje na put kojim treba ići da bi se postigla, dok ostavlja suštinsko pitanje, tj. koje pravo kome pripada".[18]

I tako dolazimo do suštine pitanja: distributivna pravda je zavisna od prostora i vremena, jer svaka pravno organizovana zajednica ima svoje kriterijume o tome, koji atributi čine ovu individualnu vrednost, koja zaslužuje da joj pripadne odgovarajući društveni i pravni tretman.

---

[12] U stvari, prema Aristotelu, izjednačavanjem ili vaspostavljanjem postiže se sredina, a prema njegovoj osnovnoj ideji, sredina je sinonim za pravdu.

[13] "Sudija ponovo uspostavlja jednakost kao kad bi od većeg dela duži presečene na nejednake delove oduzeo onoliko za koliko je taj deo veći od polovine i dodao ga manjem delu. Ali, ako se jedna celina deli između dvojice, onda se za svakog od njih kaže da je dobio svoj deo ali ako je dobio tačno polovinu. Jednako je, dakle, po aritmetičkoj proporciji, sredina između prevelikog i premalog" (Aristotel, ibidem).

[14] Distributivnu pravdu Aristotel vidi kao odnos pojedinca prema zajednici u kome se individualna svojstva uzimaju u obzir, tako da onaj ko je zaslužniji više dobija jer su njegove zasluge veće.

[15] Iustitia est constans et perpetua voluntas ius suum cuique tribuendi (Ulpianus – D. 1, 1, 10, pr.).

[16] Honeste vivere, alterum non laedere, suum cuique tribuere – iuris praecepta sunt (Ulpianus – D. 1,1,10, 1).

[17] Perelman H.: Pravo, moral i filozofija, Beograd 1983, str. 4.

[18] Marković B.: Suđenje po pravičnosti u opštem i u arbitražnom pravu, Pravni život, br. 2, 1986, str. 143.

To je pitanje opsega i karaktera ustaljenog javnog poretka određene zajednice,[19] pitanje filozofske i političke konstitucije, ekonomske i moralne emancipacije. Jednom rečju, to je pitanje stepena kulture i prosvećenosti jednog naroda.

U sledstvu ovih konstatacija, čini se, da se može reći, da distributivna pravda unosi u opšti pojam pravde određeni stepen relativnosti, što znači da pravda neminovno poseduje prostorno vremensku dimenziju. Pre svega, ovo se odnosi na konvencionalne kategorije i norme pozitivnog prava, kao heteronomnog prava, ali ne i univerzalno i prirodno pravo, kao večno i autonomno pravo,[20] koje je imalo snažnu prošlost[21] i koje ima određujuću sadašnjost.[22]

Kao što se vidi, komutativna i distributivna pravda, svaka za sebe, čini zaseban filozofski pojam i posebnu logičku celinu. Međutim, kada se ove zasebnosti stave u funkciju prakse i konkretnog pravnog života, čini se, da one moraju biti komplementarne i delovati u nekom obliku filozofsko praktične simbioze. Ceo pravnički svet je tu, da nam potvrdi ovu konstataciju.

Na osnovu ovoga, za komutativnu pravdu bi se moglo reći da se ona upravlja po načelima *ius strictum,* dok se distributivna pravda rukovodi onim što se naziva ius aequum.[23]

Dolazimo do ključnog pitanja: u kojoj meri se komutativna i distributivna pravda primenjuju u materiji ugovorne i deliktne štete i kakav je njihov međusobni odnos u ovoj obla-

---

[19] Simon: L'ordre public en droit privé, Rennes, 1941; Malaurie: L'ordre public et le contract, Reims, 1953; Claps-Lienhart: L'ordre Public, Lyion, 1934; Marmion: Etudes sur les lois d'Ordre Public et droit civil interne, Paris, 1924: Oprea: Essai sur la notion des bonnes moeurs dans les obligations en droit civil allemand, Paris, 1935; Saiget: Le contrat immoral, Paris, 1939; Pascanu: La notion d'Ordre Public par rapport aux transformations du droit civil, Paris, 1937; Tchavdaroff: De la notion des bonnes moeurs, Toulouse, 1927; Savey-Casard: Le refus d'action pour case d'indignité, Lyon, 1930; Dorat des Monts: La cause immorale, Paris, 1956; Bertrand: La notion d'ordre public en matiŐre de nullités, Lille, 1939; Bonnecase: La notion juridique des bonnes moeurs, Estudes de droit civil a la mémoire de H. Capitant, Paris, str. 91; MorandiŐre: L'ordre en droit privé interne, Etudes de droit civil a la mémorie de H. Capitant, Paris, str. 381; Kayser: Les nullités d'ordre public, Revue trimestrielle de droit civil, 1933, str. 1115; Cohendy: Des intérłts de la distinction entre l'inexistence et la nullité d'ordre public, Revue trimestrielle de droit civil, 1914, br. 1, str. 33; Darbellaly: Théorie générale de l'illicété, Fribourg, 1955; Guiraud: La police et l'ordre public, Bordeaux, 1938; Bernard: La notion d'ordre public en droit administratif, Paris, 1962; Stojanović: Sloboda ugovaranja i javni poredak, Arhiv, 1968, br. 3, str. 385; Rastovčan: Moral, dobri običaji i zlouporaba prava u građanskom zakoniku, Zagreb, 1927; Živanović: Osnovni problemi etike (filozofije moralne), Beograd, 1935; Perić: Uticaj sudije na javni moral, Privatno pravo, Skupljene rasprave iz građanskog prava Ž. Perića, Beograd, 1912, str. 261; Marković: Poštenje i moral u pravu, Arhiv, 1922, str. 332; Perović S.: Zabranjeni ugovori, Beograd, 1975, str. 99–165.

[20] Živanović T.: Sistem sintetičke pravne filozofije, Beograd, 1959, str. 523 i sl.

[21] Strauss L.: Prirodno pravo i istorija, Sarajevo, 1971 (prevod sa engleskog M. Lučić), str. 10.

[22] Cranston M.: U čemu se sastoje ljudska prava, objavljeno u knjizi Prava čoveka – zbornik dokumenata o pravima čoveka, Beograd, 1991, str. 29.

[23] To bi bili više figurativni nego izvorno tačni pojmovi. Naime, za ius aequum se vezuje više elastičnosti u primeni prava, nego što je to slučaj sa ius strictum, za koje se kaže da je striktno u svojoj primeni. Otuda, ius aequum je pravično pravo koje podrazumeva "veću slobodu i uvažavanje svih okolnosti konkretnog slučaja, za razliku od ius strictum, kakvo je bio staro civilno pravo, koje kao "strogo pravo" ne dopušta nikakve elastičnosti pri ocenjivanju konkretnih okolnosti različitih slučajeva". (Horvat M.: Rimsko pravo, Zagreb, 1958, str. 39 i sl.) Međutim, oba pojma su u rimskom pravu bila vezana za podelu prava na ius civile i ius getium, pa je ius aequum bilo pravo ius gentium-a, dok je ius strictum bilo pravo ius civile-a. Sa tih razloga, ovde upotrebljeni izrazi *aiu aequum* i *ius strictum* nemaju izvorno značenje u smislu gornje podele, već se ovde htelo reći da je komunitativna pravda shvaćena kao matematički obrazac koji se strogo primenjuje, kao što se strogo primenjivalo i ius strictum odnosno da se distributivna pravda slobodnije primenjuje uzimajući u obzir sve okolnosti konkretnog slučaja, kao što se ius aequum slobodno primenjivalo u okvirima rimskog *ius gentium*-a. Opširnije, v. Horvat, ibidem.

sti prava. Dalja izlaganja predstavljaju pokušaj da se odgovori na ovo pitanje. Međutim, ovde se već može reći, da je komutativna pravda karakteristična za sve ekvivalentne odnose u obligacijama i da je ona tu postavljena kao stožer oko koga se okupljaju pravila obligacionog prava kojima se zaštićuje princip ekvivalentne razmene. Ali, taj stožer nije i ne može biti usamljen. Prilikom primene komutativne pravde kao aritmetičke proporcije, moraju se, u izvesnoj meri koja proizilazi iz prirode datog javnog poretka, uzeti u obzir i određena individualna svojstva aktera te proporcije i njihove „zasluge", kako bi se postigla „savršena i potpuna vrlina", a to se ostvaruje prisustvom distributivne pravde.

Drugim rečima, distributivna pravda unosi u polje ugovorne i deliktne štete duh života i omogućuje da princip komutativne pravde bude primenjen onako kako to dolikuje ljudima, a ne samo brojkama i njihovim proporcijama.

Celokupna prošlost građanskopravne i moralne odgovornosti upravo je izgrađena na takvom susretu ove dve pravde. I to, ne samo prošlost, već i odgovornost organizovana *de lege lata*. Razume se, da mesto susreta ove dve pravde na području privatnog prava, zavisi od prostorno vremenske dimenzije koja određuje i njihov međusobni odnos.

Ovako određen smisao i domen primene komutativne i distributivne pravde, podjednako se odnosi, kako na ugovornu, tako i na deliktnu štetu. Postoji još čitav niz slučajeva ili bolje reći čitave oblasti obligacionog prava gde se odgovornost dužnika tj. njegova obaveza da poveriocu naknadi štetu zasniva na povredi neke druge obaveze koja među njima nije bila od ranije ustanovljena kao što je to slučaj kod ugovorne odgovornosti. Ova vrsta odgovornosti, za razliku od prve, naziva se vanugovornom ili deliktnom odgovornošću.

Naknade deliktne štete

Princip komutativne pravde primenjen na oblast deliktne štete, imao je svoju pravnu sudbinu.[24] Evolucija ove vrste odgovornosti svedoči da je ovaj princip, ispoljen kroz pravilo integralne naknade, znao i za svoja odstupanja.[25]

Aritmetička proporcija odnosa korigovana je i ovde osobenostima slučaja. Individualna svojstva oštećenog lica i štetnika i njihov položaj u tom odnosu, čine osnov za formulisanje pravila o sniženju naknade,[26] čime se kumutativna pravda povlači pred zahtevima distributivne.

Kao što je načelo ugovorne pravde[27] bilo izgrađivano na tom dvojstvu zahteva, tako i u materiji deliktne štete komutativna pravda nije mogla ostati usamljena. Ovde, ona je još i više mesta ustupila onome što se zove „distributivno pravedno",[28] što je posledica prirode deliktnog akta.[29]

---

[24] Gaudemet E.: Théorie générale des obligations, Paris, 1965, str. 296; Bettremieux R.: Essai historique et critique sur le fondement de la responsabilité civile, Lille, 1921; Josserand L.: Cours de droit civil positif français, t. II, 1938, str. 234; RodiŐre R.: La responsabilité civile, Paris, 1952, str. 112; Chabas F.: Responsabilité civile et responsabilité pénale, Paris, 1975, str. 51.

[25] V. npr. Švajcarski zakonik o obligacijania (čl. 42–44).

[26] Tako, uzimaju se u obzir i neka lična svojstva stranaka, kao što je njihovo imovno stanje ili se uzima u obzir da li je štetnik prouzrokovao štetu u vršenju neke koristi za oštećenog, ili se uzima u obzir i učešće oštećenog u prouzrokovanju štete (v. napr. čl. 191. Zakona o obligacionim odnosima).

[27] Ghestin J.: Traité de droit civil. Les obligations. La responsabilité: effets, Paris, 1988; isti autor: Korisno i pravično u ugovorima, Pravni život, br. 8–9, 1981, str. 43 (prevod M. Orlić).

[28] Aristotel: navedeno delo, str. 119.

[29] Aristotel: navedeno delo, str. 113.

Što se tiče osnovnog pitanja na koji način se vrši naknada materijalne štete, savremeno pravo se opredeljuje za vaspostavljanje ranijeg stanja i novčanu naknadu. Naime, odgovorno lice je dužno da vaspostavi ono stanje koje je bilo pre nego što je šteta nastala, čime se izražava princip integralne naknade in natura. Međutim, kada vaspostavljanje ranijeg stanja ne uklanja štetu potpuno, odgovorno lice je dužno da ostatak štete naknadi u novcu. Pri tome, kada vaspostavljanje ranijeg stanja nije moguće, ili kada sud smatra da nije nužno da to učini odgovorno lice, sud će odrediti da to lice isplati oštećeniku odgovarajući iznos novca na ime naknade štete. Najzad, sud će dosuditi oštećeniku naknadu u novcu uvek kad on to zahteva.[30]

Kod pitanja obima naknade materijalne štete treba posebno skrenuti pažnju na pravilo savremenog odštetnog prava prema kome se ne pravi tradicionalna razlika između naknade obične štete (damnum emergens) i izmakle koristi (lucrum cessans) u zavisnosti od toga da li je štetnik prouzrokovao štetu namerno ili nepažnjom. To čini i naš Zakon o obligacionim odnosima.[31] Određivanje obima naknade s obzirom na stepen krivice, ovaj zakon u principu ne prihvata. Po njemu, oštećenik ima pravo kako na naknadu obične štete, tako i na naknadu izmakle dobiti.

Ovo pravilo koje sve više prodire u savremeno pravo, polazi od ideje potpune naknade i stanovišta da u ceo sistem naknade treba na prvo mesto postaviti interes oštećenika. Ističe se da je za oštećenika po pravilu indiferentna okolnost sa kojim stepenom krivice mu je štetnik prouzrokovao štetu, za njega je, dakle, važna integralna naknada, a ne stepen krivice štetnika. Doduše, Zakon u nekim situacijama vodi računa i o stepenu krivice u smislu određivanja obima naknade, npr. kod afekcione vrednosti. Tako, kada je stvar uništena ili oštećena krivičnim delom učinjenim sa umišljajem, sud može odrediti visinu naknade prema vrednosti koju je stvar imala za oštećenika.

Pravilo potpune naknade ovaj zakon je izrazio i rečima da će sud, uzimajući u obzir i okolnosti koje su nastupile posle prouzrokovanja štete dosuditi naknadu u iznosu koji je potreban da se oštećenikova materijalna situacija dovede u ono stanje u kome bi se nalazila da nije bilo štetne radnje ili propuštanja.

Ipak, savremeno pravo, kao i rešenja našeg Zakona o obligacionim odnosima, poznaju mogućnost odstupanja od pravila integralne naknade u smislu sniženja naknade ako su se ispunili odgovarajući uslovi. Tako sud može, vodeći računa o materijalnom stanju oštećenika, osuditi odgovorno lice da isplati manju naknadu nego što iznosi šteta, ali samo pod uslovom da šteta nije prouzrokovana ni namerno ni krajnjom nepažnjom (dakle, omaškom koja se lako može svakome desiti), a odgovorno lice je slabog imovnog stanja te bi ga isplata potpune naknade dovela u oskudicu. Ovo pravilo je izraz socijalizacije prava u oblasti naknade štete, i njega poznaju, pored našeg Zakona o obligacionim odnosima, i drugi savremeni kodeksi obligacionog prava, npr. švajcarski Zakonik o obligacijama.

Sniženje naknade, pored podeljene odgovornosti,[32] predviđeno je i u slučaju kada je štetnik prouzrokovao štetu radeći nešto u korist oštećenika. Tada sud može odrediti manju naknadu, vodeći računa o brižljivosti koju štetnik pokazuje u sopstvenim stvarima.[33]

---

[30] M. Konstantinović, Skica za zakonik o obligacijama i ugovorima, izdanje Službenog lista SRJ, Beograd, 1996, čl. 147; u tom smislu i Zakon o obligacionim odnosima, čl. 185.

[31] Zakon o obligacionim odnosima (čl. 189); M. KOnstantinović, navedeno delo, čl. 150.

[32] Prema Zakonu o obligacionim odnosima (čl. 192), oštećenik koji je doprineo da šteta nastane ili da bude veća nego što bi inače bila, ima pravo samo na srazmerno smanjenu naknadu. Kad je nemoguće utvrditi koji deo štete potiče od oštećenikove radnje, sud će dosuditi naknadu vodeći računa o okolnostima slučaja. U tom smislu vidi M. Konstantinović, navedeno delo, čl. 154.

[33] Zakon o obligacionim odnosima (čl. 191); M. Konstantinović, navedeno delo, čl. 153.

Čini se, da su sva pomenuta odstupanja od principa integralne naknade inspirisana primenom pravičnosti u materiji naknade štete, i po tome, opštije pravilo trebalo bi da glasi: kad se veličina štete ne može tačno da utvrdi, sud će odrediti naknadu po pravičnosti, vodeći računa o svim okolnostima slučaja.[34]

Sistem taliona. – Pravo prvih pisanih izvora[35] nije poznavalo naknadu štete kao reparaciju u današnjem smislu. Otuda, za taj period teško je reći da je princip komutativne pravde bio prihvaćen. Međutim, to pravo je znalo za osvetu putem načela „isto za isto" (sistem taliona), a kazna (poena) nije značila naknadu štete, već otkup za odustajanje od osvete.[36]

Otuda, možda bi se moglo reći, da se u tadašnjoj individualnoj i kolektivnoj svesti, komutativna pravda ostvarivala putem taliona, kao neka vrsta današnje naturalne restitucije. Ipak, evolucija odgovornosti je napustila ovaj privatni sistem popravljanja štete i sve više prihvatala naknadu kao organizovanu pravnu sankciju za učinjeni delikt, gde je uticaj i razvoj pojma krivice imao neobično važnu ulogu.[37]

Lex Aquillia. – U rimskom pravu već sredinom III veka stare ere, uspostavljeni su temelji naknade štete kao reparacije, a ne samo kao privatne kazne. Ta prelomna tačka u razvoju ove vrste odgovornosti vezuje se za Lex Aquilia,[38] po kome je delikvent dužan da plati oštećenom samo najveću vrednost koju je oštećena ili uništena stvar imala u poslednjih trideset odnosno godinu dana.[39] Ovaj Akvilijev zakon o šteti (kasnije poznat pod imenom akvilijanska šteta ili akvilijanska tužba) unosi u ovu materiju jednu važnu distinkciju: plaćena suma novca nije kazna već naknada štete. Do tada, svaki atak na tuđa prava bio je obuhvaćen pojmom iniuria i delikvent je plaćao određenu sumu novca na ime kazne čija je visina bila određena težinom pričinjenog dela, a ne visinom prouzrokovane štete.[40] U stvari, ta novčana kazna je bila neka vrsta zamene za ličnu osvetu.[41]

Istovremeno sa razvojem naknade štete u akvilijanskom smislu, treba pomenuti i razvoj odgovornosti za štetu koja se zasniva na krivici učinioca. Ispočetka, za primenu naknade kao privatne kazne, dovoljno je bilo utvrditi da je akt jednog lica uzrok (causa) štetnog dejstva, zbog čega se ta odgovornost i nazivala kauzalnom odgovornošću.[42] Tek se u kasnijoj fazi rimskog prava (klasično rimsko pravo) postepeno uzima u obzir krivica učinioca odnosno stepen njegove krivice i to je subjektivna odgovornost zasnovana na krivici učinioca (culpa), zbog čega se ova odgovornost naziva još i kulpoznom odgovornošću.

---

[34] M. Konstantinović, navedeno delo, čl. 151.

[35] Horvat M.: Rimsko pravo, Zagreb, 1958, str. 262; Stojčević D.: Rimsko privatno pravo, Beograd 1960, str. 29; Puhan I.: Rimsko pravo, 1970, str. 332; Romac A.: Izvori rimskog prava, Zagreb, 1973, str. 439.

[36] Cigoj S.: Građanska odgovornost, Enciklopedija imovinskog prava, Beograd 1978, tom I, str. 400.

[37] Horvat: ibidem; Cigoj: ibidem.

[38] Stosjčević, ibidem; Romac: ibidem.

[39] U prvom poglavlju Akvilijevog zakona o šteti bilo je predviđeno: ako neko tuđeg roba ili ropkinju ili četvoronožnu životinju bespravno ubije, neka bude osuđen da vlasniku plati najvišu cenu koju je stvar imala u toj godini. Što se tiče ostalih stvari (izuzev ubijenog roba i životinje), onaj ko drugome učini štetu, tj. bespravno zapali, slomi ili uništi, neka bude osuđen da plati vlasniku onoliko koliko je stvar vredela u poslednjih trideset dana (v. Romac A.: navedeno delo, str. 33).

[40] Stojčević D.: navedeno delo, str. 29 i 41.

[41] Cigoj S.: navedeno delo, str. 400.

[42] Horvat M.: navedeno delo, str. 264.

Ova odgovornost se postepeno razvijala u rimskom pravu,[43] tako da je tek u Justinijanovom pravu subjektivna odgovornost na bazi krivice izborila potpunu prevlast nad ostacima kauzalne u vidu odgovornosti za kustodiju.[44] Tako dolazi do razvoja i tipologije pojedinih stepena krivice, počev od namere (dolus), pa do različitih oblika nehata (culpa) odnosno propusta dužne pažnje,[45] što se do danas održalo.

Međutim, evolucija odgovornosti po osnovu krivice nije bila okončana s kraja bitisanja rimskog prava. Posle propasti rimske države i izvora građanskog prava kodifikovanih u V veku, dolazi do velikog zastoja u razvoju prava i pravne nauke uopšte. Vraćanje na naturalnu, zatvorenu privredu, naročito u zapadnim oblastima rimske imperije, nije bio proces u kome bi se nastavili već zasnovani pojmovi u razvijenom rimskom pravu. Varvarskim zakonicima koji su u doba ranog feudalizma važili na tim prostorima, ponovo se uvodi naknada u smislu kazne ili osvete.[46] Ipak, od 13. veka i doba renesanse, počinje da se sve više ističe pravilo po kome je štetnik dužan da naknadi štetu oštećenom, ako je ovu prouzrokovao svojom krivicom.[47]

Krivica. – Međutim, krivica kao ustanova građanskog prava dobila je svoj puni smisao i značaj s početka 19. veka kada je pod uticajem prirodno-pravne škole[48] i individualističke filozofije[49] bila shvaćena kao neophodnost i uslov svake naknade. Individualna odgovornost članova zajednice iskazana kroz subjektivnu teoriju zasnovanoj na krivici učinioca, bila je u skladu sa osnovnim opredeljenjima društva koje se Francuskom revolucijom oslobodilo feudalnih stega i proklamovalo filozofiju političkog i ekonomskog liberalizma.[50]

Tada, krivica kao individualna kategorija na kojoj je zasnovana odgovornost uglavnom uspeva da obuhvati sve štetne događaje, jer su ovi „retki" s obzirom na tadašnji razvoj tehničke civilizacije i u odnosu na današnji opasni način života. Bez obzira što ona neće suvereno vladati više od jednog veka, krivica je u tom periodu na vrhuncu svoje moći. Moderne kodifikacije toga doba (francuski i austrijski Građanski zakonik) prihvataju subjektivnu odgovornost, a Jering će reći da ne obavezuje na naknadu sama šteta, već krivica.[51]

Ova formula simbolizuje vekovnu evoluciju krivice kao osnova odgovornosti, počev od Akvilijevog zakona o šteti, pa sve do polovine prošloga veka. Ipak, kao što je poznato, to je

---

[43] Stojčević D.: navedeno delo, str. 262–267.

[44] Horvat M.: ibidem.

[45] Stojčević D.: navedeno delo, str. 41.

[46] Cigoj S.: navedeno delo, str. 400; Ripert G.: La rŐgle morale dans les obligations civiles, Paris, 1927, str. 327.

[47] Pirovano A.: Faute civile et faute pénale, Paris 1966. Literatura o deliktnoj odgovornsoti je veoma bogata. Ovde navodimo neka od značajnijih dela: Mazeaud H.: Responsabilité contractuelle et délictuelle, Rev. trim. de droit civil, 1929, str. 551; Mazeaud, Tunc: Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle, t. I, Paris, 1965; Starck B.: Droit civil, Paris 1972, str. 12; Tourneau Ph.: La responsibilité civile, Paris 1976, str. 49; Lalou, Azard: Traité pratique de la responsabilité civile, Paris 1962; Marty, Raynaud: Droit civil t. II, Paris 1962, str. 329; Deschenaux, Tercier: La responsabilité civile, Berne 1975.

[48] Radišić J.: Imovinska odgovornost i njen doseg, Beograd 1980, str. 36.

[49] Gounot: Le principe de l'autonomie de la volonté en droit privé, Dijon 1912; Waline: L'individualisme et le droit, Paris 1945.

[50] Marty, Raynaud: Droit civil t. II, Paris 1962, str. 30; Planiol, Ripert, Boulanger: Traité élémentaire de droit civil, t. II, Paris 1952, str. 6; Carbonnier: Théorie des obligations, Paris 1963, str. 81; Ripert: La rŐgle morale dans les obligations civiles, Paris 1927, str. 40.

[51] Ihering: Das Schuldmoment im römischen Privatrecht, 1867, str. 40 (navedeno prema: Radišić J.: navedeno delo, str. 37).

i kraj krivice kao jedinog osnova odgovornosti, jer upravo u to vreme počinje da se zasniva i odgovornost bez krivice (objektivna ili odgovornost za opasne stvari) da bi se početkom našeg veka i teorijski postavila[52] i pridodala već postojećoj subjektivnoj odgovornosti. O tome će još biti reči. Prethodno, pogledajmo kako se krivica kao osnov odgovornosti nalazi u kontekstu principa komutativne i distributivne pravde.

S obzirom da komutativna pravda ne vodi računa o svojstvima individualiteta, reklo bi se, da je pojam krivice bliži distributivnoj pravdi koja, kao što je poznato, uzima u obzir „zasluge" pojedinca u rešavanju odnosa između zajednice i pojedinca. Ovo tim pre, kada se krivica shvati kao lična, pa čak, i kao psihološka kategorija.[53]

Međutim, u pravnoj teoriji su istaknute različite definicije krivice koje polaze od subjektivnog kriterijuma pa preko niza različitosti sve do svođenja krivice na odgovarajući standard, što je jedna objektivna kategorija.

Taj razvojni put je upravo ovim redosledom i išao, tako da je, prema vladajućem shvatanju, krivica danas shvaćena kao vrlo elastičan i prilagodljiv pojam i koji se u suštini svodi na neku vrstu društvenog standarda: kriv je svaki onaj koji se nije ponašao onako kako se od njega osnovano moglo očekivati;[54] dakle, kada se neko ponaša onako kako nije trebalo da se ponaša u datoj situaciji, a pri tome je bio deliktno sposoban, što se utvrđuje pomoću upoređenja, onda je takvo lice krivo i ono snosi posledice takvog akta. Upoređenje se vrši prema kriterijumu redovnog toka stvari, kao i prema tome, šta se od razumnog i pažljivog čoveka moglo osnovano očekivati u datim okolnostima.[55]

Kada se, dakle, krivica shvati na ovaj način, onda ona u velikoj meri predstavlja jedan objektivan izgled stvari, koji, kada se stavi u kontekst principa integralne naknade, dobija se aritmetička proporcija između oštećenog lica i štetnika, po načinu komutativne pravde.

Međutim, i ovde komutativna pravda trpi uticaj svoje „sestre" distributivne pravde. Naime, prilikom odmeravanja visine naknade, često se uzimaju u obzir i neka sasvim lična svojstva štetnika i oštećenog, i to u smislu, da od tih svojstava u dobroj meri zavisi i visina naknade, koja može biti niža od stvarno pretrpljene štete ili pak veća u odnosu na objektivnu vrednost pretrpljene štete (naknada afekcione vrednosti). Sve to ukazuje na ozbiljno prisustvo kriterijuma distributivne pravde u materiji naknade deliktne štete.

Tako, sud može, vodeći računa o materijalnom stanju oštećenog lica, osuditi odgovorno lice da isplati manju naknadu nego što iznosi šteta, ako ona nije prouzrokovana ni namerno ni krajnjom nepažnjom, a odgovorno lice je slabog imovnog stanja te bi ga isplata potpune naknade dovela u oskudicu.[56] Kao što se vidi, ovim pravilom[57] uvedena je u ovu materiju distributivna pravda kao korektivna u odnosu na komutativnu i to pomoću kriterijuma materijalnog stanja oštećenog i štetnika, što je pitanje ličnog imovinskog svojstva stranaka koje je sasvim različito u različitim slučajevima.

Takav relativitet, koji znači prodor socijalnog zahteva u pravni poredak, daleko je od automatizma aritmetičke proporcije i integralne naknade. Ali, pravo nije matematička, već

---

[52] Ristiš R.: Teorija objektivne odgovornosti, Novi Sad 1934.

[53] Pirovano A.: Faute civile et faute pénale, Paris 1966; Chabas F.: Responsabilité civile et responsabilité pénale, Paris 1975, str. 51.

[54] Konstantinović M.: Skica za zakonik o obligacijama i ugovorima, Beograd 1969, str. 49.

[55] Konstantinović, M.: Građanska odgovornost, zbirka referata, Beograd 1966, str. 332.

[56] To pravilo izraženo je u čl. 191 Zakona o obligacionim odnosima.

[57] V. čl. 44 Švajcarskog zakonika o obligacijama i čl. 153. Skice za zakonik o obligacijama i ugovorima (Konstantinović M., Beograd 1969, str. 56.

društvena kategorija, koja ima svoj cilj, i koji se, u ovom pitanju, nošen prirodom datog javnog poretka, postiže kombinacijom zahteva komutativne i distributivne pravde.

Odstupanje od integralne naknade postoji i u slučaju kada štetnik prouzrokuje štetu radeći nešto radi koristi oštećenog lica. U toj pretpostavci, sud može odrediti manju naknadu, vodeći računa o brižljivosti koju štetnik pokazuje u sopstvenim poslovima.[58] U stvari, to je jedan slučaj primene pravila o sniženju naknade usled dobročinstva stranaka, npr. šteta je prouzrokovana prilikom besplatnog prevoza oštećenog.[59]

U tom smislu je i pravilo koje govori o podeljenoj odgovornosti. Tako, oštećenik koji je doprineo da šteta nastane ili da bude veća nego što bi inače bila, ima pravo samo na srazmerno smanjenu naknadu, a kada je nemoguće utvrditi koji deo štete potiče od oštećenikove radnje, sud će dosuditi naknadu vodeći računa o okolnostima slučaja.[60]

Kao što se vidi, okolnosti slučaja često se uzimaju u obzir prilikom dosuđivanja naknade, što sve znači udaljavanje od principa aritmetičke sredine koji je, inače, ovde postavljen kao osnovno pravilo. Tako, prema nekim rešenjima,[61] kada veličina štete ne može da se tačno utvrdi, sud će odrediti naknadu po pravičnosti, vodeći računa o svim okolnostima slučaja.[62]

Odgovornost bez krivice
Objektivna odgovornost

Zasnivanje odgovornosti na krivici štetnika predstavljao je veliki napredak u istoriji pravne civilizacije, i tu nam je rimsko pravo ostavilo dragocene tekovine. Princip „ko god je kriv, treba da odgovara“ dobio je, kao što je već rečeno, najširu primenu tokom 19. veka. Ali, kraj 19. veka i početak 20. veka, doneo je i kraj apsolutne vladavine ovog principa. Pored njega i istovremeno s njim, zasnovana je objektivna odgovornost za prouzrokovanu štetu koja se ne zasniva na krivici štetnika, već na faktu prouzrokovanja štete putem držanja ili upotrebe tzv. opasnih stvari odnosno vršenja opasnih aktivnosti. Ova odgovornost koja se još naziva i odgovornost bez krivice i koja je, na granici 19. i 20. veka, bila teorijski obrazložena, danas je neminovnost savremenog sveta.[63]

U stvari, poslednje godine 19. veka, a naročito naše vreme, koje je donelo visok stepen tehničke civilizacije, primoralo je pravnu doktrinu i jurisprudenciju da konačno odstupi od hiljadugodišnje dogme prema kojoj se odgovornost uvek zasniva na krivici štetnika. Sve do toga vremena tradicionalna teorija odgovornosti, sa svojim korenom u rimskom pojmu akvilijanske krivice, zasnivala je svoja pravila na tri kumulativno zahtevane činjenice: šteta, uzročna veza i krivica. Naime, da bi žrtva neke štete mogla da dobije odgovarajuću naknadu, trebalo je da dokaže, između ostalog, i krivicu štetnika. Ona je bila ugaoni kamen klasične

---

[58] To pravilo izraženo je u čl. 191, st. 2. Zakona o obligacionim odnosima. Videti i čl. 153, st. 2. Skice za zakonik o obligacijama i ugovorima.

[59] Radišić J.: navedeno delo, str. 165–180.

[60] To pravilo izraženo je u čl. 192. Zakona o obligacionim odnosima. Videti i čl. 43. Švajcarskog zakona o obligacijama.

[61] Videti čl. 42. Švajcarskog zakona o obligacijama.

[62] Tako, prema čl. 151. Skice, kad se veličina štete ne može tačno da utvrdi, Sud će odrediti naknadu po pravičnosti, vodeći računa o svim okolnostima slučaja.

[63] Josserand L.: La responsabilité du fait des choses inanimées, Paris 1897.

teorije odgovornosti na čijem pročelju je bio ispisan aksiom: nema odgovornosti bez dokazane krivice.

Dugo je izgledalo da se ne može ništa desiti što bi pokolebalo veru u jedno ovakvo pravno pravilo. Ono je odgovaralo i pravnom i moralnom osećanju da ništa nije prirodnije nego da neko odgovara za štetu koju je drugome svojom krivicom prouzrokovao. Uvek kada se neko ponaša onako kako nije trebalo da se ponaša pri datim okolnostima i kada iz takvog ponašanja proistekne šteta za drugoga, takvo lice ovu štetu mora naknaditi. Teško bi se i danas mogli potpuno osporiti osnovi na kojima počiva pravilo da se odgovornost zasniva na krivici. To pravilo je izraz duge evolucije i društvenog imperativa da svako snosi posledice svoga čina koji se može kvalifikovati kao njegova krivica. I zato krivica kao osnov odgovornosti za prouzrokovanu štetu nije napuštena u savremenom pravu i može se verovati da će ona u nekom vidu uvek pratiti pravila odgovornosti. Ali, ako ona, kao osnov odgovornosti, produžava da živi i u naše doba, to ne znači da i dalje ostaje kao jedini kriterijum koji se uzima u obzir prilikom dosuđivanja naknade.

Krivica se, kao osnov odgovornosti, u uslovima savremenog sveta i visoko razvijenog tehničkog uma, pokazala kao nedovoljna i nejaka da pravno obuhvati čitav novi svet slučajeva u kojima uzrok štete ostaje anoniman. Princip po kome se odgovornost neizbežno zasniva na krivici vekovima je odgovarao društvima u kojima su se potrebe čoveka uglavnom zadovoljavale angažovanjem jednostavnih sredstava tehnike. Slučajevi štete, u odnosu na naše vreme, po svome broju i učestalosti nisu predstavljali neku značajnu društvenu pojavu kojoj bi zakonodavac trebalo da posveti osobitu pažnju.

Međutim, 20. vek je vek ostvarenja neslućenog tehničkog progresa, ali progesa kome stalno podnosimo nove žrtve i koji stalno uzima svoj „danak u krvi". Štetni događaji velikom progresijom rastu, a u mnogim od njih nije moguće otkriti krivicu jer ove naprosto nema, pošto je šteta neminovni pratilac opšteg progresa i načina života savremenog čoveka. Svake godine u svetu više od sto hiljada ljudi nalazi smrt samo u saobraćajnim udesima. Taj broj je petnaest ili dvadeset puta veći kada je reč o težim telesnim povredama kao posledica ovih udesa. I naša zemlja u tom pogledu nije nikakav izuzetak.

Sve ovo ukazuje na jednu antinomiju koju donosi visok razvoj tehničke civilizacije: savremeni čovek je uspeo radi sebe da ostvari neslućeni tehnički progres, ali istovremeno taj progres ga jednim delom uništava.

Ta simbioza napretka i opasnosti, progresa i žrtve, predstavljaju pravu epidemiju od koje je svet nesposoban da se izleči. Žrtve ove epidemije su danas veće od žrtava mnogih kataklizmi u istoriji čovečanstva za koje smo navikli da ih pominjemo kao vrlo velike. Razume se, ovim se nikako ne želi reći kako tehnički i drugi progres treba da zastane dok se ne reše izvesni humanitarni problemi. Svrha ovih navoda i citiranih brojki bila je samo ta, da se sa više plastičnosti predstavi društveni značaj pravnih pravila koja treba da prate pojavu razvijenog tehničkog uma i sve praktične posledice koje se otuda rađaju na terenu prava. Ovo tim pre, kada se imaju u vidu i sve opasnosti koje proizilaze iz otvaranja „planetarne ere" u kojoj se čovek služi raznim energijama, a posebno nuklearnom, što će sve više uticati na izmenjen izgled pravnih normi kojima će se ovi odnosi regulisati.[64]

Zbog svega ovoga, pravna organizacija odgovornosti za štetu morala je da pretrpi bitne izmene. Klasična škola o dokazanoj krivici štetnika, kao uslova naknade, nije mogla da izdrži snažan talas tehničkog napretka, a da ne ostavi žrtvu bez naknade.

Pravo je po svojoj vokaciji moralo da reaguje na nove pojave i zbivanja koja su od vitalnog interesa za društvenu zajednicu, jer da je u tom pogledu ostalo bez reči, ono bi izdalo

---

[64] Cigoj S.: Nuklearno odškodinsko pravo, Ljubljana 1985.

sebe. Nikle su nove teorije,[65] predložena su nova rešenja, a sudska praksa je usvojila pravilo da kada šteta dolazi od tzv. opasnih stvari, onda se odgovornost ne zasniva na krivici, tj. krivica se uopšte ne utvrđuje.[66] Dužnik naknade, pod određenim uslovima postaje sopstvenik, a ponekad, čak i držalac opasne stvari odnosno vršilac opasne aktivnosti. Određivanje pojma opasnih stvari praktično znači ustanovljenje okvira u kome funkcioniše odgovornost bez krivice.[67]

Otuda, kada je reč o pravnom regulisanju materije odgovornosti, svaki savremeni zakon o obligacijama mora voditi računa o tome da je složena životna realnost čoveka dvadesetog veka unela u materiju odgovornosti dva kriterijuma, od kojih je jedan objektivan zasnovan na riziku, a drugi subjektivni zasnovan na krivici.[68]

Dualitet osnova odgovornosti

To dvojstvo osnova odgovornosti u savremenom pravu rađa, između ostalog, i pitanje stepena ostvarenja opšte pravde u Aristotelovom značenju tog pojma.[69]

Što se tiče subjektivne odgovornosti, pitanje krivice i njenog stepenovanja u odnosu na visinu naknade, bilo je rešavano, kao što je već rečeno, primenom principa komutativne pravde korigovanog obzirima distributivne pravde. Posebno, tu treba naglasiti, da je tradicionalni način određivanja visine naknade, polazio od težine krivice, pa štetnik koji je štetu prouzrokovao namerno *(dolus)* ili krajnjom nepažnjom (culpa lata) bio dužan da naknadi celokupnu štetu (kako stvarnu, tako i izgubljenu dobit), a onaj koji je štetu prouzrokovao nehatnom radnjom, bio je dužan da naknadi samo stvarnu štetu. Tim je tradicionalno pravo iskazivalo veću privrženost distributivnoj pravdi, jer je individualnom svojstvu štetnika (stepen krivice) pridavalo veću važnost od integralne naknade koja je atribut komutativne pravde.

Naprotiv, mnoga savremena prava,[70] u principu, ne čine ovo razlikovanje, te smatraju da oštećeno lice ima pravo na potpunu naknadu štete (stvarne i izmakle dobiti), bez obzira na stepen krivice onoga koji je štetu prouzrokovao.

To je posledica ideje potpune naknade i stanovišta da u ceo sistem naknade treba na prvo mesto postaviti interese oštećenika. Ističe se, da je za oštećenika po pravilu indiferentna

---

[65] Ristić R.: navedeno delo, str. 25–86.

[66] U tom smislu v. evoluciju francuske sudske prakse u pogledu primene čl. 1382 Građanskog zakonika, koja je, praktično, od subjektivne prešla na objektivnu odgovornost, a da pomenuta odredba Zakonika nije promenjena. Za tu čuvenu odredbu Zakonika rečeno je: "Ona postavlja jedan tako širok princip pravičnosti, da bi svaka aktivnost bila paralizovana njenom doslovnom primenom" (Lévy E.: L'exercice du droit collectif, Revue trimestrielle de droit civil, 1903, str. 95).

[67] Kao opasne stvari smatraju se one pokretne ili nepokretne, čiji položaj, ili upotreba, ili osobine, ili samo postojanje predstavljaju povećanu opasnost štete za okolinu, pa ih treba posebno nadgledati (v. čl. 136 Skice za zakonik o obligacijama i ugovorima).

[68] Starck B.: Droit civil, Paris 1972, str. 152; Mazeaud, Tunc: Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle, t. I, Paris 1965, str. 452; Tourneau Ph.: La responsabilité civile, Paris 1976, str. 615; Tunc A.: Les problŐmes conteporaine de la responsabilité civile, Revue internationale de droit comparé, Paris 1967, str. 771; Weill A.: Droit civil, Les obligations, Paris 1971, str. 680.

[69] Aristotel: navedeno delo, str. 113 i sl.

[70] Zakon o obligacionim odnosima (čl. 189) ne pravi tradicionalnu razliku između naknade obične štete i izmakle koristi u zavisnosti od toga da li je štetnik prouzrokovao štetu namerno ili nepažnjom. Određivanje obima naknade s obzirom na stepen krivice, ovaj zakon u principu ne prihvata. Po njemu, oštećenik ima pravo kako na naknadu obične štete, tako i na naknadu izmakle dobiti.

okolnost sa kojim stepenom krivice mu je štetnik prouzrokovao štetu, za njega je, dakle, važna integralna naknada, a ne stepen krivice štetnika.

Na taj način, savremeno pravo je, u materiji naknade štete po osnovu subjektivne odgovornosti, smanjilo prostor distributivne, a uvećalo domašaj komutativne pravde. Razume se, ne u smislu apsolutne vladavine komutativne pravde, već u smislu njenog relativnog domašaja, o čemu je već bilo reči.

Međutim, kako se objektivna odgovornost objašnjava sa stanovišta komutativne i distributivne pravde? Čini se, da pojava ove odgovornosti proizilazi iz dva zahteva. Prvi se vidi u društvenoj neophodnosti danas razvijene tehničke civilizacije da se šteta reparira bez obzira na individualnu krivicu štetnika, uvek kada je takva krivica postala anonimna, ili je opšta, u smislu, što se određena aktivnost već samim svojim faktom, vezuje za povećani rizik. Tada, treba postupiti po principu *„gde je dobit, tu i teret treba da bude“.*[71]

U takvim uslovima, odgovornost zasnovana na stvorenom riziku, došla je i na zahtev komutativne pravde da oštećeni ima pravo na integralnu naknadu, bez obzira na krivicu učinioca. I to je drugi zahtev na kome počiva objektivna odgovornost.

Ali, naknada putem proste aritmetičke proporcije ni ovde nije mogla sama da reši problem. S obzirom da je uzrok štete ostao izvan polja krivice, trebalo je potražiti sopstvenika ili držaoca opasne stvari, kao i samog oštećenog i primenom kriterijuma njegovog individualnog svojstva i odnosa prema šteti, doneti kompleksnija pravila koja sadrže i obzire distributivne pravde. Tako, radnja oštećenika u smislu doprinosa nastanka štete, može osloboditi sopstvenika opasne stvari da štetu naknadi, delimično ili potpuno.[72]

Najzad, kada je reč o objektivnoj odgovornosti, treba primetiti, da se ona, bar početnim korakom, približava socijalizaciji odgovornosti koja je više izraz distributivne, nego komutativne pravde. Naime, ovde se, u suštini, polazi od pretpostavke da svi pripadnici određene zajednice doprinose, neposredno ili posredno tehničkom životu i njegovom napretku, pa samim timi učestvuju u „opštoj krivici“ za štetu koja proizilazi iz tog napretka. Ali, to je jedna široka formula sociološkog obrazloženja koja se danas u pravu izražava kroz ustanovu odgovornosti za stvoreni rizik.

Socijalizacija odgovornosti

Ako je objektivna odgovornost proistekla iz aktuelnog stepena razvoja tehničkog uma, i zahteva veće socijalne pravde, onda je njeno prisustvo danas samo uvod u snažniju fazu socijalizacije odgovornosti za štetu koja proizilazi iz „opšte krivice“.

Kao što je početkom dvadesetog veka, subjektivna odgovornost bila nemoćna da obuhvati novi svet odnosa nastao štetnim efektima opasnih delatnosti i stvari, tako je i danas, na kraju tog istog veka, i objektivna odgovornost ostala nejaka da odgovori na brojne zahteve oštećenih ili unesrećenih.[73]

Savremeni svet i njegova tehnička civilizacija na početku tzv. planetarne ere, stravičnom progresijom umnožava štetne događaje koji često po svom obimu prevazilaze državne i prirodne granice i prete ekološkom katastrofom (npr. štete koje potiču od nuklearne energije). Taj „progres“ i sve opasniji automatizam života, pravo sa svojim postojećim ustanovama, jednostavno nije u stanju da prati.

---

[71] Ubi emolumentum, ibi et onus esse debet (Sec. Paulus, D. 50, 17, 10).

[72] U tom smislu, čl. 177 Zakona o obligacionim odnosima i čl. 137 Skice za zakonik o obligacijama i ugovorima.

[73] Tunc A.: La responsabilité civile, Paris 1981.

U tom smislu, sigurno je da treba razvijati ekološku etiku koju je pozitivno pravo (i pored svih mera reparacija, pa čak i prevencija pod pretnjom odgovarajućih sankcija) nemoćno da ostvari.

Samo visok stepen razuma i autoritet umnosti kao atribut racionalne koncepcije prirodnog prava, može ulivati nadu za „ekološku etiku budućnosti", kako bi naš svet mogli da nastanjuju i budući naraštaji. Reč je o čovekovoj brizi za prirodu, a to znači brizi za svoj opstanak, kao i opstanak onih koji će doći posle nas.

Pozitivno pravo koje nije ispunjeno supstratom prirodnog prava ili pozitivno pravo koje poseduje taj supstrat u određenoj meri (npr. brojni propisi o zaštiti životne sredine), ali ga praktično ne sprovodi u život, nije u stanju da dostigne visok stepen ekološke etike koja je jedino u stanju da sačuva prirodu kojoj pripadamo i koja nam je izvor života.

Čini se, da je u takvoj situaciji, socijalizacija odgovornosti jedini put kojim će se pravo u ovoj oblasti pro futuro kretati. Samo snažni socijalni fondovi organizovani na stepenu nekog kolektiviteta (država, osiguravajuća društva) i po pravilima jedne nove pojave i nove teorije socijalizacije odgovornosti, mogu u izvesnim slučajevima da budu efikasni i pravični, dok u drugim (slučajevi velikih katastrofa), to mogu samo delimično da ostvare, a u trećim, nikako. U ovom poslednjem slučaju (na sreću, za sada ipak retkom), pravo je potpuno nemoćno, i štetu tada treba prihvatiti kao vis maior, kao slučaj sudbine koji ostaje bez naknade.

Trihotomija odgovornosti

Teorija socijalizacije odgovornosti treba da obuhvati onu oblast deliktne štete koja dolazi kao posledica grupne ili individualne opasne aktivnosti kojom se u većem stepenu ugrožavaju brojna lična i materijalna dobra. Tu se, po prirodi nastanka i dejstvu opasnih stvari i opasnih aktivnosti, krivica učinioca gubi kao titulus odgovornosti. Za razliku od „običnih" opasnih stvari i aktivnosti, ovde su posledice i štetni efekti takvi da dovode u pitanje ličnu i materijalnu egzistenciju većeg broja ljudi, sve do stepena moguće katastrofe. I to, bilo jednokratne upotrebe i dejstva (npr. izvor akumulirane energije), bilo kontinuiranog korišćenja opasnih stvari koje neminovno čini enormne materijalne i moralne štete (npr. saobraćaj, posebno automobilski).

Kod ovakvih šteta potrebno je organizovati obavezno osiguranje i formiranje socijalnih fondova iz kojih će se, po posebnim pravilima, vršiti naknada svakom licu koje je žrtva predviđenog štetnog događaja.

Na taj način, odvojila bi se naknada štete od odgovornosti za štetu. Sa stanovišta klasičnih pravila odgovornosti, to se teško može razumeti, ali sa stanovišta opstanka i imperativa današnjeg života, to se lako može razumeti. Krivica kao relevantna okolnost, ostala bi samo za regresni zahtev prema namernom počiniocu štete, kao i za režim bonifikacije prilikom uplate odgovarajućih premija.

Kod ovakvih enormnih i masovnih šteta, bitna je naknada, koja mora biti sigurna i efikasna, oslobođena klasičnih kategorija sudske procedure, a to se jedino može postići formiranjem obaveznih fondova osiguranja. Teret doprinosa i pravo na naknadu, treba rasporediti po načelima komutativne i distributivne pravde.

U svim drugim slučajevima šteta od opasnih stvari i opasnih aktivnosti primenjivala bi se i dalje već klasična teorija objektivne odgovornosti po ustaljenim načelima i pravilima.

I najzad, stara i prastara teorija subjektivne odgovornosti sa krivicom kao neophodnim uslovom za naknadu, zadržala bi svoje prisustvo u svim drugim oblastima prouzrokovanja, gde se šteta ne javlja kao posledica opasnih stvari i opasnih aktivnosti.

Ova trihotomija pravno organizovane odgovornosti, čini se, da bi odgovarala današnjoj razuđenosti izvora opasnosti i lepezi njihovih štetnih posledica. Ako bi se postavilo pitanje budućnosti međusobnih odnosa u izrečenoj trihotomiji, reklo bi se, da socijalizacija odgovornosti čeka da na šira vrata uđe u pravni život dvadesetprvog veka.

Antički pojam pravde u savremenim uslovima masovnih šteta

Kada je, dakle, reč o uspostavljanju teorije socijalizacije odgovornosti, treba primetiti da će ona nailaziti na brojne prepreke. Uostalom, to je bio slučaj i sa njenom prethodnicom u licu teorije objektivne odgovornosti s početka 20. veka. Teorija socijalizacije odgovornosti probija se u izvesnom broju zemalja (npr. Novi Zeland, Kvebek, Švedska). Druge, čeka taj isti proces, kada budu ostvarile potrebne mogućnosti, pravne i materijalne.

U svemu tome, antički pojmovi komutativne i distributivne pravde ne gube u svojoj aktuelnosti. Postavlja se pitanje njihovog odnosa u ovde skiciranoj trihotomiji odgovornosti. Ako se pođe od subjektivne odgovornosti, pa preko objektivne, sve do socijalizacije odgovornosti, može se zapaziti izvesno pomeranje težišta komutativne u odnosu na distributivnu pravdu. Integralna naknada naložena aritmetičkom logikom komutativne pravde ostaje kao zahtev i u hipotezi socijalizacije odgovornosti. Ali, obziri distributivne pravde, naloženi logikom geometrijske progresije distributivne pravde, prilagođavaju tu naknadu mogućnostima i potrebama savremenog čoveka, koji, dobrim delom postaje žrtva sopstvenog načina života.

Otuda, zahtevi komutativne, a naročito distributivne pravde, pretvoreni su danas u temelj na kome se gradi teorija socijalizacije odgovornosti. Ta građevina postaje neminovnost razvijenog tehničkog sveta koji je uspeo da se vine u vasionu, ali koji je na zemlji nesposoban da se odbrani od epidemije opštih šteta koja svakodnevno traži i odnosi nove žrtve.

I zato, na univerzumu savremenog pravničkog sveta na kome su ispisane reči *„šteta i njena naknada“* stoje i dalje, kao i pre dvadeset vekova, dva polja jedne opšte pravde. Na jednom polju veći domašaj ima komutativna, a na drugom, distributivna pravda, obe sa svojim pokretnim granicama.

Ako nam individualno i zajedničko htenje nalaže da se nađemo na putu opšte pravde kao potpune vrline, onda je za nas pravnike izbor već učinjen: pomoću prava ka pravdi.

III
RECENT DEVELOPMENTS IN THE FIELD OF LAND OWNERSHIP AND CONSTRUCTION LAND

Dr *Ilija Babić**, Full Professor and Dean of
the Sremska Kamenica Faculty of European Law and Political Studies,
Singidunum University, Belgrade

RIGHT OF OWNERSHIP OF BUILDING LAND

In this paper, the author attempts to clarify on the basis of a historical, comparative and systematic analysis, the impact of the Roman principle of superficies solo cedit on building land in the Serbian law. He looks in greater detail into the provisions of the 2009 Planning and Construction Law dealing with conversion of the right of use into the right of ownership of building land with no recompense and conversion of the right of use into the right of ownership with recompense.

Key words: *superficies solo cedit; right of permanent use, conversion of the right of use; right to building easement; right to build; superficies right*

I. Emergence of the First Settlements and Need for Planning

All people on the earth had once been hunters – gatherers. Even towards the end of the earliest Stone Age (Paleolithic), man led the unpredictable life of a hunter – gatherer. In order to get food and thus survive, man had to hunt animals or search for wild-grown fruits. The Paleolithic revolution took place when man started taming animals and producing grains.[1]

The earliest traces of permanent settlements were found at places stretching from India to the Baltic and they were built fifteen thousand years ago.[2] In the Mediterranean regions of South-western Asia, known as the Fruitful Crescent (encompassing parts of the present Jordan, Syria, Turkey, Iraq and Iran), around the year 8500 B.C. and only 3000 years later, in the Mediterranean parts of south-western Europe, people began to engage in agriculture and became food producers. Since those times, man has been building shelters and settling down for good.[3]

Bricks shaped by hand before 6000 B.C. have been found on the territory of the present Iran. Around the year 6000 B.C., bricks were already being shaped in moulds. Some moulded bricks have been found in Jericho.[4]

Some of the first cities were established more than 5000 years ago in Mesopotamia in the territory of the present Iraq (e.g., Ur, Uruk and Nipur).[5]

---

* Original text is in local language.

[1] Janson H.W., *History of Arts,* Publishing institute of Yugoslavia, Belgrade, 1970, page 22.

[2] Mumford Lewis, *City in history,* Naprijed, Zagreb, 1988, page 14.

[3] See in greater detail: Diamond, Jared, *Microbes, guns and steel,* Dossier and Official Journal of Serbia and Montenegro, Belgrade, 2004, pages 82 – 116.

[4] De Bono, Edward, *Eureka – Illustrated history of inventions,* Mladost, Zagreb, 1978.

[5] Group of authors, *Illustrated history of the world – Big family encyclopaedia,* Readers Digest and Mladinska knjiga, Belgrade, 2007, page 2002.

While cities were being built in Mesopotamia without any specific plan „those in the valley of the River Indus were being built according to accurately established plans". [6] It is assumed that the Mesopotamian city of Babylon, after destruction and restoration, „had reached the size of cities in the valley of the River Indus when it obtained the Hanging Gardens". [7]

Herodotus (Greek historian, approx. 484 - 425 B.C.) wrote that Babylon: „Lies in a spacious plain and has the shape of a quadrangle, each side of which is one hundred and twenty stadias long…It is, as far as I know, one of the most beautiful cities in the world".[8]

In Egypt, the city of Memphis was founded as the capital of King Menes around the year 3100 B.C. and Knossos was set up on Crete before the year 3000 B.C. Several hundred politically autonomous city states (polis) with hinterland were founded in the territory of Ancient Greece. [9]

The famous architect Hipodam of Miletus (475-400 B.C.) was, according to Aristotle[10], the first to make a city plan with a system of rectangular streets. At Pericles' request, this system was imposed on Pyreaus after the year 466 B.C. Later on, he sailed with Athenian colonists to Turi in southern Italy and imposed this system on the Greek colonies in Italy. Hipodam's system was accepted by Romans. [11] When the Romans mastered the techniques of setting arches and building vaults with concrete, they quickly transformed the appearance of their cities. The road to the creation of masterpieces such as the Roman Pantheon or Hagia Sofia in Constantinople, was open. [12]

After the fall of the Roman Empire, the power of cities gradually declined. The major downfall in city life occurred in 9th century due to the frequent plundering campaigns waged and devastations made by Vikings, Muslims and Hungarians. [13] [14] The building and strength-

---

[6] *Ibidem.*

[7] *Ibidem.*

[8] *Herodotean history,* volume I, Matica srpska, Novi Sad, 1988, page 91.

[9] The largest polis in the „golden age" of the Ancient Greece was Athens with a population of 250,000. At that time, Corinth had a population of less than 100,000 and Thebes, Argos, Kerkyra and Acragas probably had a population of 85,000 each – see in greater detail: Burstyn Daniel, G., *World of creation,* Geopoetika, Belgrade, 2002, page 89.

[10] In his work *Politics,* Aristotle discussed Hipodam's ideal city-state (See: Aristotle, *Politics,* BIGZ, Belgrade, 1984, pages 38-42), as well as city planning: „As for the distribution of family houses, it is believed that it is better and safer for business if streets are completely cut according to the more recent and Hipodam's system. On the contrary, the distribution introduced in the old times is better for safety at wartime. In such a city, foreigners cannot easily find the way out and enemies can hardly orient themselves" – Aristotle, *op.cit.,* pages 145, 173, 197 and 303.

[11] Although Rome has remained a city of winding streets, it did not hesitate to impose the Greek model of rectangular city building on his colonies", so that „from the first century onwards, almost all new colonies were established in accordance with the rectangular system. Cunliffe, Barry, *Roman Empire – people and civilization* Vuk Karadzic and Yugoslav Review, Belgrade, 1980, page 101. See in greater detail: Mumford Lewis, *op. cit.,* pages 145, 173, 197 and 303.

[12] Cunliffe, Barry, *op. cit.,* page 101.

[13] Joyce, Francis and Joseph, *Life in the middle age city,* Utopia, Belgrade, 2004, page 11.

[14] Starting from the biblical cities of Sodom and Gomorrah, cities haves been accused of being the source of perversion and decadence. Not only in the ancient times, but also in the Middle Ages, some nomads did not notice advantages of cities. The following was quoted: „The Mongols captured the city (Beijing), massacred its inhabitants, pilfered its houses and then burned it down. The devastation lasted a month…. The nomads did not understand what they could do with a city, they did not see the way of using it towards stepping up and expanding their power, because for them, the seat of power is in a mobile tent" – Supek Rudi, *The city built to suit the man,* Naprijed, Zagreb, 1987, pages 110 and 111.

ening of cities began with the revival of commerce in 11th and 12th centuries throughout Europe. [15] „Cities in western Europe, with all of their future contents, came into being in the Middle Ages. By the year 1250 cities were already the lively and thriving domiciles of people, not only on the Mediterranean Coast, but also in North-West Europe". [16] During the Renaissance (from 1450 to 1550), town planning and building in the form of grids were revived (cities in America were built later on in the 17th century according to this system). [17] Cities in Italy were most populated: in the 14th century, over 90,000 people lived in Florence. [18] It was only in the 15th century that the population of London reached 40,000. Towards the end of the 17th century, Nuremberg had a population of 20,000, Brussels and Leuven had a population between 25,000 and 40,000 and Basle had a population of 8,000. [19]

Since the beginning of the Middle Ages, city planning could be noticed: „The harmony is so complete that when looking at hundreds of plans of medieval cities one after the other, man feels that there must have been a sensible theory according to which the overall city planning was done". [20] Unfortunately, the planning of city construction was going to be abandoned increasingly later on. Cities stopped being joint ventures made for common good. After the 1666 Great Fire of London, the speculative construction of housing began on a large scale. It was said that Dr Barbone divided his property into small streets and small houses and sold them at the „street front" rate. Land rent went up because of mortgages and „others followed his suit and perfected that method even more, so that houses began to amass around London" This process was even faster along the city outskirts. When farms were divided into building lots, the city, as an organic body, was broken up. [21]

Old cities were dying out and they were no longer precedents for new cities in the 19th century. For the first time in history, mass traffic and transport emerged (inexpensive mail coaches, railways and tramways at last). Introduction of public transport was taking place in the same way as the development of other city parts – on the basis of speculation. The housing space in cities was being sacrificed in favour of streets and boulevards. [22] The city planners neglected transport. In that way, traffic engineers and city planners gave a helping hand to „devastation of the city's living tissue" because they planned and built motorways outside cities and garages and car parks in cities (to allow easier car use). [23]

In the 20th and at the beginning of the 21st century, many cities were built (they are not only expanding, but they are also growing taller[24]) and the urban population was growing rapidly. In the year 1800, no city in the Western world had a population of one million

---

[15] Group of authors, *Illustrated history of the world, ibidem,* page 203.

[16] Joyce, Francis and Joseph, *op. cit.,* page 5.

[17] Group of authors, *History* (Editor-in-Chief Anhelos Gavira Gerero), Mladinska knjiga, Belgrade, 2009, page 25 and 322.

[18] Group of authors, *Illustrated history of the world, ibidem.,* page 203.

[19] Mumford Lewis, *op. cit.,* page 317.

[20] *Ibidem,* page 306.

[21] *Ibidem,,* page 423.

[22] *Ibidem,* page 435.

[23] *Ibidem,, page* 518.

[24] In his book *Man and city,* Nolit, Belgrade, 1982, pages 153 on, Constantinos Doxiadis considered construction of tall buildings the first and major crime in architecture – such buildings are unnatural, they disturb environment proportions and act against the man and society, etc…

(the biggest was London with a population of 953,310) and already in 1900, eleven cities had a population of over one million each. [25] Only fifty years later (1950), there were 75 cities in the world with a population of between 1 and 5 million each and by 1990, the number of such cities increased to 249. In 1990, there were 12 cities with a population of over ten million each. [26] Megalopolises are coming into being. They are known for their „impersonality and aimless expansion" and „the available space in them for anything other than transport is getting smaller". [27] Even so, the issue of survival of cities in the future is uncertain." [28]

Nowadays, cities are expanding continuously and for centuries, they have been the seats of economic and government power. Because of the restricted areas of city building land already in the Roman Empire, the Roman law provided the possibility of building on somebody else's land Initially, building was done on somebody else's land on the basis of obligatory contracts (leases). Later on, the property law provisions prevailed in these contracts, so that their legal nature was changing.

II. Long-term Land Lease in the Roman Law

Long-term land leasing contracts authorized the lessee to keep the land in his possession, use it permanently and transfer it to his successors on the basis of legal transactions *inter vivos* and *mortis causa* on condition that rent is paid for it. [29] Under Justinian's law, such lease has a real law effect. The subject matter of a long-term land lease could be agricultural land (emphyteusis) or building plots (superficies).

In Justinian's law, the long-term and transferable lease of agricultural land is regulated and referred to as emphyteusis. The perpetual right to use someone else's agricultural land emerged at the time of principality in the Western part of the Empire (*agro vectigalis* or *ius perpetum) and in the post-classical law in the Eastern part of the Empire,* agricultural land was leased on long-term on the basis of *emphyteusis* . [30] In the early days of the Empire, *agro vectigalis* was the land owned by the state or city that was leased out on long-term (most often for a period of 100 years) or „for ever" (*in perpetuum)* against payment of rent (*vectigal)*. In the second century A.D., this institute produced the property right effects. Land was leased out on a permanent basis (emphyteusis) by the emperor in the fourth century A.D. and in the fifth century, it was also made possible for private land owners to lease out their land on long- term on the basis of emphyteusis. Under the Zeno Constitution, this was a special legal transaction, the subject matter of which was neither sale nor lease. According to the Digesta, this is an institute called *ager vectigalis id est emphyteuticarius.* [31] The emphyteuta could transfer this land to other persons *inter vivos* and *mortis causa*, but the land owner had

---

[25] Those are the cities of: Berlin, Chicago, New York, Philadelphia, Moscow, St. Petersburg, Vienna, Tokyo and Calcutta – see: Mumford Lewis, *op. cit.,* page 203.

[26] Group of authors, *Illustrated history of the world, ibidem,* page 203.

[27] Mumford Lweis,, page 553.

[28] Group of authors, *op. cit.,* and page 203.

[29] Puhan Ivo, *Roman Law,* Naucna knjiga, Belgrade, 1970

[30] Horvan Marijan, Roman Law., Skolska knjiga, Zagreb, 1974, page 165.

[31] Paund Rosko, *Jurisprudence,* Official Journal of the Federal Republic of Yugoslavia, Belgrade and CID, Podgorica, 2000, page 95

the right of preemption. The emphyteuta's rights ceased in the event of his failure to pay rent in three consecutive years or perform his fiscal duties. [32]

Superficies[33] is a contract of long-term lease on building plots in the Roman law, authorizing a person to use a building which is yet to be erected or has already been erected on somebody else's land. [34] It came into being in the classical period, when the right of land ownership was fully established and most areas of land were owned by a small number of proprietors. The non-farming persons had a great need for houses and business premises. The long-term lease of building lots was obligatory in the classical period. The builder of a building had only an obligatory claim against the lessor (actio conductio).

Superficies allows the existing owners to carry on enjoying the right of ownership and the right of use, building plots in particular, to be transferred to other persons. In this way, the user of land actually acquired the right to build. [35] This contract, which was of a public law nature initially, was also accepted in private law and was named *superficies*. [36] The state or municipality (city) leased out land – *loca publica* – under this contract to an authorized person (superficiarius) for the purpose of erecting a building on it, unless there is already a building on it[37], using the erected or existing building and paying a rent for it (*solarium, pensio)* „or using it free of charge or for a nominal rent as a token of recognition." [38] Formally and legally, the owner of land is also the owner of the building in accordance with the principle *superficies solo cedit*[39] [39] – anything which is permanently joined with the surface of land is an integral part of land and belongs to its owner. [40] With the emergence of the *superficies* right (property right to somebody else's thing) this principle was somewhat corrected. [41] The superficiarius acquires the right, under a contract, to use the building permanently or for a specified long period of time (99 years usually) and exercise on it the same rights as its owner could. [42] The right of the superficiarius arises under the general presumption for the onset of real rights to property. The superficiarius may lease out the building or let it for use, or encumber it with mortgage or easement, sell it, exchange it or bestow it. This right of the superificiarius is also heritable. Despite the tendency shown ever since the emergence of superficies to separate land from buildings, this

---

[32] Puhan Ivo, op. cit., page 247.

[33] Lat. *superficies, ei, f. (super-facies)* – surface; „building on top of land", Divkovic Mirko, *Latin-Croatian dictionary,* Zagreb, 1980 (reprint of 1900), page 1035.

[34] Some law writers believe that superficies also exists in some parts of the building (i.e. on floors) – Salkovski Karl, *Institutions with the history of Roman private law,* State printers of the Kingdom of Serbia, Belgrade, 1894riter, page 307; Arnts, L. Knight of Arnesberg, *Pandecte, Book II – Real law,* State printers of the Kingdom of Serbia, Belgrade, 1892, page 489.

[35] Puhan Ivo, *op. cit.,* page 247.

[36] Horvat Marijan, Roman law., Skolska knjiga. Zagreb, 1974, page 167; Arandjelovic Dragoljub, *Lectures in Roman law,* Geca Kon, Belgrade, page 201

[37] Paund Rosko, *ibidem;* Salkovski Karl, *ibidem.*

[38] *Ibidem.*

[39] The *superficies solo credit* rule stems from the *accessorium cedit principale* principle: land is always the main thing – *res principale,* and anything joined with it permanently is its accession – Simonetti Petar, Legal unity of real estate, *Legal life,* number 11/2007, page 432.

[40] Stanojevic Obrad, *Roman law,* Official Journal of Serbia and Montenegro, Belgrade, 2004, page 286.

[41] Horvat Marijan, *op. cit.,* page 166.

[42] Arandjelovic Dragoljub, *op. cit.,* page 307.

institution „even at its peak could not legally separate land from buildings as two independent items of real estate". [43]

Initially, the praetor protected the superficiarius with the means of a special quasi possessory interdict which acted *erga omnes* – it produced the real right effect,. Later on, for the purpose of protecting his real right (*erga omnes),* the superficiarius could bring the same actions as the owner of land (those actions were called *utiles) – rei vindication utilus, action negatoria utilus, action Publicania utilis.* It is emphasized that it was only Justinian who determined that superficies is a special real right relationship and classed it in *iura in re aliena*[44].

For the purpose of protecting possession, the superficiarius could file *interdictum de superficiebus* that is similar to *interdict possidetis,* in addition to quasi possessory interdicts.[45]

III The Roman *Superficies Solo Cedit* Rule and its Impact on Modern Law

The *superfcies solo cedit* rule originates from the Roman law and it means that a permanent building shares the legal destiny of land. The cogent rule that land is the main thing *ex iure* was in force. It stemmed from a broader principle – *accessorium cedit principale*: whoever is the owner of the main thing (land) is the owner of everything that is permanently joined with land (buildings, trees, plants). All things which are permanently joined with land as the main thing, lose their legal independence. Thus, the right of ownership of land and things joined with it persisted from the Roman law times to the end of the Middle Ages (when technical conditions for the use of land surface, land below and above surface, were reduced to a thin layer), without limitations as to the height and depth – from heaven to hell *cuius est solum eius est usque ad coelum et ad inferos.* [46] Modern times make it technically possible to use land almost up to the cosmos and deep below its surface, but the right of ownership is legally limited, so that once again, only a thin layer of land and air space can be used.

The *superficies solo cedit* rule was adopted in civil codes that were in force in the first Yugoslavia and in modern continental European law.

Paragraph 293 of the Common Austrian Civil Code (CACC) defines chattels and real estate. According to it, real estate means also the chattels, which according to their owner or law „make up an integral part of an item of real estate. [47]

According to Paragraph 185 of the Serbian Civil Code of 1844 (SCC), real estate are things that „cannot be moved from one place to another or be transferred without disrupting their integral parts". The legal destiny of real estate is also shared by the real estate by pur-

---

[43] Simonetti Petar, *op. cit.,* page 307.

[44] Stojcevic, Dragomir, *Roman private law,* Savremena administracija, Belgrade, 1985, page 180

[45] Arnts L. Knight of Arnesberg, *op. cit.,* page 490.

[46] Simonetti, Petar, Legal unity of property, *Legal life,* number 11/2007, page 433.

[47] CACC considers accession as „anything having a perpetual connection with something". Such characteristic is attributed in the first place to the accession of things „until it is separated from it and accessory things without which the main thing cannot be used…" (paragraph 294 of CACC). The impact of the *superficies solo cedit* rule is regulated in detail in paragraphs 417 through 420 of CACC – during building and accession (by sowing and planting).

pose (although they are chattels by nature, they are regarded as real estate accession – „supplements". [48]

The General Property Code for the Principality of Montenegro of 1888 expressed the *superficies solo cedit* rule with the means of the legal maxim referred to in Article 1017: „A house belongs to the owner of land it stands on and crops belong to the owner of the field in which they were grown".

The legal rules provided by the mentioned codes were also applied in the second Yugoslavia, [49] i.e., also the *superficies solo cedit* rule, with a small exception in the case of building on somebody else's land. [50]

The French Civil Code of 1804 (FCC) took over the *superficies solo cedit* rule and regulated it by Articles 552 through 555. According to the FCC provisions, the ownership of land relates to its surface and underground.. The owner can plant and build anything on the surface, except when a judge establishes in connection with that special easements or land easement. The owner can build anything underground, unless a judge renders a decision to the contrary (see Article 552 of FCC). It is assumed that any buildings, plants and creations were made on/in land by the owner with all accessions unless proven to the contrary and they cannot be removed without the owner's permission (see Article 553 of FCC). [51]

The 1896 German Civil Code (GCC) regulates the heritable lease (similar to emphyteusis) and the heritable right to build (like superficies). The heritable right to build is regulated by Article 1012: „A plot may be encumbered in such a way that its user acquires on such grounds the inalienable and hereditary right to make a building on or under ground". The right to build may be permanent, but as a rule, the period of validity of this right and the amount of yearly rent are set (like in the Roman law, this right may be established without paying rent). The right to build does not cease with the destruction of a building. [52]

The 1942 Italian Civil Code (ICC) regulated the superficies right that separates buildings from land (building is an independent real estate) and allowed one person to be the owner of a building and another person to be the owner of the land it stands on. [53]

The right to build is also known in the USA law. It can be acquired by paying rent to the land owners in the states of Pennsylvania, New York, Georgia, and Maryland. [54]

The 1994 Netherlands Civil Code (NCC) regulates the right to build (Articles 101 through 105). According to Article 101, the right to build is the real right to have or acquire

---

[48] See paragraph 186 of SCC. Paragraph 189 of SCC shows that land is the main thing in the first place, but also „anything attached to the main thing so that it cannot be separated from it without being disturbed; those are all houses and other buildings, anything built in the land or bricked in, or sealed to or fixed like: cauldrons, built in shelving and anything for normal use like: sweeps,,tubs, ropes, well chains, etc." *paragraph 189 of SGZ).

[49] See Article 4 of the Law on the Invalidity of Regulations Enacted before 6 April 1941 and During Occupation by the Enemy („Official Journal of the Federal People's Republic of YugoslaviA" number 86/1946).

[50] Simonetti Petar, *Property rights,* Faculty of Law of the University of Rijeka, Rijeka, 2009, pages 49 and 50.

[51] See in greater detail: Lucas Andre and Catala Pierre, Litec, *Code civil,* Paris, 2001, pages 332-335.

[52] Paund Rosko, *Jurisprudence, book III,* Official Journal of the Federal Republic of Yugoslavia, Belgrade and CID, Podgorica, 2000, page 96.

[53] See: Simonetti Petar, *Property rights,* Faculty of Law of the Rijeka University, Rijeka 2009, pages 50 and 51; Legal unity of property, *Legal life,* number 11/2007, pages 435 and 436.

[54] *Ibidem,* pages 96 and 97.

the title to a building constructed on or under somebody else's real estate. The right to build can be independent or dependent on another real right and on the right of long-term real estate lease. The contract may bind the holder of the right to build to pay the owner of land pecuniary compensation at regular or irregular intervals. The appropriate provisions dealing with long-term land leasing apply to the right to build (see Articles 85-100 of NCC).

The 1994 Russian Federation Civil Code (RFCC) [55] regulates in greater detail the right of ownership. The owner of a plot has the right to use as he likes anything on or under the surface of the plot unless otherwise provided by the laws dealing with natural resources, use of the air space and other laws and does not violate the rights of other persons (Article 261, paragraph 3 of RFCC). The owner of a plot and the real estate on it can put them at the disposal other persons permanently or for a specified period of time on the basis of a lease (Article 264, paragraph 1 of RFCC).

RFCC regulates the „right of lifelong and heritable use" of land lots. Article 266, paragraph 2 of RFCC provides as follows:: „If otherwise is not provided by the conditions of using land lots as provided by the law, the holder of the title to a land plot has the right to erect a building on it and build other immobile things and acquire the right of ownership of them".

The right to build has also been regulated by the laws of the states that came into being with the disintegration of the Socialist Federal Republic of Yugoslavia. [56]

The mentioned basic provisions of the right to build institution of the comparative legal systems come, therefore, from the Roman law.

IV. Rights on Developed Building Land in Serbia

1. Abandonment of the superficies solo cedit principle in the Second Yugoslavia and Serbia. Exceptions.

During the National Liberation War and after the Second World War, land, buildings and other things and rights were forcibly transferred in Yugoslavia from private to social (state) ownership for the purpose of „expropriating the expropriator", i.e., abolishment of capitalist relations. [57] Land (agricultural and building) was seized from individuals and legal entities on several grounds and according to several laws such as: Law on the Confiscation of Property and Confiscation Procedure[58], Law on the Transfer of Enemy Property to Government Property and Sequestration of the Property of Absent Person from the Federal People's Republic

[55] RDCC came into force on 1 January 1995 on the basis of Item 1 of the Federation Law on the Enforcement of the First Part of the Code.

[56] The right to build in Croatia is regulated by Articles 280 through 296 of the Ownership Law and other laws on real rights (Official Journal, Nos. 91/96, 68/98, 137/99, 22/00, 129/00 and 114/01), and the Republika Srpska (Serb Republic) has regulated this right by the provisions of Articles 286 through 301 of the Real Rights Law (Official Gazette of the Republika Srpska, No. 124/08).

[57] See: Simonetti Petar, *Denationalization,* Faculty of Law of the University of Rijeka, Rijeka, 2004, pages 39 and 40.

[58] Official Journal of the Democratic Federal Yugoslavia, Nos. 40/45 and 70/45. This law was confirmed by the Law Confirming and Amending the Law on the Confiscation of Property and Confiscation Procedure of 9 June 1945 (Official Journal of the Federal People's Republic of Yugoslavia, No. 61/46).

of Yugoslavia[59], Law on the Treatment of the Property which had to be abandoned by Owners during Occupation and the Property Seized from them by the Occupying Power and its Aides[60], Law on Depriving of Citizenship the Officers and Non-commissioned Officers of the Former Yugoslav Army who do not Want to return to their Fatherland, Members of Military Formations in the Service of the Occupying Power who had Fled Abroad and Persons who had Fled after Liberation, [61], Basic Law on Expropriation[62], Law on the Agrarian Reforms and Colonization[63], etc.

The *superficies solo cedit* rule was abandoned in the Second Yugoslavia and Serbia, in cities and settlements of urban nature, with the adoption of the Law on the Nationalization of Rental Buildings and Building Land. [64] Under that law, in addition to the leased out residential and office buildings, the building land in cities and settlements of urban nature was forcibly turned into state (social) property (Article 1 of the Law).

If there is a building on a nationalized building plot which has not been nationalized, i. e., a privately owned building, its owner has the right to gratis use of the land underlying that building and the land serving for the regular use of it, for as long as that building exists on that land (Article 37 of the Law). In this way, the right of ownership of land (which is socially owned) is separated from the right of ownership of a family house which has been erected or is to be erected on it. [65] The separation of the right of ownership of socially owned land from the right of ownership of privately owned building was done by force of law, on the basis of imperative norm.

Article 32 of the Building Land Law[66] provides that building land in a building area is the land earmarked by the municipal assembly as being in general interest for building or development and preservation of specified space. Such solution was basically included also in the subsequent laws dealing with building land[67]. The Building Land Law of 1995[68] provides that building land may be: city building land; building land in a building area; and building land outside a building area (Article 3). [69]

---

[59] Official Journal of the Democratic Federal Yugoslavia, No. 63/46

[60] Official Journal of the Federal Republic of Yugoslavia, No. 64/46

[61] Official Journal of the Federal People's Republic of Yugoslavia, No. 86/46

[62] Official Journal of the Federal Republic of Yugoslavia", No. 28/47

[63] Official Journal of the Democratic Federal Yugoslavia, No. 64/45 with subsequent amendments

[64] Official Journal of the Federal People's Republic of Yugoslavia, No. 52/58. It came into force on 28 December 1958.

[65] At the request of the former owner of nationalized undeveloped building land, the municipal people's council shall let him use that land for the purpose of erecting a family residential building, if according to the town plan or a decision of national council replacing that plan it is permissible to erect such building on that land (Article 40, paragraph 1 of the Law). Article 2 of the Law Identifying Building Land in Cities and Settlements of Urban Character (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 5/68 and 20/69) provides that building land in cities and settlements of urban character is to be identified in accordance with a republic law The acquisition of city building land is provided for by the Law on the Organisation and Use of City Land, (Official Journal of the Socialist Republic of Serbia, No.12/64.

[66] Official Journal of the Socialist Republic of Serbia, No. 32/75

[67] Official Journal of the Socialist Republic of Serbia, No 27/86; Official Journal of the Socialist Republic of Serbia, No. 23/90 and Official Journal of the Republic of Serbia, Nos. 44/95 and 16/97.

[68] Official Journal of the Republic of Serbia, Nos. 44/95 and 16/97.

[69] See: Simonetti Petar, Institutions of legal separation of land and building and right of easement of building according to the Draft Law on Ownership and other Real Rights of the Republic of Serbia, *Legal life,* No. 11/2008, page 122, and Andjelkovic Zarko, Land under building and land for regular use of building, *Legal life,* No. 11/2008, *page 259.*

With the construction of a private building on socially owned land, its owner acquired the right of perpetual use of the land under that building and land for the regular use of it. [70]

However, the compulsive rules of legal separation of socially owned buildings and land did not apply to private land and buildings. The positive regulations of the Second Yugoslavia and Serbia recognized the principle of legal unity of private land and buildings. The requirements for the application of this principle were not provided by positive law[71], which is why the rules provided by paragraph 189 of SCC were subsidiarily applied to these relations. According to these rules, if privately owned land is being disposed of, that also goes for a permanent building on it as its accession. Thus, the parties could legally separate the land and building on the basis of a contract in such a way that 1) a party disposes of the land and keeps the title to the building, 2) a party disposes of the building and keeps the title to the land and 3) the title to land is transferred to one person and the title to the building to another one.[72]

If the building is a condominium[73] and built on privately owned land, the owners of separate units of the building had joint inseparable titles to the shared parts and were co-owners of the land under the building and that for the regular use of it, [74] in proportion to the value to their respective parts of the building, according to the total value of the building. If a socially (state) owned building has been erected on socially (state) owned land, the owners of separate parts of the building have the permanent right to use the land underlying it for as long as the building exists. [75]

2. Planning and Construction Law of 2003

2.1 The rule of legal separation of land and building.

The Planning and Construction Law of 2003 (PCL 2003) [76] has retained the principle of separation of land and building. In certain cases, it allows the conversion of the right of use into the right of ownership.

According to the PCL 2003, building land can be: public building land and other building land (Article 68). Public building land is the land on which public buildings of general concern and public grounds, all publicly owned, have been erected/developed before the effective date of this law (i.e., by 13 May 2003). The developed or undeveloped public build-

---

[70] See Article 9 of the Law on Fundaments of Ownership Rrelations, Official Journal of the Socialist Federative Republic of Yugoslavia, Nos. 6/80 and 36/90, Official Journal of the Federal Republic of Yugoslavia, No. 29/96 and Official Journal of the Republic of Serbia, No. 115/2005 – second law.

[71] See for Croatia: Simonetti Petar, *Property rights,* Faculty of Law of the University of Rijeka, Rijeka, 2009, page 70.

[72] Simonetti Petar, Institutions of legal separation of the land and building and the right of easement of building according to the

Draft Law on Ownership and other Real Rights of the Republic of Serbia, *Legal life,* No.umber 11/2008, page 124 and Andjelkovic Zarko, Land under building and land for regular use of the building, *Legal life,* No. *11/2008, page 259.*

[73] Right of ownership of any separate part of the building can relate to a flat, office or garage, or parking space. In the case of shared parts of buildings and installations, the owners of separate parts have the right of joint indivisible ownership – Article 19 of the Law on Fundamental Ownership Relation.

[74] See: Planojevic Nina, *Condominium,* Faculty of Law, Kragujevac, Kragujevac, 1997, page 136; Subic Milan, Right of Building ownership, *Legal life,* No. 10/2000, page 323

[75] *Ibidem,* pages 148-151

[76] Official Journal of the Republic of Serbia, Nos. 47/2003 and 34/06.

ing land may not be excluded from state property (Article 70, paragraph 7). Other building land can be in all ownership forms and is marketable. The land which was treated prior to the effective date of this law as state-owned city building land remains state-owned, unless otherwise provided by another law_(Article 79, paragraphs 1, 2 and 3).

The 2003 CPL provides that the owners of the buildings which were built before the effective date of that law (i.e., by 13 May 2003) „ in accordance with law on other developed public building land have the right to use the existing building lots for the duration of the buildings' existence (Article 83 of 2003 CPL).

Apart from the right of ownership and the right to use as the conditions for obtaining the building permit and the right of ownership after completion of building, the, 2003 CPL has provided yet another basis: lease. The right of land ownership and right of building ownership have also been legally separated on the basis of lease. A municipality can lease out undeveloped public building land for a specified period of time pending its being put to its planned use, for the purpose of erecting temporary buildings. [77] These deadlines were not long in the general municipal rules. [78] Other undeveloped state-owned building land can be leased out on the basis of contracts between the municipality concerned or its authorized agent on the one side and the lessees on the other (see Article 81, paragraph 1, in connection with to Article 72, paragraph 3 of the 2003 CPL), in accordance with the general rule of the municipality (see Article 81, paragraph 4 of CPL 2003). The decisions of municipalities or cities provide actually for long-term leasing of building land. [79]

2.2. Conversion of the right of use into the right of ownership by individual administrative decision

Conversion of the right of use into the right of ownership was made possible by the 2003 CPL only at the request of the earlier owner and by following the administrative authority act adopting such request, not by force of law. In this way, it is also possible to establish the legal unity of real estate, which is, however, regulated as an exception to the rules of separation of property. The 2003 CPL has regulated two legal situations: – one that has in mind the common document of the local government unit and the other that has in mind the individual administrative decision.

---

[77] See Article 76 of CPL 2003.

[78] Article 14, paragraphs 2 and 3 of the Decision on Building Land of the City of Belgrade (Official Journal of the City of Belgrade" Nos.16/2003 and 2/2004 and Official Journal of the Republic of Serbia, No. 41/2005 – decision of the Constitutional Court of the Republic of Serbia) provides that undeveloped public building land can be leased out pending its being put to planned use, but for not longer than five years. That period of time can be extended in exceptional cases only. The same provision is also included in Article 36, paragraph 1 and in connection with Article 38, paragraph 2 of the Decision of the City of Novi Sad on Leasing Out Building Land Sad (Official Journal of the City of Novi Sad, Nos.11/2003, 9/2004 and 10/2005).

[79] Article 16 of the City of Belgrade Decision on Building Land provides that other public undeveloped land may be leased out for „construction purposes "for an unspecified period not exceeding 99 years" and that the duration of lease should be fixed depending on purpose, surface area, temporal depreciation of the building, etc. Article 2 of the Decision on Leasing Out the Building Land of Novi Sad provides that Novi Sad may lease other public building land for the purpose of construction and putting it to its planned use, in accordance with corresponding town plans, planning documents and/or spatial plan. The duration of the lease depends on the purpose of other building land or objects and nature of depreciation of buildings for the following: 1) residential buildings – 99-year lease, and 2) other buildings -15 to 80-year lease. Lease may be extended prior to expiry, in accordance with law.

In the first legal situation, the following requirements have to be met for converting the right of use into the right of ownership: 1) that the capacity of state-owned city building land was determined by decision of the municipal or city or City of Belgrade assembly, 2) that this other building has not been put to planned use wholly or largely by the effective date of the 2003 CPL (13 May 2003), 3) that it does not make up an urbanistic and functional entirety with public building land, 4) that the earlier owner or his/her legal successor have submitted a request to the municipal administration within two years from the date of the building land determination decision, and 5) that the request of the earlier owner or his/her legal successor has been adopted (see Article 79, paragraphs 4 through 6 of the 2003 CPL).

In the second legal situation, the following requirements have to be met for converting the right of use into the right of ownership: 1) that the administrative body has enacted the decision on excluding the city building land from its earlier owner, 2) that the user of city building land did not put that land to its purpose for which that land was excluded within a year from the effective date of the 2003 CPL, 3) if the earlier owner or his/her legal successor has filed a request for cancellation of the decision excluding that land, and 4) that the administrative body has accepted the request for cancellation of the excluded land.

3. Conversion of the right of use into the right of ownership pursuant to the 2009 Law on Planning and Construction (2009 LPC)

1. General

The Construction and Planning Law (CPL) [80] that came into force on 11 September 2009 established the legal unity of land and building: 1) by the force of law or 2) allowed its establishment.

1) The CPL has converted the right of use into the right of public ownership of construction land without recompense in favour of the Republic of Serbia, autonomous province, or a local self-government unit (Article 100). The law did not terminate the perpetual right of use, but as a rule, it provided for conversion of the right of use into the right of public ownership or the right of (private) ownership. [81] The right of perpetual use of developed building land by individuals has been converted into the right of ownership without recompense compensation (Article 101). This has resulted in the establishment of the principle that a privately owned building may not stand on state-owned land. [82] The title to the land which cannot be the subject matter of the right of ownership may not be acquired even by converting the right of use. [83] The Planning and Construction Law has turned, by force of law, the right of perpetual use of building land by condominium owners into the right of co-ownership of that land, without recompense.

(2) The conversion of the right of use into the right of ownership of building land against a market value recompense is provided as a possibility for the companies and other legal entities, as well as their legal successors, to which are applicable the provisions of the laws dealing with privatization, bankruptcy and executive proceedings.

---

[80] Official Journal of the Republic of Serbia, Nos. 72/09 and 82/09 – amendment

[81] Simonetti Petar, *Rights relating to building land,* Faculty of Law of Rijeka, Rijeka, 2008, page 419.

[82] *Ibidem.*

[83] Simonetti Petar, *op. cit.,* page 400. See also Article 360, paragraph 1 of the Law on Ownership and other Legal Rights of the Republic of Croatia.

2. Conversion of the right of use into the right of ownership of building land without recompense

2.1. Conversion of the right of use into the right of public ownership

The holders of the right of use of developed and undeveloped state-owned land, which are entered in the land registry, including: the Republic of Serbia, autonomous province, and/or local self-government units, [84] became by force of law (Article 100 of PCL 2003), the holders of public property on the effective date of the PCL (11 September 2009), without recompense.

The right to use of developed and undeveloped state-owned land entered in the land registry in the name of the legal entities established by the Republic of Serbia, autonomous province and/or local self-government unit was to be converted into public ownership, without recompense on the effective date of the 2009 PCL (see: Article 100, paragraph 2 of the PCL). The legislators had in mind the legal entities established by the Republic of Serbia, autonomous province or local self-government unit, which are acting for common good. Legal entities can be institutions such as those engaged in health care[85], education and science research[86] or business operators such as public enterprises (which can be established by the Republic of Serbia, autonomous province or local self-government unit) [87], etc.

Public property, however, has not been regulated by law as provided by the Constitution of the Republic of Serbia. [88] The Constitution of the Republic of Serbia guarantees private, cooperative and public property and also their equal legal protection. Public property is: (1) government property, (2) autonomous province property and (3) local self-government unit property (Article 86, paragraphs 1 and 2 of the Constitution).

The Draft Law on Public Property, Ownership and Other Property Rights of the Republic of Serbia, autonomous province and local self-government unit[89] has regulated the public property right, right of ownership and other real rights of the Republic of Serbia, autonomous province and local self-government units. The holders of title to public property are the Republic of Serbia, autonomous province and local self-government units (Article 3, paragraph 1 of the Draft Law).

---

[84] According to the existing still valid provisions of Article 2 of the Law on the Resources owned by the Republic of Serbia (Official Journal of the Republic of Serbia, Nos. 53/1995, 3/1996, 54/1996, 32/1997 and 101/2005 – other laws), building land cannot be the property of a municipality, city or autonomous province.

[85] According to the provisions of Article 46 of the Health Care Law (Official Journal of the Republic of Serbia, Nos.107/2005 and 72/2009 – second law), health care institutions can be established as health centres, pharmacies, hospitals (general and special), institutes, public health institutes, clinics, clinical-hospital centres, and clinical centres.

[86] See, for example, Articles 54 through 59 of the Science Research Law (Official Journal of the Republic of Serbia, Nos. 11/2005 and 50/2006 – amendment).

[87] See Article 4 of the Law on Public Enterprises and Conduct of Business of Common Concern (Official Journal of the Republic of Serbia, Nos. 25/2000, 25/2002, 107/2005 and 108/2005 – amendment).

[88] Official Journal of the Republic of Serbia, No. 98/2006. The Constitution has not regulated the acquisition of public property, and in Article 86, paragraph 4, it provides as follows: „Publicly owned assets may be disposed of in the way and on conditions provided by law. However, the acquisition, as well as transfer of public property must be regulated by law, which should have been stated in the Constitution.

[89] Draft Law was made by the Ministry of Finance of the Republic of Serbia in October 2008.

Due to the fact that no law dealing with public property was adopted, the PCL set a period of one year from the effective date of the 2009 PCL within which the competent public attorney or some person representing the Republic of Serbia, autonomous province, or a local self-government unit is to file a request for public property rights to be entered in the land registry. Exceptionally, the request for entry of the rights relating to the building land used by the ministry responsible for defence matters, may be filed within two years from the effective date of the 2009 PCL. Although the provisions of dealing with entry of public ownership are imperative, pursuant to the provisions of Article 100, paragraphs 3, 4 and 5 of the PCL, this law also regulates the situations in which the request for entry of public property has not been filed within the mentioned deadlines. According to the provisions of Article 100, paragraph 6 of the 2009 PCL, in such cases, „the competent authority will enter ex officio the public property right concerning the real estate for which, on the effective date of this Law, entry has been made of the right to use the developed or undeveloped building in favour of the Republic of Serbia, autonomous province, or local self-government unit."

The mentioned provisions take into account the fact that the real estate registry has not been completed in all parts of the Republic of Serbia, so that it is not possible to establish a real estate registry in keeping with the provisions of Article 90 and in connection with Article 187 of the State Survey and Cadastre Law. [90]

2.2. Conversion of the right of use into the right of ownership

When the 2009 Planning and Construction Law came into force, building land was divided into public building land and other building land (Article 68 of the 2003 PCL). The building land on which state-owned buildings of common concern were built and public areas developed before the effective date of the 2003 PCL (i.e., 13 May 2003) became public building land. Such was also the status of the state-owned land which was earmarked by the plan adopted in accordance with that law for the construction of public buildings of general concern and public areas (see: Article 69 of the 2003 PCL). Public building land could not be transferred from state property (Article 70, paragraph 7 of PCL 2003). Other building land includes developed land, as well as land earmarked for the construction of buildings in accordance with law and which has not been designated as public building land. This land could be in all ownership forms and was marketable (Article 79, paragraphs 1 and 2 of PCL 2003).

According to the provisions of Article 83 of the 2003 Planning and Construction Law, the owners of the buildings erected up to the effective date of that law in conformity with law on other state-owned building land had the right to use the existing building lots for the duration of existence of such buildings (Article 83 of PCL 2003).

In the case of the persons registered as holders of the right of perpetual use of state-owned developed building land with buildings, their right of use was converted into the right of ownership without recompense, as of the effective date of the 2009 PCL. The word „persons" as used in this law means both individuals and legal entities, with the exception of companies and other legal entities „to which the provisions of the law dealing with privatization, bankruptcy and executive proceedings were applicable (conversion of the right of use into the right of ownership is dealt with by Article 103 of the 2009 PCL). The public book „of records of real estate and rights thereto" is the land register kept by basic courts and the

[90] Official Journal of the Republic of Serbia,, No. 72/2009.

Republic Geodetic Office (the latter keeps the real estate cadastre and it has also taken over the records of real rights to real estate) [91].

The owner of a building acquired the right to perpetual use of it with its completion. This right was converted, by force of law, into the right of ownership, so that at the same time, the owner of the building also became the owner of the land underlying it and that for its regular use (to which he had the right of perpetual use). This imperative norm cannot be altered by any legal transaction. [92]

2.3. Conversion of the right of perpetual use of land into the right of co-ownership of the condominium owner

As of the effective date of the Housing Law (HL) [93] (2 August 1992), it was not possible to acquire the right of tenancy in a dwelling (Article 30, paragraph 1, of the HL). Article 31 of the HL provides that the deadline for redemption (privatization) of dwellings is 31 December 1995 and if the holder of tenancy right has not concluded the contract of redemption (sale) of that dwelling by that time, he can carry on using it as a tenant for an indefinite period of time with option to redeem (purchase) it. The right of ownership of a dwelling was acquired by purchasing it as a separate part of the building and indivisible ownership of the shared parts of the building (condominium ownership). In that way, the condominium ownership primarily in dwellings in cities and settlements of urban character became the most important ownership form.. Condominium ownership is established in most cases in relation to dwellings, [94] business premises, garages and parking places[95], parts of cellars, attics, etc. [96] Buildings stopped being socially owned and the responsibility for their maintenance and use was assigned to the residential building assemblies which have the legal entity status and are made up of all owners of dwellings and other separate parts of buildings. [97] However, the land under buildings carried on being state-owned until the effective date of the 2009 Planning and Construction Law

---

[91] At the request of the Republic Geodetic Office (the Office), competent courts are bound, to hand over the land register, deed book and mortgage book or parts thereof by the starting up date of establishment of the real estate cadastre at the latest. As of the starting up date of establishment of the real estate cadastre (as decided on by the Office), no changes will be made in the land cadastre, land registry, deed book and mortgage book, deeds will not be issued and changes will not be made in the book of sold socially-owned dwelling with mortgage, and the non-settled and new requests for entering changes should be forwarded to the Office and be dealt with in the real estate establishment procedure – see Article 92 and in connection with Article 91, paragraph 2 of the State Survey and Cadastre Law (Official Journal of the Republic of Serbia, No. 72/2009).

[92] Simonetti Petar, *op. cit.,* page 421.

[93] Official Journal of the Republic of Serbia, No. 50/92 to 101/2005 – second law.

[94] A dwelling unit is made up of one or several rooms intended and suitable for accommodation, which as a rule make up a single building entirety with a separate entrance (Article 3 of the Housing Law).

[95] Article 253, paragraphs 1 and 2 of the Draft Law, for example, provides that a separate part of a building (which can be in condominium ownership), is a dwelling, office, garage, garage place which is clearly marked or a cellar, which make up a building entirety.

[96] Planojevic Nina, *Condominium (storey ownership),* Faculty of Law, Kragujevac, 1997, pages 87-89; Spasic, I., Storey Ownership in the Collection of papers *Changes in the Real Law of Serbia,* pages 107-111, and

[97] See Articles 11 and 12 of the Residential Building Maintenance Law, Official Journal of the Republic of Serbia, Nos. 44/95, 46/98, 1/2001 – Decision of the Constitutional Court of Serbia, and 101/2005 – second law.

As of the effective date of the Planning and Construction Law (11 September 2009), the right of perpetual use by condominium owners – owners of separate physical parts of a residential building with many dwellings, offices and a business-residential building, was converted into the right of co-ownership on that land without recompense. The right of co-ownership of the land on which a building stands and the land that serves for the regular use of it, came into being by inversion of the *superficies solo cedit* principle. Namely, the owner of a separate part of a building acquires the right of ownership of the land underlying that building and that for its regular use „in proportion to the size of the physical part owned by it". This has provided for the legal unity of co-ownership of the land underlying a building and that for its regular use, [98] These rules do not apply to persons who exercise the right to conversion of the right of use into the right of ownership with recompense (see Article 101, paragraph 2 and in connection with paragraph 4 of 2009 PCL).

The 2009 PCL has not dealt with the ownership of shared parts of a building. The Draft Law provides that shared parts of a building are those that serve to the building as a whole and cannot be converted into exclusive or co-property of the condominium owners, unless otherwise provided by law (see Article 256, paragraphs 1 and 2 and Article 258, paragraph 1 of the Draft Law).

2.4. Determination of land for regular use of a building in the case of conversion of the right of building land use into the right of its ownership, without recompense

The land for regular use of a building is the land underlying it and that around it, the area of which has been set as the minimum one for the formation of new lots for that zone, according to the valid planning document for that building (Article 70, paragraph 1 of 1979 PCL). [99] The decision determining the land for regular use of a building and forming the building lot is rendered by the competent authority at the request of the owner of the building involved. The surface area of land for regular use is to be determined when the right of use of building land is converted into right of ownership without recompense, if the owner of the building or a separate physical part thereof is not registered as the holder of the right of using the building land on which the building has been erected, but the local self-government unit, autonomous province, Republic of Serbia or some legal entity founded by a local self-government unit, autonomous province or Republic of Serbia instead (see Article 102, paragraphs 1 and 2 in connection with Article 101 of 2009 PCL).

If it is established in the procedure for determining the land for regular use that the area of a cadastral lot is also the land for regular use of the building in accordance with 2009 PCL, the owner of the existing building acquires the right of ownership of that building land without recompense. If it is established that the land for regular use of the building is smaller than the cadastral lot on which the building was erected, and the remaining land cannot form a separate construction lot, the owner of land can lease this remaining land to the owner of building or sell it to him at market price by direct arrangement (see Article 102, paragraphs 2

---

[98] Simonetti Petar, Legal unity of property, *Legal life,* number 11/2007, page 445.

[99] According to Article 67 of the 2003 PCL, the land for the regular use of a building was determined as the land on which buildings were and the land serving for the regular use of buildings. Also see: Andjelkovic Zarko, Land underlying a building and land for regular use of building, *Legal Life,* number 11/2008, pages 255-259; Jovanovic Ljiljana, Establishment of the right to use undeveloped building land, *Legal life,* number 11/2008, pages 244-246.

and 3 and in connection with Article 96, paragraph 9, point 4 of PCL 2009). If it is established that the land for regular use of a building is smaller than the cadastral lot on which the building was erected and the remaining land can form a separate building lot, the owner of the remaining part of land can dispose of this land in accordance with the 2009 PCL.

The owner of a building or a separate part of it acquires the right to be entered in the land registry as the owner of building land on the basis of an effective decision of the competent authority determining the land for regular use of that building in the mentioned situations (see: Article 102, paragraph 5 and in connection with Article 70, paragraphs 4 through 7 of PCL 2009):

2.5. Conversion of the right of long-term lease into the right of ownership

Article 101, paragraph 3 of the 2009 PCL also provides for conversion of the right of long-term lease on building land into the right of ownership (co-ownership). According to these provisions, the owner of the building or owners of separate physical parts of the building erected on the building land for which at least a 50-year lease contract has been made for building purposes, acquire the right of ownership to that building land or building land in proportion to the area of the separate physical parts owned by them, without recompense (Article 101, paragraph 3 of PCL 2009). Although the 2009 PCL refers to „the building land for which at least a 50-year lease contract has been made for building purposes" (Article 101, paragraph 3), a systematic interpretation leads to the conclusion that the legislators had in mind the other state-owned undeveloped building land. The other state-owned undeveloped building land could be leased out on long-term basis, where the procedures, condition, modality and leasing programme of that land were to be dealt with by the municipality concerned (Article 81, paragraphs 1 and 4 of the 2003 PCL).

The owners of other privately owned undeveloped building land lease it out guided by the autonomy of will (Article 10 of the Law of Obligations). [100]

If the provisions of Article 101, paragraph 3 of the 2009 PCL were to be interpreted as if they relate also to the conversion of privately owned building land on which buildings have been erected into the property of the owners of buildings or co-property of the owner of a separate part of the building, without recompense, that would actually mean nationalization, which is contrary to the Constitution of Serbia. [101] This is why the mentioned provisions take into account the other state-owned undeveloped land..

If legal entities or individuals have concluded a contract on leasing state-owned building land, in accordance with the provisions of the 2003 PCL (see Article 81 of that Law), and after erecting a building, they sold separate physical parts of it to third parties, they would remain bound to pay rent according to the valid lease contract. (see Article 100, paragraph 4 of the 2009 PCL).

The long-term lease on the other state-owned undeveloped building land, as provided by Article 81 of PCL 2003, is actually a superficiary right that legally separates the land and an existing building on the basis of a lease contract. Based on the lease contract, the builder is authorized to erect a building on the land which is the subject matter of the lease, maintain

---

[100] Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 45/89 and 57/89 and Official Journal of the Federal Republic of Yugoslavia, No. 31/93.

[101] „The right of ownership can be revoked or restricted only in the public interest determined by law, against a compensation that cannot be lower than market value" (Article 58, paragraph 2 of the Constitution of the Republic of Serbia, Official Journal of the Republic of Serbia, No. 98/2006).

it in a good state, use it as an usufructuary and pay rent for the duration of contract. The superficiary right (which has been adopted, for example, in Italian, French, Spanish, Belgian and Swiss laws) differs from the right to build (which has been accepted, for example, in Austria, Germany, Croatia and Bosnia and Herzegovina). [102] In the building right, a building which has been built or is existent is considered in the legal sense as an artificial real estate and in the superificiary right, a building is not an accession of that right; it is separated from the superficiary right and land and is considered to be a separate thing. [103] If a lessee has erected a building on undeveloped building land on the basis of a long-term lease (superficiary right) and then sold separate parts of that building to third parties, he will remain the lessee for the duration of that contract, even after the effective date of the 2009 PCL.

3. Conversion of the right of use into the right of ownership of building land with recompense

The right to use state/publicly owned developed and undeveloped building land , the holders of the right of use of which were or still are companies and other legal entities to which the provisions of the laws dealing with privatization, bankruptcy and executive proceedings apply, as well as their legal successors, is not converted by force of law into the right of ownership of such legal entities or their legal successors. The legal successors of companies and other legal entities may be both individuals and legal entities. This right of use may be converted into the right of ownership of the above mentioned persons only against a compensation equal to the market value of that building land at the time of conversion of the right, less the costs of acquiring the right of use on that building land (see: Article 103, paragraph 1 of PCL 2009).

The conversion of the right of use in the mentioned cases can be carried out only at the request of the current holder of the right of use. The decision on a request to that effect is to be rendered by the competent authority in the territory of which the building land involved is situated (Article 103, paragraphs 2 and 3 of PCL 2009).

The change in ownership of the state and/or socially owned capital of a social enterprise or some other legal entity was carried out in conformity with the Privatisation Law. [104] The subjects of privatization were socially owned enterprises or other socially owned legal entities. The buyer of capital could acquire the permanent right to use state/publicly owned developed or undeveloped land (of land under the building and that for its regular use) or the right of use. By buying a socially owned enterprise or some other socially owned legal entity, the buyer did not acquire the title to the land on which buildings are situated or to undeveloped land.

The 2009 PCL provides the possibility of converting the right to use state-owned undeveloped land, which was acquired for building purposes,, in accordance with the earlier law dealing with building land until 13 May 2003 (effective date of the 2003 PCL), into the right of ownership. The conversion of the right of use into the right of ownership is carried out at

---

[102] Simonetti Petar, Institutions of the legal separation of land and building and the right of easement of construction according to the Draft Code of Property and other Real Rights of the Republic of Serbia, *Legal life,* number 11/2008, pages 129-136.

[103] Ristov Angel, The right of long-term lease on construction land, *Legal life,* number 11/2007, pages 573 and 574.

[104] Official Journal of the Republic of Serbia, numbers 38/2001, 18/2003, 45/2005, 123/2007 and 123/2007 – second Law.

the request of the holder of the right of use, against a compensation equal to the market value of that land at the time of conversion of rights, less the real cost of acquiring the right of use and revalorization accounted up to the time of payment on this basis (Article 104, paragraphs 1 and 2). If the right of use is not converted into the right of ownership within a year from the effective date of the 2009 PCL (11 September 2009), the competent authority established ex officio the cessation of the right of use and establishes the right of ownership in favour of the local self-government unit in the territory of which the land involved is situated (Article 104, paragraph 4).

Socially owned enterprises, persons whose status is regulated by the law dealing with sports and associations of citizens, as holders of the right of use of building land, remain the holders of the right of use, unless the provisions of the 2009 PCL relating to the cessation of the right of use or annulment of the decision on the exclusion of land are applicable to them pending the completion of privatization. The conversion of the right of use to the right of ownership of a subject of privatization on that land is possible after privatization and payment of the sale price (Articles 105 and 106 of the 2009 PCL).

V. Construction Easement in the Draft Code of Ownership and other Real Rights

The Roman law principle of *superficies solo cedit* was consistently adopted in the Draft Code: „A thing which is perpetually joined with ground is the property of that ground's owner and it may be transferred, pledged, inherited, disposed of in some other way and seized in the same way as land, unless otherwise provided or agreed on." (Article 25).

A departure from this principle can, therefore, be prescribed or agreed on. The Draft provides for the introduction of a new institution in the Serbian law – construction easement (Articles 347 through 357) and in this way, it provides for legal separation of a building and the land it stands on. [105]

The construction easement is the right of a permanent owner of dominant property to own a building or a part thereof on somebody else's immovable thing (servient property), as well as to the usual owner of property (dominant tenement) to, for the needs of such tenement (real easement of construction), or the right of the person to (for his own needs – personal easement of construction), on another man's property (servient tenement) own a building or its part (Article 347, paragraph 1 of the Draft Code). Therefore, the construction easement authorizes its holder to erect on a plot a permanent independent building to which he acquires the title and which is legally separated from the plot until cessation of the construction easement. [106] The holder of the construction easement and the owner of servient property can make a contract binding the holder of the construction easement to pay a compensation to the owner of servient property, although such easement can also be acquired without compensation (see: Articles 349 and 350 of the Draft).

The holder of the construction easement can be authorized to erect a building on the servient property and own it, or to own an existing building on the servient property, make addi-

---

[105] Simonetti Petar, Institutions of the legal separation of land and building and construction easement right according to the Draft Code of Property and Other Real Rights of the Republic of Serbia, *Legal life,* page 138.

[106] *Ibidem,* page 139.

tions to it, finish it, renovate it or demolish it and erect a new one (Article 347, paragraph 2 of the Draft Code). The construction easement can be acquired in the same way as real easements, i.e., by making an entry in the public register on the basis of a contract made in writing, a court decision based on a testament, other court decision or decision of some other competent authority, as well as a unilateral statement of will made in writing by the owner of servient property (see: Article 356 and in connection with Article 324 of the Draft).

In contrast to the basic form of real easement, the same person can be the holder of construction easement and the holder of servient property (property construction easement – Article 348).

The object of a construction easement can be the building land on which a lasting building can be erected and the land serving for the exercise of the right of ownership of a building.

Construction easement can last up to 50 years with the possibility of its being renewed with the consent of the owner of servient property and it can be transferred, pledged and inherited during the period of its validity. When this period expires, the building becomes the property of the real estate owner.. The construction easement ceases upon expiration of the 50-year period, by renunciation and in other cases provided by law (along with appropriate application of the provisions dealing with real easement), by its deletion from the land register (on the basis of appropriate documents) – see: Article 354 of the Draft.

The construction easement provided by the Draft Code coincides with the superficiary right existing in some European legal systems. Namely, the both institutions separate buildings from land and they cannot exist without construction. In contrast to that, the right to build attracts the building to itself and it is its accession. The right to build and the building make up an inseparable legal unity. [107]

Conclusions

Because of the limited area of urban building land existing already in the Roman Empire, the Roman law made provisions for construction on somebody else's land. Initially, the construction on somebody else's land was based on long-term lease contracts. Later on, in the Justinian law, the property law elements prevailed in these contracts and they changed their legal nature. The subject of a long-term land lease could be agricultural land (*emphyteusis*) or building lots (*superficies*). The Roman law solutions affected the European legislations, which by accepting the *superficies solo cedit* principle, regulated mainly the right of building or superficiary right..

Before the Planning and Construction Law came into force (11 September 2009), the biggest areas of the urban building land in cities and settlements of urban nature were state-owned. If there was a privately owned building on a building lot, the owner of that building had the right of perpetual use of the land under the building and the land serving for the regular use of that building for the duration of its existence on that land.. Forced norms on the legal separation of the land and building that were public (government) property, however, did not apply to the privately owned land and buildings. However, the coercive rules of separation of buildings from socially (state)-owned land did not apply to privately owned land and buildings. The positive regulations of the second Yugoslavia and Serbia recognized the principle of legal unity of privately owned land and buildings.

---

[107] *Ibidem,* pages 145 and 154.

The Planning and Construction Law converted the right of use into the right of public ownership of building, without recompense in favour of the Republic of Serbia, autonomous province or local self-government units.

The right of individuals to perpetual use of developed building land was converted, without recompense, into the right of ownership. The owner of a building erected on the building land for which a more than 50-year lease contract has been made for construction purposes, acquired the right of ownership of building land without recompense by force of law. Furthermore, the right of condominium owners to perpetual use of building land was converted into the right of co-ownership of that land, without recompense. In this way, the legal unity of land and building was established.

The conversion of the right of use into the right of ownership of building land was provided as a possibility for companies and other legal entities, as well as their legal successors, to which the provisions of the law dealing with privatization, bankruptcy and executive proceedings were applicable, against a compensation equal to the market value of that land.

The conversion of the right of perpetual use into the right of ownership and some other real law relations have been dealt with by the Planning and Construction Law of 2009, although this is not its basic subject matter, because the law dealing with the right of ownership and other real rights has not been adopted.

The Draft Code on Property and other Real Rights provides for introduction of a new institute in the Serbian law – construction easement (Articles 347 through 357), thus making it possible for an existing building and the land it stands on to be legally separated. The construction easement coincides with the superficiary right, which already exists in a number of European legal systems.

Dr. *Nada Dollani**
University of Tirana, Faculty of Law
Lecturer of Civil Law

REGULATION OF LAND OWNERSHIP UNDER THE ALBANIAN LEGISLATION

I. An Overview of Ownership Relations

Under the Civil Code of 1981,[1] the right of ownership contained a guarantee of the right of the individual to the possession, enjoyment and disposal of property within the limits established by law. Two forms of ownership were recognised: the social property and personal property. In the People's Republic of Albania, the title to property was held by the State, agricultural cooperatives and individuals. The social property was made up of state-owned property and agricultural cooperative property.

The state property was recognised as the highest form of social property, and it belonged to the whole nation. **The state was the sole owner of the whole state property**. The state-owned property also included any other property created in the state-run sector, or gained by the state in accordance with law.

By decision of the relevant state bodies, land was allotted to state enterprises and institutions, agricultural cooperatives and social organisations for collective use, and to citizens for personal use. Land was allotted without any compensation.

On the other hand, the cooperative property was defined as the property of a group of rural workers who have joined an agricultural cooperative on a voluntary basis. The buildings, machines, equipment, means of transport, tools and means of work, working and producing animals, fruit-trees, and crops were the property of agricultural cooperatives, together with other things required for their operation.

In contrast to the state property, the personal one was very limited and included the income from labour and other legitimate resources, family homes and other dwellings, which helped meet the personal and household material and cultural needs.

Modern and comprehensive regulation of ownership was introduced for the first time in the Civil Code of 1994.[2] It specifies that ownership contains a guarantee for the right of individuals to free enjoyment and possession of objects, within the limits set by law.[3] State-owned property is no longer expressly regulated, and private property and state property were placed on an equal footing. Objects may belong to individuals, legal entities and state. Under the Civil Code, this right of ownership right is equally regulated for these three kinds of holders of title. Now, we no longer have a hierarchical ladder or a higher position of the state property form, as was provided by the laws in force prior to the collapse of communism.

---

* Original text is in local language.

[1] Adopted by Law No 6340 of 26 June 1981.

[2] Adopted by Law No 7850 of 1994.

[3] Article 149 of the Civil Code of 1994.

II. Regulation of Land Ownership under the Civil Code
Acquisition of Ownership by Unification and Blending of Objects

The right of the owner to use the surface, interior space and underground rooms is guaranteed under the Civil Code. Article 173 of this code provides that everything built underground and on ground belongs to the owner of land, unless otherwise provided by law. This constitutes a legal presumption in favour of the owner of land, who, under this legal presumption, is also considered to be the owner of what is built on ground and underground, unless:

a) Otherwise provided by the provisions of the Civil Code or other laws in the cases in which that what is built on ground and underground belongs not to the owner of land, but to other persons; and,

b) Other persons succeed in proving the contrary to such presumption or where they succeed in proving that they are the owners of what is built on ground and underground, not the owner of land.

The exception set forth in the law to the effect that the owner of land who is not the owner of that what is built on ground and underground, provided that the requirements provided by the law are met, applies precisely to the cases involving the joining of different owners' things into single ownership. This joining of different owners' things into single ownership may represent the joining of immovable things, joining of movable and immovable things and joining of movable things. Under these conditions, the acquisition of ownership by joining and blending things takes place in three ways:

A Acquisition of ownership through the joining and blending of immovable with movable things;

B. Acquisition of ownership through the joining and blending of movable things;

C. Acquisition of ownership through the joining and blending of immovable things.

The provisions of the Civil Code particularly set the requirements for each of these ways of acquiring ownership. This paper will focus on the acquisition of ownership by joining and blending of immovable things, mainly the rights derived from the things on ground.

A. Acquisition of Ownership by Joining and Blending Immovable Things and Movable Things

This way of acquiring ownership is governed by Articles 174 and 175 of the Civil Code. These provisions provide the following two ways of acquiring ownership by joining and blending immovable things and movable things:

a) Use of somebody else's movable things by the owner of land for building on his own land is regulated by Article 174 of the Civil Code;

b) Use of own movable things by the owner of land for building on his own land is regulated by Article 175 of the Civil Code.

a) In order to allow a landowner who is building on his own land using somebody else's things to acquire ownership of the building, it is necessary to take into account three criteria on the basis of which the ownership of new things is established, in conformity with law:

First: If movable things can be separated from the newly created thing without causing serious damage to it;

Second: The owner of movable things keeps the right of choice, if movable things can be separated from the newly built thing without serious damage, and

Third: If the owner of land has acted in good faith or in bad faith.[4]

Where it is possible to separate the movable things joined with ground from the built thing without serious damage, the owner of movable things has the right to choose, according to law, between restitution of movable things and remuneration for their real value. Serious damage to a thing should be understood to mean that the movable things belonging to another owner cannot be separated from the immovable thing without demolishing and destroying it. This circumstance will be checked on by court on a case-to-case basis during the proceedings. For instance, if an owner of land has taken some logs from his neighbour's courtyard without their owner's permission, and used them for building the roof of his house, the movable things (logs) cannot be returned to their owner in this case, because the newly made thing would be damaged seriously. However, if an owner of land has taken away a number of seedlings from his neighbour's courtyard without the latter's permission, and planted them on his own land, the owner of seedlings has the right to request their being returned to him, since their return would not cause any serious damage to the owner of land.

Where the owner of movable things decides for the movable things which are joined with an immovable thing and cannot be separated without causing significant damage to the newly created thing, to remain with the owner of land, the owner of movable things has the right to claim from the owner of land the value of his movable things. Where the owner of movable things chooses to take away his property (of course, where something like that is possible, if the newly created thing does not get damaged seriously), the owner of land is obliged to hand over such things to their owner, provided that the restitution by the owner is not conducive to serious damage to the newly created immovable things.

These rules apply where the owner of land has acted in good faith in creating new things by joining somebody else's movable things with the land owned by him. Where the owner of land has acted in bad faith, he is obliged to return the movable things to their owner, if so requested by the latter, and where this does not lead to serious damage to the newly created thing, also pay for the damage incurred, if it is not proven that by his act, he had caused serious damage to the owner of movable things. If it turns out that the return of movable things by the owner of land, who has acted in bad faith, is not possible because the return would lead to serious damage to the newly created thing, the owner of land is obliged to pay to the owner of movable things the value of such movable things, as well as indemnify him for the damage sustained, if it is proved that his action has caused serious damage to the owner of movable things.

Hence, if he has acted in bad faith, the owner of land is in any case obliged either to return the movable things to their owner, where so is possible, without damaging the newly created things seriously, and indemnify him for the damage incurred, where his actions have led to serious damage to the owner of the movable things, or pay the value of movable things, where the return of movable things is impossible, and indemnify the owner of movable things for the damage sustained, where it is proved that serious damage has been caused to him by the joining of things. The owner of land will be deemed to have acted in bad faith if he had

---

[4] Article 174 of the Civil Code provides that, *„the owner of land, who has built, planted and performed other operations using somebody else's materials, shall be obliged to pay their value, if the separation and return of such materials has not been requested,when it is possible to do so without inflicting serious damage to buildings or seedlings. „Where separation of the materials is possible, and the owner of land has acted in good faith, the latter must indemnify the owner of the materials for the damage sustained."*

known, or must have known in the light of a whole series of concrete circumstances that he was building using somebody else's things.

b) The acquisition of ownership by the owner of things who is building on someone else's land, is subject to the satisfaction of the following criteria in accordance with law:

First: The owner of land has the right of choice.

Second: Knowledge or ignorance of the owner of land about the existence of the erected building.

Third: Expiration of the six-month time limit from the date on which the owner of land was notified about the building.

Fourth: Action in good or bad faith of a third person who is building on someone else's land.

Fifth: The value of the building and land.[5]

The ownership of new objects should be established on the basis of these criteria. Under the law, depending on the case involved, either all of these criteria or several of them or only one of them must exist at the same time. Where the owner of movable things is building or planting on someone else's land, the owner of that land has the right to keep the newly created objects, or request of the owner of the movable things built or planted on someone else's land, to remove such things at his own expense, and where it is proven that the owner of movable things has acted in bad faith, the owner of land also has the right to claim indemnity, if he is able to prove that the building has caused real damage on his land. If he is agreeable to the new things remaining in his possession, the owner of land must pay to the owner of movable things the value of such things, as well as the cost of labour required for construction and other work, or the value added to the building.

In any event, the owner of land does not have the right to request the removal of buildings and seedlings built and planted on his land by someone else. Paragraph 3 of Article 175 of the Civil Code provides that the owner of land may not request the removal of the things built on his land by someone else using his own materials, if the following requirements are met at the same time:

a) Where such things have been constructed with his (owner of land) knowledge;

b) Where six months have elapsed from the date on which the owner of land was notified of the thing's existence;

c) Where the person who has erected the building has acted in good faith, that is, he did not know, or in view of all circumstances, could not have known that he was building on someone else's land.

---

[5] Article 175 of the Civil Code provides that, *„Where a third person has built, planted or performed other operations using its own materials on someone else's land, the owner of that land shall have the right to keep the movables or request of the other person who has done the work, to take on the obligation to remove them at his own expenses, and where necessary, to pay compensation for the damage inflicted.*

'Where the owner agrees to keep them, the owner of land shall be obliged to pay the value of materials and labour, or the value added to land.

'The owner of land may not request the removal of buildings and seedlings if they were constructed/ planted with his knowledge or in good faith by a third person, and if six months have elapsed from the date on which the ownerwas notified of the existence of such buildings and/or seedlings."

„Where a building has been erected in good faith on someone else's land and its value is higher than that of land, the person who has put up the building may be recognised as the owner of land by decision of the competent court."

If all of the three mentioned requirements are met at the same time, the owner of land is obliged *to keep the new building in his possession* and must pay to the owner of the building the value of the materials used for the construction of the building and the value the new construction has added to land. With regard to the first requirement laid down in item a), the phrase *„the building has been erected with his knowledge"* must be construed properly, and it must be pointed out that this requirement differs from that laid down in item b). In this case, irrespective of the fact that the term *„with the knowledge of the owner"* has been used in the law, we are of the opinion that it relates to a building erected with the owner's permission, namely with his explicit or tacit approval. Provided that the first requirement is construed in this way, it would be possible to draw a distinction between this requirement and that laid down in item b), which requires that six months elapse from the date on which the owner has been notified of the building erected on his land. In the second case, although the owner did not allow, either explicitly or implicitly, the building to be constructed on his land, it was constructed without his knowledge and the owner of land has been only notified of the existence of a newly constructed building on his land After six months from being notified that a third person has erected a building on his land, the owner of land forfeits the right to request the removal of such building.

There is a need for the third requirement laid down in item c) to be clarified and properly understood because in practice, misunderstandings may arise with regard to its application. According to this requirement, it is required that the person who has erected the building was acting in good faith when erecting the building or planting the seedlings or that he did not know or in view of all circumstances, could not have known that he was building or planting on someone else's land. We believe that a person is building on someone else's land in good faith *only when he is doing so with the permission of competent government bodies,* i.e., on the basis of a *building permit* issued by the competent authority. In all the other cases, when a person is building on someone else's land using his own materials without permission of the competent authority, such person will be considered to have acted in bad faith, because, irrespective of the fact that he may not have known that he was building on someone else's land, in accordance with all circumstances, he must have known that he was building on someone else's land. Therefore, in the case of a building erected by a third person on someone else's land without permission from the competent body, that person may not be deemed to have acted in good faith, and consequently, the owner of land has the right to request the removal of that building from his land at the expense of the person who has erected it, even though the first two requirements have been satisfied met, because the obligation for the owner of land to refrain from removing the building erected on his land applies only if the three aforementioned requirements are satisfied simultaneously.

The fourth paragraph of Article 175 of the Civil Code makes it possible for a person who is, building using his own materials to become owner of both the newly created thing and the land on which it has been built. The owner of the movable things built on someone else's land can also become the owner of the land they had been built on subject to the simultaneous satisfaction of the following conditions:

a) That he had acted in good faith in constructing the building;

b) The value of the building must be greater than the value of land;

c) Such person must file a lawsuit with the court in order to become the owner of the building and the land its was erected on.

The first condition making it necessary for the person concerned to build or plant in good faith has been explained earlier and only the person who has obtained a building permit

from the competent body to build will be considered as person acting in good faith. In all the other cases, irrespective of circumstances and irrespective of the fact that the value of the building may even be a hundred times greater than the value of land, the person who has put up the building may not become the owner of either the building or land. Instead of that, at the request of the owner of land, he is obliged to vacate at his own expense the land on which he had erected the building and thus restore unencumbered land to its owner, in the state it was in before the building was erected.

The second condition is to be looked into by the competent court experts, who, based on the market data and the real value of the land and building, establish the value of the both of them. The third condition is related to procedures. Under this condition, where the value of the building is higher than the value of land, the person who has built acting in good faith on that land must file a lawsuit with the court, requesting of the latter to proclaim him as the owner of both the building and the land it was erected on. Having considered the case and established that the both conditions have been satisfied simultaneously, that the builder had acted in good faith and that the value of building is higher than that of land, the court shall decide whether to accept or reject the lawsuit.

If it finds that both of these conditions have been satisfied, the court is obliged to recognise the owner of the movable object, who had built it using his own materials on someone else's land, both as the owner of the building and someone else's land on which he had erected it, provided that the latter pays to the owner of land the value of land, even though this latter requirement is not explicitly set forth in the law. On the other hand, if the court finds that the person who was building on someone else's land does not satisfy the both conditions: that he has acted in good faith when erecting the building and that the value of the building is not higher than the value of the land the building stands on, or if just one of these conditions has not been satisfied, namely, either the builder was not acting good faith or that the value of the building is lower than the value of the land it stands on, the court will rule to strike down the lawsuit brought by the owner of movable things, who has been building on someone else's land.

III. Legislation Governing the Ownership of Land in the Transition Period

Given that under socialism, the highest form of ownership in Albania was the state-owned ownership and private ownership was almost non-existent, the regulation of the latter was needed urgently. Immediately after the fall of communism in 1991, for the purpose of establishing a new economic order and ensuring the transformation from a centrally governed economic system controlled by the State into an economic system based on free market principles, the pluralist Parliament of Albania passed the law sanctioning and protecting private property, free initiative, independent private activities, business operation, foreign investment, the right of giving and taking loans, right to employ others and to be employed, privatisation of state property, thus, regulating the whole process of transformation of the economy in the Republic of Albania from a planned economy controlled by the state into a free market economy.[6]

[6] Law No 7512 of 10 August 1991 „On the sanctioning and protection of private property, free initiative, independent private activities and privatisation."

To this effect, the Law No 7652 of 23 December 1992 „On the privatisation of state-owned buildings," also regulating the ownership of land on which such buildings stand, was also passed. The purpose of this law was to provide for the privatisation of state-owned buildings and establishment of a free market for privately owned buildings and help in the use, maintenance, and management of buildings, recognising the right of the tenants of state-owned buildings to become their owners. Under this law, the owners have the right to dispose of, lease out and register their buildings. Under this law, the land underlying a building is considered to be a separate thing and its ownership is assigned to the building occupants. Following privatisation, co-ownership of the courtyard surrounding a detached building, which has always been used and maintained by tenants is assigned to them. The co-ownership relations among co-owners were regulated later on by the Civil Code of 1994, and co-ownership of dwellings was established and regulated as one of the forms of binding co-ownership.

The Law on the Privatisation of State-owned Buildings provided that the land which was privately owned in the past, should be regulated by a special law and that was done later on by the Law No 7698 of 15 April 1993 „on the restitution of property and indemnification of former owners."

Yet another social issue, which remained unsettled for a long time, was to do with intensified demographic migration which was escaping government control for a long time and thereby also with illegal buildings built particularly in informal settlements, on state-owned land or on the land of former owners. The issue of legalising the illegal buildings was regulated by the Law No 9482 of 3 April 2006 „on the legalisation, urbanisation and integration of illegal buildings." That law sanctions the legalisation of buildings erected without permits in „formal residential areas," „informal areas," „other territories," as well as „additions without subsequent permits to buildings for which building permits have been issued." It also provides for the transfer of ownership of the building plots on which illegal building have been constructed; urbanisation of the informal areas, blocks and buildings, and their integration into the country's territory and infrastructure development, with a view to improving the living conditions, and the procedures for the legalisation of informal areas/buildings and setting up and operation of the structures responsible for implementing these processes.

The property legalised under this law is entered in the real estate property registers in accordance with the Law No 7843 of 13 July 1994 „on the real estate registration." After registration of the legalisation permit for a building plot, which is entered in the real estate register in the name of private persons, the latter have the right to compensation in kind or money. Where a building plot is state-owned, the transfer of ownership of the building plot or land from the state to the individual who has applied for that procedure is governed by the provisions of the Civil Code.

Pursuant to the Law „on the legalisation, urbanisation and integration of illegal buildings," the Law No 10 186 of 5 November 2009 „on the regulation of ownership of the state-owned land in the priority areas for the development of tourism," was passed. The purpose of this law is to regulate the ownership relations affecting the land and buildings constructed in the areas treated as priority areas for the development of tourism, which have been designated for stimulated activities. This law is applicable to the transfer of ownership rights to the facilities constructed and land located within the stimulated areas onto the interested subjects or stimulated persons.

The Law „on the regulation of the ownership of state-owned land in the priority areas for the development of tourism" prescribes all modalities for the conclusion of contracts of sale between the state and individuals, which have been building on or are enjoying property rights to state-owned land, and it also provides all the preliminary procedures and those for registration with the Real Estate Registration Offices of the land purchased by individuals.

In conclusion, we could say that an effort has been made to ensure that the Albanian legislation regulates all situations in which the owners of a building and land are two different persons, where priority is given to the owner of building, in the cases in which the state was the owner of land. Therefore, a legal unity exists between a building and land, allowing no overlapping in the newly created by the joining and blending of things.

References:

Andrea Natanaili, *Lectures on the Property Law*, Tirana 1975.

Avni Shehu, *Ownership,* Tirana 2000. *Albin* Publishing House.

Ardian Nuni and Luan Hazneziri, *Lectures on Ownership and Inheritance Law*, Tirana 2008.

Civil Code of the People's Republic of Albania, 1981.

Civil Code of the Republic of Albania, 1994.

Law No 7512 of 10 August l991,, On the sanctioning and protection of private property, free initiative, independent private activities and privatisation."

Law No 7652 of 23 December 1992 ,,On the privatisation of state-owned buildings."

Law No 7698 of 15 April 1993 ,,On property restitution and compensation to former owners."

Law No 9482 of 3 April 2006 ,,On the legalisation, urbanisation and integration of illegal buildings."

Law No 10 186 of 5 November 2009 ,,On the regulation of the ownership of state-owned land in the areas with priority for the development of tourism."

Borislav P. Rašović,*
Attorney-at-Law, Podgorica

LEGAL REGIME OF DEVELOPED CONSTRUCTION LAND IN MONTENEGRO

With the exception of its Chapter V, dealing with fees for the use of building land, the enforceability of which was to run until 1 January 2009, the Construction Land Law[1] ceased to be valid when the Law on Spatial Development and Building Construction[2] came into effect.

The Law on Spatial Development and Building Construction includes only the general concept of construction land defined in the meaning of the term referred to in Article 9, paragraph 1, item 12, as the land designated by planning documents for the construction of buildings.

The Law on Spatial Development and Building Construction materializes this standard with the means of set rules of planning documents for building construction.

This law does not contain the concept of developed and undeveloped construction land, but on the basis of the thus defined meaning of construction land and other standards in the law, we can conclude that developed construction land is the land on which a building has been erected up to the requirements laid down in planning documents, while undeveloped construction land is that the purpose of which has been specified in the building construction planning document. "The Construction Land Law of the Socialist Republic of Croatia explicitly provided that undeveloped construction land also means the land on which an accessory facility has been built, which does not serve for the regular use of an existing residential or commercial building and for the construction of which no building permit was required".[3]3

Under this legal solution, the construction land regime is conditional on the purpose of areas laid down in the planning document with the planned objective of spatial development solely for the purpose of constructing buildings.

1. Construction of buildings in the area covered by a detailed city plan

A detailed city plan, like all other kinds of planning documents, state and local, has the character of a public document and the construction of buildings is based on the principle of public interest protection.

A detailed city plan sets the conditions for the construction of buildings in the manner which provides for implementation of that plan. This plan also contains the land subdivision plan. The authority competent for cadastral affairs is obliged to transfer the subdivision plan

---

* Original text is in local language.

[1] Official Journal of Montenegro, number 55-2000

[2] Official Journal of Montenegro, number 51/2008

[3] Petar Simonetti, Actualities of civil and commercial legislation and legal practice, Collection of Papers, Mostar 2006, page 21.

established by the planning document to cadastral lots. Based on the subdivision plan or conditions and guidelines established by the planning document, an urban lot (as part of space) is formed. It covers one or several cadastral (proprietary) lots or parts thereof and satisfies the conditions laid down by the planning document. This is why the Law on Land Restructuring and Construction of Buildings stipulates that it is the duty of the owner of a cadastral lot to allow changes of the cadastral lot boundaries to be made according to the subdivision plan.

When the subdivision plan, therefore, has an urban lot "overlapping" a cadastral lot (on undeveloped construction land), the subject of the right of ownership of the cadastral and urban lot is the same. When an urban lot is formed, as part of the space of several cadastral lots or parts thereof, co-ownership is created on the urban plot. In this case, construction of buildings on the urban plot can be started with the prior joint consent of all owners as the evidence of the right of ownership, or any other right on construction land, is one of the conditions for issuance of the building permit.

Another case is when one of the owners "buys up" the proprietary share of the urban lot for completion. An urban lot covering several cadastral privately and state-owned plots is formed by the transfer of rights after full completion of the urban lot according to the subdivision plan. When government property is involved, sale can also be carried out by direct agreement in accordance with the Government Property Law[4].

Construction of buildings in the area covered by the detailed city plan can be carried out solely in accordance with the law and other regulations, technical norms and quality standards.

The constructed building is subject to the assessment of its fitness for use that is established by technical inspection.

The building is deemed fit for use pursuant to Article 121, paragraph 2 of the Law on Spatial Development and Building Construction if:

1. If it has been constructed in accordance with the building permit and revised main design;
2. If evidence has been provided concerning the quality of the work done and the material built in, services and equipment installed, as issued by an authorized organization;
3. If the works have been performed in accordance with rules, standards, technical and quality norms applicable to given types of works, materials, equipment and services.

The construction of buildings, without meeting the abovementioned requirements, in the area covered by the detailed city plan does not result in the originary acquisition of the right of ownership of the building for the builder and such building cannot be entered in the property cadastre (declarative effect of entry would not happen here). This rule is also included in the Law on Proprietary Relations. Article 46 of that Law provides that by building, the owner of land acquires the right of ownership of the building constructed in accordance with law.

2. A building constructed without a building permit – legal status of the building and construction land

When the owner of construction land or some other person (a developer) constructs a building without permission of the competent authority, it is treated as a temporary building and cannot be the subject of ownership which can be entered in the public book. A temporary building is real estate only seemingly since its temporary nature is also pointed at by the pro-

[4] Official Journal of Montenegro, number 55/2000.

vision of Article 167 of the Law on Spatial Development and Building Construction to the effect that it would be removed, if it did not fit into the planning document.

The provisions of Articles 41 through 44 of the Property Relations Law, dealing with construction on somebody else's land, cannot be applied to the construction of buildings on construction land without building permit.

The permission of the competent authority to erect a building on one's own or on somebody else's construction land is a prerequisite for acquisition of the right of ownership. The building permit referred to in Article 91, paragraph 1, of the Law on Spatial Development and Building Construction is issued by the administration authority for the building constructed according to the national planning document and the one referred in paragraph 2, for a building constructed according to the local planning document, by the local government authority.

The construction land on which a building has been constructed without a permit remains under the regime of undeveloped construction land, since the construction of a building may be commenced with on the basis of an administrative document, i.e., the building permit.

The administrative measure and action performed by the civil engineering inspector pursuant to Article 153, paragraph 1, item 3, of the Spatial Development and Building Construction Law also include the warrant for demolition or removal of the building and putting the land back into its original use.

3. Joint indivisible ownership of an urban lot

The construction of buildings on an urban lot in accordance with law is the condition not only for acquiring the right of ownership of the building by the builder as the owner of the land, but this is also a relevant requirement for the owners of separate parts of a residential building to acquire joint indivisible ownership of an urban lot. Article 171 of the Property Relations Law provides that the owners of separate parts have joint indivisible ownership of the urban lot on which a residential building has been constructed.

Article 53, paragraph 2, item 3 of the Law on State Survey and Real Estate Cadastre[5] provides that the real estate sheet, as the basic document of real estate and rights thereto, must also include the data on buildings and separate parts thereof and holders of the rights to them (Sheet V).

Therefore, the owner of a separate part in an erected residential building, ex lege, acquires, together with other owners of separate parts, joint indivisible ownership of the developed construction land within an urban lot.. This is a case of establishment of the regime of joint indivisible ownership for all owners of separate parts of a residential building instead of the regime of the right of exclusive ownership, co-ownership or joint ownership that existed on the undeveloped urban lot also during the construction of the building. With the construction of a residential building up to the planning document requirements and in accordance with law, undeveloped land is turned into developed one and the regime of joint indivisible ownership of the urban lot of all owners of separate parts is established.

4. Joint indivisible ownership of an urban lot in the event of destruction of a residential building

Article 172, paragraph 3, of the Property Relations Law, regulates the regime of joint indivisible ownership of an urban plot in the event of complete destruction of a residential building. In the case of demolition of a residential building, according to this legal solution,

---

[5] Official Journal of Montenegro, number 29/2007

each owner of a separate part of the residential building concerned is entitled to a share in the land, on which the building was constructed, in proportion to the share of his/her separate part in the total value of the whole building, unless otherwise provided by contract signed by the owners of separate parts..

In this case, the legislators have established dependence of the share of the present undeveloped construction land due to the demolition of the building in proportion to the share of each separate part in the total value of the whole building. The law makes it possible for the owners of separate parts to deal with this rule in a different way under a contract.

5. Approach to developed construction land – urban and cadastral lot

The purpose of adopting the planning document is to have it implemented with the development of construction land. In practice, the categories of urban and cadastral lots often tend to be equated, so that the development level of a cadastral lot is taken into account when appraising the development level of construction land. Such approach is wrong in legal terms.

The cadastral lot is a category of the cadastral plan. In Article 31, paragraph 1, of the Law on State Survey and Real Estate Cadastre the cadastral lot is identified as a part of land in a cadastral municipality, which is defined by boundaries and marked with a number. One or several persons may be the holders of rights to it or its users.

A cadastral lot may be the property of one or several persons.

An urban lot is a category of the city plan and under Article 58, paragraph 1 of the Law on Spatial Development and Building Construction, its characteristics are as follows:

a) It is a part of space,
b) It is formed on the basis of the subdivision plan or requirements laid down in the guidelines established by the planning document,
c) It covers one or several cadastral lots or parts thereof,
d) It meets the construction requirements as provided by the planning document.

Construction land is always developed by developing an urban lot and its being put to use as designated by the planning document.

According to Article 60 of the Law on Spatial Development and Building Construction, a site is the place where works are being carried out towards putting the space to intended use in keeping with the planning document and a site may be made up of one or several urban lots or a part of an urban lot.

This differentiation is particularly important for proper application of the rules of de-expropriation referred to in Article 39, paragraphs 2 and 3 of the Expropriation Law.[6]

According to this rule, at the request of the former owner of expropriated real estate, the valid decision on expropriation will be rescinded or modified if the beneficiary of expropriation has failed to carry out works to the value of at least a third of the total value of the works envisaged to be done, within 3 years, but not upon expiration of 6 years from the effective date of the decision on expropriation. The envisaged works are specified in the planning document for each part of the space which is up to the construction requirements on an urban lot exclusively. One third of the value of the works carried out in relation to the total value of planned works is a factual issue which is to be established on the basis of expert opinion as a means of evidence and depending on whether there are one or several sites or whether the site is a part of one urban lot.

---

[6] Official Journal of Montenegro, number 55/2000, 28/2006, 21/2008.

The issue of the development level of a cadastral lot can be of importance outside the area covered by a planning document. In the area covered by a city plan, a cadastral lot is not a site, it is not put to a purpose and in the evaluation of the development level of construction land, it is legally wrong to evaluate the development level of a cadastral lot.

6. Rights of foreign persons, foreign states and organizations in relation to construction land

Chapter XII of the Property Relations Law provides special rules concerning the application of this law's provisions dealing with foreign persons, foreign states and foreign organizations.

"The Property Relations Law provides the possibility for foreign persons to acquire the right of ownership in the same way as domestic citizens, unless otherwise provided by law (this or some other law) or by an international agreement (primacy of international law)."[7]

With the adoption of this law, the restrictions applicable to foreign persons with regard to acquisition of the right of ownership under the Law on the Elements of Property Relations, have been modified. According to the existing provisions of the Property Relations Law, a foreign individual can acquire in the territory of Montenegro the right of ownership of real estate by inheritance the same as the citizens of Montenegro can. It provides restrictions for foreign persons with regard to acquisition of the right of ownership of property in general use and natural resources.

The Law on Government Property and the Law on Property Relations define the construction land as property of general interest. "No generation is authorized to deprive the next generation of the right to this common property".[8]

In Montenegro, a foreign person can acquire the right of ownership of construction land without any restrictions.

Foreign states, as well as the OUN organizations and specialized agencies may acquire, with the prior consent of the Ministry of Foreign Affairs, the right of ownership of construction land by legal transaction/sales contract for the purpose of constructing buildings and dwellings for their diplomatic and consular missions/offices.

In contrast to the acquisition by foreign persons, the legislators call in this case for the fulfillment of certain requirements, including:

a) That the buyer is a foreign state or a UN organization or specialized agency,
b) That according to the planning document, the construction land concerned is intended for the construction of buildings for the needs of diplomatic and consular missions of foreign states and UN organizations and specialized agencies and apartments for official needs,
c) That the prior consent of the Ministry of Foreign Affairs has been obtained.

7. Conversion of the right of use into the right of ownership

The Law on the Nationalization of Rental Buildings and Construction Land[9] and other regulations have established the regime of public ownership of construction land in central construction sections of cities and settlements of an urban nature and the previous owner has become the user ex lege.

---

[7] Zoran P. Rasovic, Property Law, page 132, published by the Podgorica Faculty of Law, 2010.

[8] Petar Simonetti, ibid

[9] Official Journal of the Federal People's Republic of Yugoslavia, number 55/1958, came into effect on 28 December 1958.

This public property relict cannot stand the test of any legal justification. All it did was to create for the whole period enormous economic and legal power for municipalities and it was abandoned with the adoption of the Law on Property Relations.

"The provisions of the Nationalization Law show that the purpose of the construction land nationalization was to prevent the individual appropriation of city rent; direct the city rent to the funds of the community; provide for planned and cheaper housing construction and make it possible for the community to manage the construction land and in that context, to prepare the land for the construction of appropriate infrastructure and allocate construction land, in accordance with the criteria provided by law, for the construction of residential and commercial buildings of individuals and legal entities."[10]

According to the provision of Article 419, paragraph 1 of the Property Relations Law, the right of management, use or permanent use and disposal of socially and now government-owned land has been turned by this law into the right of ownership of the hitherto holder of the right of management, use or permanent use, unless otherwise provided by a special law or if the person concerned proves that he/she had acquired the right of ownership of particular land before this law came into effect. These social property rights are turned into the right of ownership by force of law, so that the ownership regime in favour of the hitherto holder of these rights is established.

"The provisions of this article will be applied most often to construction land"[11]

Article 64, paragraph 1, of the Government Property Law provides that the right of use or permanent use of the government-owned land which is registered in the scope of a general town plan, detailed town plan, town plan project and local site study in the name of Montenegro, municipality and/or a public service established by Montenegro or a municipality, becomes the government property of Montenegro or a municipality or a public service, which does not affect the rights of individuals and companies in the process of transformation of social ownership rights in the meaning of the Property Relations Law.

This provision has converted the right of use registered in the name of Montenegro, a municipality and a public service established by Montenegro, into the right of government property of Montenegro.

The establishment of the right of ownership of government-owned construction land in favour of the holder of permanent right of use is a possibility which is also provided by the Law on Restitution of Revoked Property Rights and Indemnification[12]. According to this law, the conversion of the permanent right of use into the right of ownership can be requested by the owner of a building erected on state-owned construction land in keeping with law and standing town plan.

8. Requirements and procedure for restitution of undeveloped and developed construction land to former owners pursuant to the Law on Restitution of Revoked Property Rights and Indemnification

The restitution of the undeveloped and developed construction land seized in favour of general national, government, public and co-operative property to former owners has been dealt with by the Law on Restitution of Revoked Property Rights and Indemnification.

---

[10] Petar Simonetti, Denationalization, Faculty of Law, Rijeka, page 96, 2004.

[11] Zoran P. Rasovic, Commentary on the Property Relations Law, page 21-53, Faculty of Law, Podgorica, 2009.

[12] Official Journal of Montenegro, numbers 21/2004 and 49/2007.

According to Article 17, paragraphs 1 and 2 of this law, the undeveloped construction land that was turned into social or state property has to be returned to its former owner, unless otherwise provided by this law. The nationalized undeveloped construction land, which has been handed over to a local self-government unit or somebody else in accordance with law for the purpose of being put to the use envisaged by the planning document, is to be restituted to its former owner in the way and by the procedure provided by the Expropriation Law, unless at the time of filing the request for restitution, the value of the performed works exceeds at least one third of the value of the total envisaged works.

Article 2, paragraph 1, item 6 of the Law on Restitution of Revoked Property Rights and Indemnification defines the meaning of undeveloped construction land as an urban lot which has not been put to its final use laid down in the city plan.

The developed construction land as referred to in Article 2, paragraph 1, item 7 of the Law on Restitution of Revoked Property Rights and Indemnification is defined as an urban lot or a part thereof on which a building has been erected in accordance with plan. According to Article 18, paragraph 1 of that law, nationalized construction land will not be the subject of restitution unless there is a building on it which is to be returned to its former owner in accordance with this law. According to Article 18, paragraph 2 of this law, the nationalized developed construction land on which there is a building which had existed at the time when the land was seized and the value of which has increased significantly because of the investments made in the building, can be the subject of restitution only if the former owner pays the amount by which the value of property has been increased because of investments and if that building is not owned by individuals or legal entities which have not been founded by the state.

The Law Amending the Expropriation Law[13] has introduced the category of fair compensation instead of the category of compensation referred to in the 1947 Expropriation Law. The 1992 Constitution of the Republic of Montenegro[14] introduced the category of market compensation for deprivation of the right of ownership and the 2007 Constitution of Montenegro[15] the category of fair compensation. Under Article 7, paragraph 1 of the Law on the Restitution of Revoked Property Rights and Indemnification, the former owner has the right to restitution of compensation for revoked rights, if the compensation in money or other things or rights had been set for him/her prior to the effective date of the Law Amending the Expropriation Law (Official Journal of the SFRY, No. 5/68).

According to this provision,, the former owner whose compensation for revoked property rights was not fair and based on market prices is entitled to restitution or indemnification.

Under Article 7, paragraph 4 of this Law, the former owner who has transferred his/her property by a legal transaction or a one-sided act, is not entitled to restitution and compensation.

According to Article 12, paragraph 1, item 10 of the Law on Restitution of Revoked Property Rights and Indemnification, the subject of restitution is not the property right and a thing which has become the property of an individual or legal entity in conformity with law.

The issue of restitution of revoked property rights can cause a violation of the ownership rights of the present title holder and diligence of acquisition. This provision rules out such possibility, if the new owner has acquired the right in accordance with law.

---

[13] Official Journal of the Socialist Federal Republic of Yugoslavia, number 5/1968

[14] Official Journal of the Republic of Montenegro, number 48/1992

[15] Official Journal of Montenegro, number 1/2007

9. Beneficiaries of expropriation

According to Article 52 of the Law on Spatial Planning and Building Construction, the adopted planning document establishes the public interest in expropriation of real estate for building construction and spatial planning purposes.

Article 1 of the Expropriation Law defines expropriation as deprivation or limitation of the right of ownership of real estate with reasonable compensation, when public interest calls for that.

Article 7 of the Expropriation Law provides that the state, municipalities, government funds and public enterprises can be the beneficiaries of expropriation, unless otherwise provided by law.

With means of this legislation, the government has not created the legal assumptions for the satisfaction of a public interest - implementation of the planning document. It is necessary to expand the circle of persons who could be the beneficiaries of expropriation in setting up an urban lot from several cadastral lots of different owners. It happens in practice that an urban lot remains undeveloped construction land due to the absence of an agreement on joint construction or absence of a legal transaction concerning the transfer of rights to the cadastral lot or a part thereof to the acquirer – co-owner of the urban lot.

Recommendations for Legislation Reforms

1. Returning the Construction Land Law to the legal order of Montenegro
2. Amending the Expropriation Law by expanding the list of expropriation beneficiaries

Dr.sc. *Petar Simonetti*,*
full-time Professor of Civil Law, Rijeka,
Republic of Croatia

ESTABLISHMENT OF RIGHT OF OWNERSHIP OF SOCIALLY/STATE-OWNED DEVELOPED CONSTRUCTION LAND IN THE REPUBLIC OF CROATIA AND IN BOSNIA AND HERZEGOVINA

Management of Construction Land owned by Public Entities

Introduction

In the legal system of social property of FPRY/SFRY, permanent buildings are legally separated from land by permanent right to use. This principle has no exceptions, just like the opposite principle of Roman law *superficies solo cedit*[1] had no exceptions.

In the Republic of Croatia and in Bosnia and Herzegovina, after the disintegration of social property, permanent right to use has transformed into ownership (co-ownership) right of building's owner (co-owner), i.e. owner of particular units of building by establishment of legal unity of land and building[2], and the legal unity of land and buildings has been established.

Upon establishment of ownership right on the construction land that used to be socially-owned, the local authority units, of which legal predecessors (municipalities) had managed and controlled all the construction land, have kept in their ownership only those surfaces which belong to buildings in their ownership and small surfaces of undeveloped construction land, which they regularly alienate, most frequently for the purpose of accounting (budget) consumption, losing in this way the last sources of the increasingly growing city rent, which should be directed into the communal infrastructure funds by the institutes of right to construct, concession, rent and easement.

---

* Original text is in local language.

[1] More in: Prava na nekretninama (1945. -2007.), Simonetti, P., published by Faculty of Law, University of Rijeka, 2008, Book 1, part 2, §3, p.46-56 where the principle of legal unity of real estate is presented.

[2] More in book: Simonetti, P., Prava na građevinskom zemljištu (1945-2007), published by Faculty of Law, University of Rijeka, 2008, p. 259-282 and 417-464.

§1 Transformation of permanent right to use into ownership right of building owner in the Republic of Croatia

1. Principle of legal unity of real estate

Here is a broader discussion on legal unity of real estate, land with all its accessions, land and building in particular, which is traditionally expressed by principle *superficies solo cedit*. Secondly, the principle of legal duality of real estate is presented[3], the principle without exception, in the system of social ownership of land and building or of land alone (the land in social ownership was also occupied by the buildings in private ownership). The reason for this is that application of these principles under different factual presumptions has far-reaching legal consequences, which affect the acquisition of ownership right and other real rights by establishment of both ownership right over the land that used to be a socially-owned property and legal unity of real estate.

1. Concept of the principle superficies solo cedit

A legal unity of real estate, particularly legal unity of land and building, is traditionally expressed by Roman law principle *superficies solo cedit*. Therefore, this paper begins with explanation of the concept of principle *superficies solo cedit*.

Superficies is literally surface, i.e. in this case the surface of land (*la superfice* in Italian, *le superficie* in French).[4] The phrase *superficies solo cedit* means: everything that is permanently linked to land surface belongs to the land, i.e. land owner, that is, it becomes an integral part of the land: plants, trees, buildings and other constructions, as well as all other man-made devices. All the physical movables that are permanently incorporated in the surface or underneath the land surface become an integral part of the land, losing their legal autonomy, because land, according to the Roman Law, as well as according to the contemporary civil law systems, is without exception the main thing, while all other things, regardless of their value in comparison with the land, become accessories - integral part of the land (*accessorium*) - once they are linked to the land.

It was mentioned above that the rule *superficies solo cedit* is a specific expression of the principle *accessorium cedit principale*. Whoever is the land owner is also the owner of plants and trees, everything that grows on it, buildings and other constructions built on the surface or under the surface of the land to the depth to which the ownership right of land owner extends on the particular land, considering its purpose, and in accordance with the particular legal system.

The rule *superficies solo cedit* is expressing a principle according to which a permanent building is sharing legal destiny of the land. Once the land is alienated, inherited or encumbered, the land is also alienated, inherited or encumbered. The land and building are one thing; one real estate. It is not possible that one person owns the land and another one owns the building. The

---

[3] Simonetti, P., Prava na nekretninama (1945.-2007.), Faculty of Law, University of Rijeka, 2009, p.89-95. On permanent right to use, which separated building from socially owned land: Simonetti, P., Prava na građevinskom zemljištu (1945.-2007.), Faculty of Law, University of Rijeka, 2008, p.259-282 and 303-328.

[4] Superficies – surface or on the surface from Latin super-up, over, on + facies – external form, surface. (A. Romac: Rječnik rimskog prava, Informator, Zagreb, 1975., p. 549.) Forcellini, Totius latinitatis lexikon 1871, t.5, p. 756, quoted according to D. Knežić-Popović, Počeci razvoja superficiesa, Godišnjak PF Univerziteta, Sarajevo, XXIX, 1981, p. 242.

land owner is the building owner even when another person has built the building on the owner's land either with his own or with another person's construction material. Therefore, construction on someone else's land is a presumption for the original way of acquiring an ownership right over building *ex iure accessionis*.

2. Superficies solo cedit in Roman law

According to Roman law, whatever is sown, planted and constructed on the land surface is an integral part of the land. The land owner acquires a right of ownership of all movables once they are incorporated in the land. *Superficies est omne id, quod supra soli facien est; ut arbores, plante, praeprimis aedificia, que quis in alieno solo aedificavit, consentiente domino*[5] or as Gaius says: *Ex diverso si quis in alieno sua materia aedificaverit, illius fit aedificium, quius et solum est* (D. 41, 1, 7, 12).

The rule *superficies solo cedit* is expressing the essence of Roman right of land ownership, its limitlessness, which stretches from hell to stars (*usque ad inferos et usque ad sidera*). The right of land ownership is spatially unlimited in both depth and height. It expands to all things which are inseparably linked up with land: *cuius est solum eius est usque ad coelum et ad inferos*. Land is *ex iure* main thing and, according to the principle *accessorium cedit principale*, all the things which are inseparably linked to the land are losing their legal autonomy. The cogent legal norm excludes horizontal distribution of a real estate: land and building, as well as the building itself by floors. Therefore, an agreement on such distribution would be legally void, i.e. it would not produce such real legal effects desired by the contracting parties.

The spatially unlimited right of ownership of land in depth and in height is, therefore, protected by an imperative norm. In the opinion of Roman lawyers, the rule *superficies solo cedit* is expressing harmonious unity of civil and natural law: *„ ... proprietas et civili et naturali iure eius est cuius… solum*" (D. 43, 18, 2)[6]*; plantae quae terra colescunt solo cedunt*[7] or as Ulpianus says: „*naturale ius, quid superficies ad dominium soli pertinent*", that is, „*semper enim superficies solo cedere*" (D. 43, 17, 3, 7). Paulus expresses this thought with the following words: „*sic et in tradendo si quis dixerit se solum sine superficie tradere, nihil proficit, quo minus et superficies transeat quae natura solo cohaerat*" (D. 44, 7, 44, 1). In one of the constitutions of Severus and Caracalla of A.D. 213, it is said: „*...id quod in solo tuo aedificatum est quoad in eadem causa manet, iure ad te pertinet…*" (C. 3, 32, 2, 1).

3. Superficies solo cedit in contemporary law

The spatial limitlessness of the right of ownership of land in depth and in height was, naturally, only a juristic principle of legal limitlessness of the ownership right at the time when, due to very limited technical possibilities, only the use of narrow layer under and above the land surface was possible.[8] At the threshold of modern time when, due to technical achievements, the limits of land use are expanding, opinion that the right of land ownership

---

[5] Voet, *ad Pandectas*, lib XLIII, tit. 18.

[6] Integral text D. 43, 18, 2 (*Gaius libro vincesimo quinto ed edictum provinciale*) is as follows: *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, quius et solum.*

[7] *Gaius*, D. 41.1.9. pr.

[8] Biondi, Instituzioni di diritto romano, 4th issue, Milan, 1972, p. 231; Arangio Ruiz, V. Instituzioni di diritto romano, Jovene, Napoli, 1934, p. 249-252.

is spatially limited is prevailing. This opinion also had its reflection in canon law[9] before modern civil codifications.

Nowadays, when technological possibilities of use of land and space above land are stretching „from hell to stars", literally to the closer parts of cosmos, the right of ownership is so limited in the general (public) interest that its object is limited to only narrow layer above and under the land surface. Ownership right does not authorize owner to use land exclusively according to his will. On the contrary, a whole series of limitations, especially in urban areas, are forcing the owner to partially use even that small volume of land, which has remained in his ownership, in the general interest.[10], [11] Technical possibilities of use of air column directly above the land, as well as of use of underground space, are in inverse proportion to the volume of the right of land ownership. Nowadays, when there are so many possibilities and needs for use of bowls of the Earth and space above earth in the interest of local and broader community and, gradually, of all human communities, entire mankind, even for the advocates of holy and sacrosanct ownership right, outlined in the first civil codifications at the beginning of the 19th century[12], the Roman idea of unlimited right of ownership of land in depth and in height seems absurd.

The increasing limitations of right of land ownership extending to expropriation of land in the general interest, are not conditioned solely by technological achievements and technological possibilities of land exploitation but mostly by changes in social relations, which are primarily caused by such achievements[13], as well as by concentration of major number of population and very varied human activities in the narrow areas of major cities.

---

[9] According to the opinion at that time the sacred land at cemeteries stretched to usual depth of a grave, approximatelly up to four feet underground. There is a story that when famous comedy writer Molière died the problem of his burial in the sacred land emerged. Lous XIV intervened and asked Archbishop of Paris: „How deep is the sacred land", and when he answered: „Four feet underground", the King said: „Well, then bury him deeper than four feet underground". So Molière is still resting at Paris cemetary Saint-Joseph (Bulgacov, Vita del Signor di Molière, trad. a cura di Piersigilli, Milano, 1969, p. 238-239, quoted according to Tenella Sillani, op. cit., p. 1).

[10] I. Cacciavillani, Urbanistica e regime della proprietà, CEDAM, Padova, 1987; S. Amorosino, Beni ambientali e culturali e territoriali, CEDAM, Padova, 1995, p. 45-97; A. Trabucchi, Instituzioni di diritto civile, CEDAM, Padova, 37a ed., 1997, p. 421-424; P. Zatti, V. Colussi, Lineamneti di diritto privato, 4. ed., CEDAM, Padova, 1993, p. 220-222 (proprietà edilizia); F. Galgano, Diritto privato, 9. ed., CEDAM, Padova, 1996, p 127; P. Bon, P. Carrias, Expropriation (Dictionnaire juridique), Dalloz, Paris, 1993, (Index alfabetique, Urbanisme); L. Barassi, La proprietà nel nuovo Codice civile, Giuffrè, Milano, 1941, p. 169-389; F. Messineo, Manuale di diritto civile e commerciale, vol. 2, Giuffrè, Milano, 1965, p. 343-349; R. Đurovic, Uticaj zakonodavstva o građenju i urbanizmu na pravo svojine na nepokretnostima, Anali PF u Beogradu, year XIII, no. 1-2, 1965; B. T. Blagojević, Eksproprijacija, pravo na stan i stambena izgradnja, Anali PF u Beogradu, year IX, October-December, 1961.

[11] This limitation originates from the essence of modern ownerhip right and its internal limitations. Constitutions of Republic of Croatia sets forth: "Ownership is creating an obligation. The holders of ownership righ and its users are obliged to contribute to public good " (art 48. p. 2). The principle „ownership is making obligation" was first adopted by the Constitution of German Weimar Republic of 1919, which stipulated: „Ownership obliges. Its use should also serve to public benefit.". Similarly, the Constitution of FR Germany (1949) sets forth: „The ownership and inheritance right are guaranteed. The content and limits of ownership are set forth by law. Ownership obliges. Its use should use to public good at the same time." (Art.14).

[12] Art. 544. Code civil (1804.); §354. ABGB-a (1811) – Das Allgemeinen bürgirliche Gesetzbuch.

[13] D. Stojanović, Pozitivnopravna ograničenja prava svojine, Institut za uporedno pravo, Beograd, 1963., p. 11-70;same: Privatna svojina i koncept socijalne pravde, Pravni život, XLIX., no. 5–6, 2000, N. Gavella, Sadržaj i granice vlasnikove pravne vlasti, Odabrane teme iz stvarnog prava, Faculty of Law, Zagreb, 1992.; Ch. Tenella Sillani, I limiti verticali della proprietà fondiaria, Giuffrè, Milano, 1994, p. 93-380; F. Messineo, op. cit., p. 327-330; A. Trabucchi, op. cit., p. 421-423; P. Zatti, V. Colussi, op. cit., p. 205-222.

The present concept of ownership right, however, is not in conflict with the principle *superficies solo cedit*. On the contrary, it is expressed in all civil codes, which will be compared in this paper.[14]

The rule *superficies solo cedit,* with minor exceptions in case of construction on another's land, existed in civil codes, which have been subsidiarily applied as legal rules in ex FNRY/SFRY on the basis of Article 4 of the Law on invalidity of legal regulations.[15],[16]

But, since contemporary civil laws are familiar with real law, which legally separates land and building, the principle *superficies solo cedit* is not a cogent rule any more, like it was in the Roman Law, but a refutable presumption – a dispositive legal norm.

For instance, according to Italian law, the right of (co)ownership on land and common parts of building is presumed, but legal separation of land and building by legal transaction is allowed so the co(ownership) of land does not have to extend to building.[17] The Italian superficiary law, namely, separates land and building and, unlike Austrian right of construction (*Baurecht*) and German inherited right of construction (*Erbbaurecht*), it does not take over the role of land, so building is an independent real estate, an object of superficiary ownership (proprietà superficiaria). Therefore, it is possible to determine by legal transaction that one person is owner of building, another person is owner of land, and third one is owner of a special unit of building, which is separated from building on the basis of specific superficiary right, originating from the institution of sectional title *(condominio negli edifici*, art. 1117-1139, Codice civile).[18]

According to Yugoslav Law, i.e. according to Croatian (Socialist Republic of Croatia) and Bosnian (Socialist Republic of Bosnia and Herzegovina) law, in sectional building, all the separate units were legally separated from the whole (Art. 1 of Law on ownership of separate units of building[19]), while building in sectional ownership (a family building, by rule) was also separated from privately owned land (Art. 6, Par. 2), because the right of co-ownership of the land that belongs to owners of separate units of building does not extend to building, but common units of building are object of common ownership of owners of separate units. Right of co-ownership of land is separating building from land, while separate units of building are separated from the building as a whole by common ownership of common units

---

[14] Austrian Algemeines Bürgerlches Gezezbuch (§§ 294.–297.), Code civil française (Art. 552.-553.); Spanish Codigo civil (Art. 358-374), Code civil suisse (Art. 552-553); Italian Codice civile (Art. 812 and 934), German Bürgerlische Gesetzbuch (§§ 94 and 905), Greek Civil Code (Art. 1001); New Dutch Civil Code (Art. 100) of 1992; Civil Code of Quebèc (Canada) of 1998 (Code civil de Quebèc).

[15] §§ 297. and 418. OGZ, §§ 189. and 278. Serbian GZ i Art. 35 i 1017 Montenegrin OIZ-a, Law on invalidity of legal regulations adopted before 6 April 1941 and during enemy occupation – refined text – Official Gazette of FNRY 86/46.

[16] Simonetti, P., Građenje na tuđem zemljištu, Svjetlost, Sarajevo, 1982, p. 69 – 140.

[17] S. Merz, Manuale pratico del condominio, CEDAM, Padova, 1996, p. 107-108. See court practice in book: P. Alvigini, Le regole del condominio, CEDAM, Padova, 1995, p. 17-21.

[18] L. Salis, Proprietà superficaria, CEDAM, Padova, 1936; same: La superficie, UTET, Torino, 1958, p. 27; G. Pugliese, Della superficie, in Commentario del Codice civile, Book 3, 4 ed., Zanichelli, Bologna, - Soc. ed. del Foro ital., Roma, 1976, p. 420; M. Zaccagnini, L'enfiteusi - La superficie - Gli oneri reali - Gli usi civici, Piacenza, 1970, p. 200-207; G. Balbi, Il diritto di superficie, Giappicchelli, Torino, 1947; F. Messineo, op. cit., p. 79-84; Barca, A.-Marvasi, C. La superficie, Giuffrè, Milano, 2004, p. 277, etc. See presentation of various opinions on legal nature of sectional title i.e. the right that is separating particular parts of building in Italian Law, Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu, ZPFR, year 15, 1994, p. 30 - 35.

[19] Official Gazette of FNRY 16/59 and 48/59, refined text, Official Gazette of SFRY 43/65 and 57/65; applied in Socialist Republic of Croatia and Republic of Croatia prior to 1 January 1997 (Art.394 Par.1 al.3 and 396 of Law on property and other real rights, NN 91/96, 73/00, 114/01, 79/06, 141/06, 38/09)

of the building *(infra)*. This is the case set forth in the Law on ownership of units of building of Socialist Republic of Bosnia and Herzegovina (Art.4, Par.2 and Art.6, Par.2)[20]. In such system no one has right of ownership of building in sectional ownership as a whole[21].

On the contrary, according to the Austrian and German Law, as well as according to the Croatian Law (since 1 January 1997), the right of co-ownership extends from land to building and, therefore, to all common parts of the building, including cellar and roof, which means that, in accordance with the law, the right of superstructure belongs inseparably to all owners of separate units – co-owners of the real estate, which consists of land and building; and to nobody particularly. They can establish an exclusive right of superstructure in favor of any co-owner or third party only by agreed expression of their will in the prescribed form. According to Italian Law, the right of superstructure, on the contrary, belongs exclusively to the owner of the highest story (Art. 1127 CC).[22]

According to ZSP RS the right of ownership of separate unit of building, same as in German, Austrian and Croatian law, originates from the right of co-ownership of real estate, which consists of land and building or the right of construction and land to which it is inseparably linked (Art. 81, 82, 84, 85 and 87).

3.1. Legal presumptions of superficies solo cedit

It was mentioned above that all movables, which are permanently linked to land, are becoming an integral part of land because land is the main thing according to the law. After they have lost their autonomy due to establishment of permanent link with land, the movables cannot be an independent object of Civil Law. At the moment of linking, the right of ownership of movables is extinguished, as well as other real rights, and at the same moment the right of ownership and other real rights extend from land to them because movables are land accessories from the moment of linking, i.e. according to German terminology, an important integral part of the land. The land owner is, at the same time, owner of all movables that are permanently linked to the land. Once the land is alienated, encumbered or inherited – all the movables permanently linked to the land are alienated, encumbered or inherited, and when ownership right or any other real right over land is acquired on any legal basis, the right of ownership or other real right over movables that are permanently linked to the land is aquired as well. All this also applies to the movables built in permanent buildings that are an integral part of land, e.g. devices for heating or cooling the premises, water supply and drainage appliances, cables for TV sets and transmitters etc.

The German law often points to firm link parallel to permanent link (§§ 94 and 95, Par. 1 BGB), but when such rules are systematically interpreted, the conclusion is made that this law also sees only permanent link as a constitutive element of legal unity of land and building, while firm link is, actually, only a legal presumption of existence of permanent link, but this presumption can be refuted by evidence that the building is temporary.[23] Besides, a firm link of building, structure and other device with land, even a temporary one, is a constitutive element of the thing

---

[20] Official Gazette of Socialist Republic of Bosnia and Herzegovina 35/77.

[21] This is explicitly stated in working draft of Law on property and other real rights (Art. 252, Par. 1) of the Republic of Serbia, June 2006, which is following this concept. Art. 252, Par. 1 states: „Nobody has ownership right over sectional title building as a whole". O koncepcijama (pravnoj prirodi) etažnog vlasništva (On concepts (legal nature) of sectional titles), Planojević, N., Etažna svojina, Kragujevac 1997, p. 153-173.

[22] A. Nicoletti, Le inovazioni e la sopraelevazione nel condominio, 2 ed., CEDAM, Padova, 1996, p. 113-146; Messineo, op. cit., p. 549.

[23] See: Staudinger, Kommentar zum BGB, Bd. 1, 11 Aufl., Berlin und München, 1957, p. 452-458.

property. Such thing is immovable because it can not be relocated without destroying its structure or it can be done with out-of-proportion costs although, being temporary, according to law, it does not belong to the land.

According to Italian law, however, all temporary buildings are real estates *(anche se unite al suolo a scopo transitorio*) regardless if they are firmly linked to land or not (art. 912/1, Codice civile).

3.2. Permanent link as presumption of legal unity of land and movables, permanent buildings and other structures

The movables that are permanently linked to the land are an integral part of the land. This linking is mostly a consequence of human activity but it does not have to be the case. Linking of movables to land also happens by the activity of natural forces. However, here is discussed only artificial linking of movables to land, which is the linking caused by devised (purposeful) human activity, human work. A legal monolith is created by permanent linking of movables to land.

3.3. Temporary building and other constructions

The movables linked to land or real estate for a short period are not an integral part of land, i.e. real estate. Even a temporary building is not an integral part of land. Such buildings and devices are not an integral part of land even when they are firmly dug into the ground and, therefore, cannot be relocated without destroying their structure[24]. Accordingly, we should make distinction between permanent link as a legal presumption of legal unity of land and building and all other things that are permanently linked to land or installed in permanent building, i.e. other permanent construction that forms unique real estate with land, and firm link of movables that are temporarily linked to land such as buildings and other constructions and, therefore, legally separated from land.

3.4. Firm link of land and temporary buildings and other constructions

The buildings or other constructions that are linked to land so firmly that they cannot be relocated without damage to their essential structures are immovable, but they are not an integral part of the land if they are not permanently or proportionally permanently linked to land. The truth is that a firm link is usually overlapped with a permanent link of building or other construction linked to land, but this does not have to be so. Nowadays, permanent buildings or other constructions are built of metal, reinforced concrete, wooden and other prefabricated elements, which can be relatively easily disassembled and reassembled in other location, i.e. relocated without damage to their structures. On the other hand, sometimes firm buildings and other constructions are built for a short-term purpose, e.g. sports facilities for the Olympics or other international sports events, pavilions for international or national trade fairs. Therefore, permanent link is a significant presumption of legal unity of real estate, while firm link can only indicate that building or other construction is a permanent one, but in some cases the opposite can be proved or it may be evident due to short-term purpose of the building or other construction.

3.5. Legal effects of relocation of permanent buildings and other constructions

Modern technologies facilitate even the relocation of a firm, permanent building without changing its construction and architectural structure or its cultural-historical and artistic value (for example, relocation of buildings and entire complexes of buildings and monuments with

---

[24] Art.14, Par.1 ZSP RS. ZV sets forth: „However, those buildings and other things that are linked to the land only for some transitory purpose are not part of the land" (Art. 9, Par. 3).

cultural and historical value with the aim of avoiding their flooding by accumulated water). Namely, that was the way to preserve famous Abu Simbel temples during construction of Aswan dam on the Nile in Egypt[25] or bridge at the mouth of the Zepa river (Bosnia and Herzegovina), Piva Monastery near Pluzine in Montenegro. But such building, i.e. construction as an integral part of a land or a land lot shall change its identity in legal sense if it becomes an integral part of a cadastral or a construction lot, i.e. land registry entity, which is inscribed in another land registry file, including lots that have been created by geometrical splitting and merger with another lot that represents other land registry entity, although it has preserved its identity in the construction, architectural, cultural, historical, and every other sense. Only under the presumption that construction lot is not formed according to existing building so the building can be physically moved to another part of the same cadastral lot or to another cadastral lot of the same land registry entity, its legal identity shall not be changed. In that case, it is still an integral part of the same cadastral lot, i.e. same land registry entity, the same real estate. Legal identity of the real estate as a whole is not changed even in case of destruction and reconstruction of the building on the same cadastral or construction lot, i.e. same land registry entity. The identity of the building, which is legally separated from land, is changed only if the new building does not have those independent parts (apartments or other independent premises) that the demolished building had or if the new building has new parts in addition to the earlier independent parts. Legal separation of land and building is possible: by the construction right, by the right of easement, or by a concession based on the law. [26]

4. Ratio of the superficies solo cedit principle

The principle *superficies solo cedit* originates from the fact that land is the main thing but it does not provide an answer to the question: Why is the land main thing without exception regardless of the ratio of the value of land to the value of building or other construction, which is usually much more valuable than land. Even the world's biggest and most valuable buildings and other constructions, as well as the most significant cultural and historical monuments, are an integral part of land and represent its accessories *(accessorium)*. In addition to the social and economic significance of land *(supra),* there are another two reasons: the first is legal security, while the second is privileged position of land owner.

4.1. Legal security

Why is land, then, the main thing in relation to all movables that are permanently linked to it, including a permanent building on the surface or under the surface, regardless of the ratio of values? It seems that the most accurate answer to this question is: legal security. Legal security is an important presumption of legal transactions, which in today's market economy include, more than ever before, land lots (particles of the Earth's surface) with all their accessories to a great extent.

a) Durability of land

Land is a work of nature and all devices on its surface or under it – are human creations, which are subject to deterioration. The land, therefore, remains but human creations are built and demolished or removed due to geo-mechanic or other changes (landslides and land settling), which are the results of natural causality during passage of time, or because of human

---

[25] Gööck, R., Sva čuda svijeta, Marjan tisak (translation by O. Šolc), Split, 2005, p. 170-174.

[26] Art.7, Par.4 (concession); Art.14, Par.3 and Art. 286-302 ZSP RS (right to construct). Art. 280-296 ZV (right to construct); Art. 196 ZV (on right to own part of building and devices on another's land); Art. 3, Par. 4 and Art. 9, Par. 4 ZV (concession, which separates building and other construction from land or public good).

activity, war destructions, urban and other reasons for urban area regulation, and land is indifferent to such changes. Therefore, land identity remains the same both when building is constructed and when it is demolished.[27]

Some land can deteriorate as an object of ownership right, for instance, because of flooding[28] or a change in river course or due to tectonic and other changes caused by natural forces, or human interventions, but compared to changes that appear continuously on all human creations, which suffer „wear and tear" of time[29] and are destroyed by man, such changes are negligible. Also, buildings deteriorate with physical deterioration of land. However, as a rule, land is not ruined with deterioration of building. Due to the fact that land, as a rule, does not deteriorate, and in those rare cases when that happens (physically or legally) it also leads to deterioration of building,[30] the right of ownership of land, which, as a rule, does not change its legal identity, represents the supporting pillar of legal safety in legal transactions and protection of right of ownership of such unique and non-restorable natural resource and everything that is permanently linked to it.

b) Identity of land

By the nature of things, the identity of land is determined by space because land is, naturally, immovable and unrepeatable. Therefore, the land registry and cadastral demarcations of land are unchangeable in principle. There are two important demarcations of land identity in the system of land registry law: the number of cadastral lot and the number of cadastral district. Each cadastral lot in a cadastral district has its own number. Therefore, land registry file is not important for determination of legal identity of a cadastral lot. A cadastral lot can be splitted, but new lots keep the basic number of the lot from which they have been created and get their sub-numbers, for instance, cadastral lot 7 in cadastral district K is split to cadastral lots 7/1, 7/2, etc., regardless if the new lot is going to stay in the same land registry file or it is going to be inscribed in another land registry file or possibly inscribed into the newly established land registry file. The same applies to construction lot.

---

[27] Art.16, 25 ZZK RS, i.e. Art.7, 13 ZZK FBiH. See: Art. 10 and 145 Par. 4 and 5 ZZK, NN 91/96; 114/01; Law on Amendments and Supplements to ZPS NN 68/98, which annuls Art. 225 ZZK USRH (NN 137/99.) annuls Art. 221 Par. 1 ZZK, 114/01; Law on Amendments and Supplements to Law on sale of apartments which annuls Art. 225 of Law on Land registry; USRH (NN 137/99.) annuls Art. 221 Par. 1 of Law on Land registry.

[28] In Lousiana (USA), the sea has flooded 1900 square miles since year 1932, and it is presumed that it will swallow another 500 to 700 square miles within next 50 years, as stated by government agency La Coast – http://www.lacoaPar.gov/watermarks/2004-01, crisisofloss/index.htm. Similar events are known to occur on ocean coastlines all around the world. Recently, the sea level has increased because of ice melting on Arctic and Antarctic. If this process continues, huge areas, settlements and towns on low shores all over the world will be under the water (Glavač, op. cit., p. 73 – 80, 85 – 93, where it is stated that the sea level in the 20th century increased by 15 cm and the increase by another 35 cm is expected by the end of the 21st century, with predictions varying from 20 to 86 cm). It is well known that land is settling and sinking because of natural causality (Venice) or because of human interventions, for instance, in Tuzla where a lake popularly called „Panonian Sea" was created in the middle of town within several decades. The name is the reference to the disappeared Panonian Sea (from the geological history), which left layers of salt and salty water behind. The exploitation of this caused the sinking of the center of this Bosnian town. In case of land settling (Venice), land identity remains the same; land sinking (Tuzla) causes the change in land identity (once the city quarters, several streets – now the lake). The real estates that used to be the objects of ownership right of particular persons do not exist any more. Now the lake bottom is a public good. Major landslides caused by rapid mountain streams or tectonic disturbances, which are deforming the Earth's surface, are frequent occurrences.

[29] Lately, the protection of Great Chinese Wall from sudden deterioration has been actualized.

[30] Except in the cases when a building with major cultural and historical value is relocated to other land (infra), but this exception confirms the rule that the real estate identity is determined by the land (cadastral or construction lot) and not by a building or other construction that is relocated to another land.

c) Land's failure to fulfill particular purpose does not influence its identity

A land may deteriorate and, thus, fail to fulfill particular purpose, for instance, construction land deteriorates when due to tectonic or geo-mechanical changes (deformations), it cannot be used for construction of building, which could have been constructed before such changes occurred, or because some regulations excluded construction for some reason or due to a change in the spatial (urban) plan, detailed regulation plan, but the land still remains the object of ownership right; its legal identity has not changed by this. Only its purpose and market value has changed. Therefore, according to the general opinion, it is natural that land is the main thing in relation to buildings and other constructions on its surface and under the surface, regardless of the ratio of land value to building value.

4.2. Privileged position of land owner

The principle *superficies solo cedit* is producing important legal and economic effects. It is without doubt privileging land owner by extending his ownership right to all movables that are permanently linked to the land. A land owner is even more privileged if the land value is constantly being increased by investments in construction of buildings for various purposes, for varied activities, by investments in public, communal and other infrastructure within the complex, without his contribution and risk[31]. Land has such characteristic to „suck in" all the things that become permanently linked to the land, all the incorporated capital of known and anonymous investors, because everything that is permanently linked up with the land on or under its surface is becoming an integral part of it and belongs to the land owner according to the law (*superficies solo cedit*), if otherwise is not set forth by a law or a legal transaction in accordance with the law.[32] Inclusion of land in construction area brings an unexpected wealth to its owner without any investment (by urban plan) because the value of his land has multiplied in that way.

5. Relativity of legal unity of land and building in contemporary law

In the private property systems, in Roman Law, and in contemporary civil laws, land is always the main thing (*res principale*), while building and other construction that is permanently linked to land, regardless of its value – is accessory (*res accessorium*). This rule is producing two legal effects. The first is that everything permanently linked to the land is the property of the land owner– *accessorium cedit principale – superficies solo cedit*. And the second one is that things, linked in such way, are sharing the legal destiny of the land in legal transactions (*accessorium sequitur principale*). Lien on land extends to everything that becomes permanently linked to land (extensiveness of a mortgage). By transfer of right of land ownership, the ownership of permanent building is transferred as well; by mortgage of land, the mortgage is extended to building; by inheritance of land – building is inherited. Different co-owner's shares cannot exist on land and building, because land and building are one homogenous entity,[33] indivisible thing – real estate.

These rules are not absolute. The modern laws are familiar with legal institutions that are legally separating land and building, as well as other construction. According to some laws, the trees can also be separated from land (*infra*) on the basis of subjective law, which

---

[31] The most recent examples of influence of motorway construction on real estate value can be found in the area gravitating towards newly constructed motorways in the Republic of Croatia where the real estate prices multiplied over the night.

[32] Art. 2 Par. 3 ZV.

[33] District Court of Bjelovar Gž 996/2004-2 of 16 September 2004.; IO VSRH 2/2004., t. 4.

is usually acquired on the basis of legal transactions and rarely by the decision of a court or other competent authority.

In accordance with the law, buildings have always been separated from socially owned land without any exception, while condominiums have also been separated from privately owned land (infra). Other buildings could have been legally separated from privately owned land on the basis of a legal transaction.

The right that is separating permanent building from land can be established before the construction of building, which legally neutralizes the effect of land's attraction force (right of land ownership), and it can be also established after the construction of building, which removes the effect of the rule *accessorium sequitur principale* (alienation of building without land or land without building, or land ownership is transferred to one person and building ownership to another). Such possibility existed under the Federal Law on turnover of land and buildings (Art.6, Par. 1) of 1 July 1954 in the case of privately owned land. The Law on turnover of real estate of Socialist Republic of Bosnia and Herzegovina[34] has excluded such possibility (Art.7, Par. 1). Nowadays in the Republic of Serbia, land and building are separated only by the right to construct (Art. 286-301 ZSP RS) and by a concession based on the law (Art.7, Par. 4).

With the expiration of construction right, i.e. concession, building, i.e. other construction is becoming an integral part of the land in accordance with the principle *superficies solo cedit*. This is a proof that in spite of the effect of the right to construct or concession, the land has kept the characteristic of the main thing, which was deprived of legal attractive force as long as such rights existed.

6. On establishment of legal unity of land and building

In the period between 8 October 1991 and 1 January 1997, the legal unity of real estate in the Republic of Croatia was established, according to the law itself, by transformation of permanent right to use into ownership right of building owner (Art. 9 ZP ZOVO)[35], while from 1 January 1997, it is established nominally (seemingly) by merger of land registry bodies, building and land, according to the rules of ZV[36] (Art. 366-373). Real legal unity, according to the Law on property, is also established by transformation of permanent right to use into ownership right because land registry body is a construction lot, which is the object of permanent right to use (*infra*). So, the legal unity of real estate is not established by cessation of permanent right to use, which existed as long as building existed, but by its transformation into ownership right.

The right of ownership (co-ownership) of developed construction land is acquired by such land surface to which right to use of the building owner is extended, i.e. land on which the building is constructed „and land that is utilized for regular use of that building" (Art. 12,

---

[34] Official Gazette of Socialist Republic of Bosnia and Herzegovina 38/78.

[35] Law on takeover of Law on basic ownership relations, NN 53/91.

[36] Law on ownership and other real rights, NN 91/96, 73/00 and 114/01. Law on Amendments and Supplements to Law on sale of apartments with tenancy rights (NN 68/98) annuls Art. 371 of ZV; USRH (NN 137/99) annuls Art. 388, Par. 4 of ZV; USRH (NN 22/00) annuls Art. 356, Par. 5, Art. 357, Par. 5 and Art. 367, Par. 3 of ZV; Law on Amendments and Supplements to Bankruptcy Law (NN 129/00) annuls implementation of Art. 366 through Art. 373 of ZV if legal unity has not been established in regard to particular real estate at the moment of opening of bankruptcy proceedings; the provisions of Law on civil lawsuits shall be applied to encroachment litigations. The provisions of ZV on legal consequences of violation of the principle of real estate legal unity are not applied to bankruptcy proceedings if real estate unity has not been established in regard to particular real estate at the moment of opening of bankruptcy proceedings.

Par. 1 of ZOVO[37]), and not by the entire cadastral lot, so it can not be registered as an object of ownership right of the building owner before formation of the construction lot - land that belongs to building in the system of legal duality of land and building - by the decision of competent authority (*infra* ZGZ 2003,BiH, Art.39-41).

The real estate legal unity is established in the favor of the building owner (co-owner) by inversion of the principle *superficies solo cedit* because building was the main thing in the system of legal duality of real estate. The following principle is strictly implemented: the building owner acquires the right of ownership of the land that belongs to the building, or whoever acquired the right of ownership of building, i.e. separate unit of building, has also acquired the right of ownership, i.e. co-ownership of the land that belongs to the building. In such case, application of inversion of the principle *superficies solo cedit* is necessary for termination of legal duality of building and land and establishment of legal unity of real estate in the favor of owner (co-owner of building). In such case, as a rule, the right of ownership of real estate is acquired by holder of permanent right to use of land (building owner).

The owners of separate units of building were able to acquire a right of co-ownership of land, but that did not lead to establishment of legal unity of land and building prior to 1 January 1997 when the Law on ownership of parts of building ceased to be valid (Art. 394, Par. 1, subparagraph 2 of ZV), i.e. prior to 1 July 2009 in Republic of Srpska (Art. 355, Par1 t.b. and 357 ZSP)[38], which also legally separated building from privately owned land by means of three forms of ownership: of land – co-ownership, of common parts of building – common ownership, of separate units of building – ownership right (Art. 5, Par. 3 and 6, Par. 2). So, the right of ownership of separate unit of building does not originate from the right of co-ownership of real estate as per the Law on ownership (Art. 66–70, Law on ownership of parts of building, which is still in effect in the Federation of Bosnia and Herzegovina), which is establishing the principle of legal unity of land and building (Art. 366 of ZV; Art. 330 of ZSP RS).

The right of ownership of real estate by inversion of the principle *superficies solo cedit* is also acquired by the person who has illegally built a building on the land for which the third party had a temporary right to use or a right to use for the purpose of construction, provided that such illegal construction has been legalized and, thus, a permanent right to use has been constituted, directly or indirectly, in favor of the builder (investor).

The principle *superficies solo cedit* is valid upon establishment of legal unity of land and building. This principle also does not terminate the right to build because building is an accessory of the right to build – „as if it was land" (Art. 280, Par. 3 of ZV; Art. 286, Par.3 of ZSP RS), and that means that the right to build is just replacing land – the object that is legally attracting building and forms a unified real estate with that building. *Superficies*, originally: land surface, is the right to build as legal land in this case, and not as natural land that is „deprived" from legal attractive force by the right to build. The principle in effect in our law is as follows: whoever is the holder of the right to build is the owner of the building, without exception. Building can be legally separated from land by the right to build or by concession (Art. 9, Par. 4 of ZV; Art.7, Par.2 of ZSP RS), and it cannot be separated from the right to build (Art. 280, Par. 3 and 285, Par. 3 of ZV; Art.286, Par.3 and Art. 291, Par.3 of ZSP RS) on any legal basis. Only the part of building that stretches to neighboring land encumbered with the right to build is separated from the right to build on the basis of the right of easement (Art.196, Par. 1 of ZV; Art.219, Par.4 t.a of ZSP RS), which is constituted by overstepping the boundary line by construction (Art. 157) or on other legal basis (on the basis of legal transaction or deci-

[37] Law on basic property rights relations, Official Gazette of SFRY 6/80 and 36/90.

[38] Law on real rights, Official Herald of RS 124/08.

sion by a competent authority)[39]. The part of building that is separated from the neighboring land or the right to build on neighboring land by the right of easement is making legal unity with privileged real estate (horizontal accession). According to ZSP RS, by overstepping boundary line by construction, conscientious builder is acquiring a right of ownership of the occupied land (Art.62, Par.2). The same is stipulated by Art.62, Par.2 of Draft ZSP FBiH.

7. Direct transformation of permanent right to use into ownership right (1991 – 1997)

Permanent right to use of developed construction land, which separated land and building, was transformed into ownership right of owner (co-owner) of building (separate units of building) by the Law on takeover of the Law on basic property relations, after Article 12 of ZOVO[40] was amended (8 October 1991) by replacement of word „use" with word „ownership", while the final part of sentence in Paragraph 1, which stated „as long as it exists" (i.e. building), was preserved. So, in that way, right of land ownership was established, which ceases to exist if the cancellation condition is met, that is, if the building is demolished or removed. By the decision of the Constitutional Court of the Republic of Croatia of 30 November 1994[41], aforementioned final part of the sentence was removed („as long as it exists"), which was justified by the explanation that it was not in accordance with the principles of the Constitution of the Republic of Croatia on guarantee and inviolability of ownership right (Art. 48, Par. 1 and Art. 3), which can be terminated against the will of the owner only under the conditions and in the procedure set forth by the Law in the interest of the Republic of Croatia and with the indemnification of the market value (Art. 50, Par. 1 of the Constitution of the Republic of Croatia)[42].

The transformation of permanent right to use into ownership right has truly established the principle according to which a privately owned building cannot stand on socially owned land. This means that upon the transfer of the building from social to private ownership, on any legal basis, in the period from 8 October 1991 to 1 January 1997, in accordance with the law, the building owner acquired the right of ownership of land that belongs to the building. By transformation of right to manage, right to use, or legal person's right to dispose of buildings or right to dispose of separate units of building into the right of ownership of its legal successor, the owning legal person;[43] by acquiring the right of ownership on the basis of an agreement on purchase of apartment,[44] other separate unit of building or entire building on the basis of legal transaction

---

[39] For instance, on the basis of an agreement between co-owners in the procedure of physical (geometrical) division.

[40] ZP ZOVO, NN 53/91, Art. 9

[41] NN 92/94.

[42] See Law on dispossession, NN 9/94, 35/94, 112/00 and 114/01.

[43] Josipović, T., Upis vlasništva pravnih osoba u zemljišne knjige, Godišnjak 1, Aktualnosti hrvatskog zakonodavstva, Organizator, Zagreb, 1994, p. 231-246; Koketi, B., Uknjižba nekretnina trgovačkih društava nastalih pretvorbom u zemljišnu knjigu, Zbornih radova: Nekretnine u pravnom prometu, Inženjerski biro, Zagreb, 2000.

[44] On purchase of socially owned apartments in monograph Uređenje prava na nekretninama, Book 2; Tumbri, T., Stambena reforma - prodaja stanova na kojima postoji stanarsko pravo, Zakonitost, No. 2-3/91, p. 291-303; same: Prodaja stanova na kojima postoji stanarsko pravo, Informator, No. 4206/94; Turčić, Z., Primjena Zakona o prodaji stanova, Informator, year XL, no. 4008-4009, 1992, same: Uredba o izmjenama Zakona o prodaji stanova na kojima postoji stanarsko pravo, Informator, year XL., no. 3962, 1992; Koketi, B., Prodaja stanova na kojima postoji stanarsko pravo, Informator, year XXXIX., no. 3939 and 3940, 1991; Josipović, T., Otkup stanova u društvenom vlasništvu i denacionalizacija, Zakonitost, year 45, no. 7-8, 1991, p. 933-941; Bagić, S., Otkup nacionaliziranih stanova, Pravo u gospodarstvu, vol. 36, No. 4, 1997, Radolović, A., Naknada za oduzete stanove i oduzeti poslovni prostor, ZPFR, vol. 18, no. 1, 1997, p. 107-117.

with the aim of acquiring ownership right, the permanent right to use of socially owned construction land was transformed into the ownership right[45] of the owner (co-owner) of building, i.e. separate units of building.

The object of right to use of land, which has been transformed into the right of ownership (co-ownership) of owner (co-owner) of building, was a construction lot, and if construction lot was not formed, that right extended to such surface of land that was occupied by building „and the land utilized for regular use of land"[46],[47]. The legal unity of land and building was established by transformation of permanent right to use of land into ownership right of building owner.

§2. Establishment of legal unity of land and building by merger of land registry bodies (indirect transformation of permanent right to use since 1 January 1997) in the Republic of Croatia

The right of ownership of owner (co-owner) of building, i.e. separate units of building on socially owned construction land is established by merger of land and building into a single land registry body (Art. 366-373 of ZV).[48]

1. General issues

1.1. Period of validity of principle of legal unity of land and building

Legal unity of building and socially-owned land is established, by force of law, by an imperative norm, so it cannot be stipulated otherwise by a legal transaction. Moreover, from the day ZV came into force, even earlier „legal transactions that are contrary to the principle of real estate unity do not produce legal effects" (Art. 366, Par. 3). Prior to 1 January 1997, legal transaction of separation of building from privately owned land had been allowed and produced legal effects (Art. 6, Par. 1 of Law on turnover of land and buildings[49] and Art.10, Par.2 of ZGZ)[50], which means that, until 1 January 1997, legal unity of land and building that is not condo-converted was an optional norm that was valid if it was not agreed otherwise.

---

[45] More in Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva, ZPFR, vol. 20, no. 2, 1999, p. 487-528.

[46] Art. 12, Par. 1 of ZOVO, i.e. Art. 9 of ZP ZOVO, Art. 36 and 37 of Law on nationalization of rental buildings and construction land, Official Gazette of FNRY 52/58; and Art. 6, Par. 2 of ZPZZ, Official Gazette of FNRY 26/54, 19/55, 48/58, 30/62, Official Gazette of SFRY, no. 15/65, 43/65 (refined text), 57/65, 17/67, 11/74 and NN 52/73, which ceased to be valid in the Republic of Croatia on 1 January 1997. (Art. 394, Par. 1 al. 3 of ZV).

[47] Simonetti, P., Prava na građevinskom zemljištu (1945-2007).

[48] More on this: Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva ZPFR, vol. 20, No. 2, 1999, p. 487 -528; same: Pravno jedinstvo nekretnine i njenih posebnih dijelova u: Rasprave iz stvarnog prava, Faculty of Law, University of Rijeka, Rijeka, 2001, p. 165-201.

[49] Law on turnover of land and buildings (hereinafter: ZPZZ), in effect since 1 July 1954 as a federal law, Official Gazette of FNRY 26/54. After several modifications and amendments – refined text of 1965, which also suffered modifications and amendments, was taken as the Law of the Socialist Republic of Croatia, NN 53/73, and was valid until 1 January 1997. (Art. 394, Par. 1 al. 3 of ZV).

[50] More on legal separation of land and building according to the regulations in force prior to 1 January 1997: Simonetti, P., Rasprave iz stvarnog prava, Faculty of Law, University of Rijeka, 2001, p. 236-249.

Nowadays, principle of legal unity of land and building is a cogent norm that excludes opposite agreement. This legal duality was allowed in Bosnia and Herzegovina prior to 4 January 1979 when ZPZZ ceased to be valid by coming into force of ZPN[51], which has excluded legal separation of building from privately owned land (Art.7, Par.1).

Legal unity of land and condominiums was established in the Republic of Croatia by coming into force of Law on ownership (ZV) on 1 January 1997 when Law on ownership of parts of buildings ceased to be valid (Art.394, Par.1 al.3 of ZV). According to this, the right of ownership of apartment and co-ownership of land that belongs to building was acquired by agreement on purchase of socially owned apartment, its registration or presenting to the court. This did not establish legal unity of land and condominium so two independent land registry bodies still existed, although both of them were privately owned. This was until 1 January 1997 when legal unity of land and building was established by coming into force of Law on ownership (Art. 370).

The Law on ownership sets forth that, from its coming into force (1 January 1997), the principle of legal „unity" of real estate, determined by the provisions referred to in Art. 2 of Par. 3 and Art. 9, is valid in the Republic of Croatia unless a special law has set forth otherwise (Art. 9 Par. 4 and 5 and Art. 366 Par. 1 of ZV), like, for instance, in the Law on Amendments and Supplements to Bankruptcy Law of 19 December 2000.[52],[53] All this with the exclusion of real estate (buildings) referred to in Art. 390 of ZV[54], for which an ownership right has not been established to date because socially-owned building does not make a legal unity with land. By transformation of the right to dispose of such buildings into the ownership right after 1 January 1997, the legal unity of land and buildings has been established.

Before ZV, the legal unity of privately owned real estate was regulated by legal regulations of OGZ (§§ 294-297)[55], which were implemented in a subsidiary manner in FNRY/SFRY after 15 May 1945.[56]

It is pointed out in the book Prava na nekretninama (1945.–2007.)[57], vol. 1, part 2, which deals with the principle of legal unity of real estate, that important presumption of that

---

[51] Law on turnover of real estate, Official Gazette of Bosnia and Herzegovina 38/78.

[52] Law on amendments and supplements to Bankruptcy Law, NN 129/00.

[53] Dika, M., Neprimjenjivanje načela jedinstva nekretnine u stečajnom postupku, Informator, year IXL, no. 4914 – 4915, of 11 and 14 April 2001.

[54] Art. 390. sets forth:

„(1) The provisions of Art. 360 through 365 of this Law do not apply to things that were subject of the right of management, use and disposal of former social and socio-political organizations, or things that haven't been included into social capital of legal persons in the procedure of transformation on the basis of Law on transformation of social companies, as well as to things of socially owned legal persons with headquarters on previously occupied and now liberated part of the territory of the Republic of Croatia.

(2) Transformation of right of management, use and disposal of things, referred to in Paragraph 1 of this Article shall be regulated by special law."

[55] Klang, H., Kommentar zum allgemeinen bürgerlichen Gesetzbuch, T. 2, Wien, 1950 with §§ 294-297 ABGB; Rušnov, Tumač k Općemu austrijskomu građanskomu zakoniku, Vol. 1, Zagreb 1893; Rummel, Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Bd. 1, Wien, 1990, with §§ 294-297 of ABGB.

[56] The legal regulations of OGZ were applied till 31 December 1991 on the basis of Art. 4 of Law on invalidty of legal regulations adopted before 6 April 1941 and during enemy occupation, Official Gazette of FNRY 84/46; from 31 December 1991 to 1 January 1997 they were applied on the basis of Art. 1 and 2 of Law on method of implementation of legal regulations adopted before 6 April 1941, NN 73/91.

[57] Simonetti, P., Prava na nekretninama (1945.-2007.), published by Faculty of Law, University of Rijeka, 2009.

legal unity is permanent link of the movables joined with land, and only permanent, i.e. relatively permanent building is an integral part of land.

2. Rules of establishment of legal unity of real estate by merger of land registry bodies – land and building

2.1. Rule of establishment of legal unity of land and building

2.1.1. Non-registered

Legal unity of land and building without registration is established in accordance with the law itself. So, in the Republic of Croatia, it was established on 8 October 1991 if the building was already privately owned on that day or by transfer from social to private property prior to 1 January 1997, even when nothing has changed in the land registry because such legal change happens by force of law.

Therefore, we should make distinction between establishment of legal unity of land and building without registration, in accordance with the law itself, and establishment of land registry unity of real estate, which is, in principle, of declarative significance because legal unity has already occurred without registration and in accordance with the law itself.

2.1.2. Registered

The land registry registration of legal unity of real estate and building is of the first-class significance for two reasons:

First, before the establishment of land registry unity of real estate, there are two land registry bodies in the land registry: land and building, in spite of non-registered change;

Second, in the case when construction lot has not been formed in accordance with the law, there is no presumption of its registration in the land registry prior to its final formation, and the boundaries and surface of the real estate that is formed by the land registry bodies – land and building – remain unknown.

The rules by which, under various hypotheses, the land registry unity of real estate is established by the change of registration in the land registry have been set forth by the Law on ownership (Art. 366–373), if a special law has not stipulated otherwise (Art. 366, Par. 2 and Art. 390). Deviation from this principle is possible only by legal provision: exceptions to the legal principle can only be stipulated by a law.

2.2. Exception to the rule

So, a special law has stipulated a deviation from the principle of legal unity of real estate if it was not established before the opening of bankruptcy proceedings for the real estates that have been brought into the bankruptcy estate.[58], [59] An indirect deviation from the principle of establishment of legal unity of land and building existed in those cases in which transformation of ownership right over socially owned real estate was postponed in accordance with the Law on ownership (Art. 390).

---

[58] Art. 71 of Law on Amendments and Supplements to Bankruptcy Law, NN 129/00.

[59] Dika, M., Neprimjenjivanje načela jedinstva nekretnine u stečajnom postupku, Informator, year IXL, no. 4914 – 4915, of 11 and 14 April 2001.

2.3. Invalidity and renewal of legal transaction that is contrary to principle of legal unity

Buildings could have been legally separated from a privately owned land on the basis of a legal transaction (Art. 6, Par. 1 of ZPZZ[60] and Art. 10, Par. 2 of ZGZ) by registration in the land registry.[61] On the basis of a legal transaction, before registration in the land registry, only right and obligation of establishment of such legal duality are created - splitting of real estate into two independent land registry bodies: land and building.

According to the Law on ownership, the legal transactions that are contrary to the principle of legal unity of real estate (land and building) do not produce legal effects since 1 January 1997 (Art. 366, Par. 3) so they cannot be the base for any registration (registering, registration of land charges and encumbrances) in the land registry. But since this rule applies to otherwise valid legal transactions that were allowed and produced all legal effects prior to 1 January 1997, the Law stipulates: „each contracting party, and the third party for whose benefit the agreement is concluded, is entitled to a fair modification of agreement, which would remove this defect" (Art. 366, Par. 3 of ZV). A fair modification would be a change of the basis (*causae*) or main obligation – transfer of right of ownership (co-ownership) of the land with transfer of right of ownership of building, i.e. entire real estate with the payment of agreed or appropriate compensation for the land (payable legal transaction), if the land price has not already been included in the price from the existing agreement. Or, in accordance with the Law on ownership, establishment of right to build, which is separating land and building by taking over the role of land, so the building is its accessory as if it was the land (Art. 280, Par. 3 of ZV). In both cases, by registration in the land registry on the basis of renewed agreement, the legal unity of real estate is established: in the first case – of land and building, in the second case – of the right to build and building.

By renewal of legal transaction, a new contractual relation is created when participants in the legal transaction that established a certain contractual relation reach agreement on change of the obligation or basis (cause) of the legal transaction or both[62]. As it can be seen, the possibility of renewal of invalid legal transaction in legal separation of land and building, concluded before 1 January 1997, has been envisaged by the Law on ownership – implemented modification of agreement that eliminates its invalidity.

If registration of land and building as two independent bodies is done before 1 January 1997 on the basis of a legal transaction (Art. 6, Par. 1 of ZPZZ and Art. 10, Par. 2 of ZGZ[63]), the agreement is consumed. In such case, real estate legal unity is not established by the law itself because that would violate the acquired rights established by the legal transaction, i.e. the will of the real estate owner[64], which are protected by the Law on ownership (Art. 389,

---

[60] Law on turnover of land and buildings, Official Gazette of FNRY 26/54, 19/55, 30/62, Official Gazette of SFRY 15/65; refined text 4/65, 57/65, 17/65, 11/74; NN 52/73, which ceased to be valid on 1 January 1997. (Art.394, Par.1 al.3 of ZV).

[61] Simonetti, P., Rasprave…, op. cit., p. 236-254

[62] Vuković, M., Opći dio građanskog prava, Knj. 2., Školska knjiga, Zagreb, 1960, p. 325; Perović, S., Obligaciono pravo, Official Gazette of SFRY, Belgrade, 1980, p. 132 and 137.

[63] Law on construction land of Socialist Republic of Croatia, of 1980, refined text 48/88, 16/90 and 53/90., which ceased to be valid on 1 January 1997 (Art.394, Par.2 of ZV).

[64] Perović, S., Retroaktivnost zakona i drugih opštih akata (teorija sukoba zakona u vremenu), Svetozar Marković, Belgrade, 1984, p. 104; also Geršić, G., Teorija o povratnoj sili zakona in: Klasici jugoslovenskog prava, NIU, Official Gazette of SFRY, Belgrade, 1985, T. 8., p. 381, which provides a critical review of previous theories about protection of acquired rights. The Lasal's theory on acquired rights (Lasal, F., Thèorie des droit acquis et de conflits de lois, 1861, trad. fr. Paris, Giard, 1904) was pushed aside by more coherent theory of Roubier (Roubier, P., Les conflits des lois dan le temps – thèorie dite de la non – reactivite de lois, Paris, 1929).

Par. 1). Then it is possible to establish legal unity of land and building only by the will of owners of those two land registry bodies. By their will (legal transaction), the autonomy of those two real estates can also be modified by establishment of the right to build, which separates land from building and takes over the role of land, so the building becomes its integral part as if it was the land (Art. 280 of ZV). The legal unity in accordance with the law is established under the assumption that the building owner has acquired the right of ownership of land or that the land owner has acquired the right of ownership of building on any basis.

3. Opposite interpretations of institution of merger of land registry bodies

3.1. Introductory remark

The institution of merger of land registry bodies in accordance with the transitional provisions of the Law on ownership has been interpreted in different ways from the very beginning. According to one opinion, the building owner is acquiring the right of ownership of entire land registry body (cadastral lot or group of cadastral lots) even when construction lot has not been formed. According to another opinion, which is advocated in this book, the building owner is acquiring right of ownership of such land surface that is utilized for the regular use of building if the construction lot has not been formed in accordance with the law, and it is determined by competent authority according to the directives for spatial planning and the comprehensive master plan, i.e. location permit according to the rules of ZPU[65] if such plan has not been adopted. Such surface is established according to the legal rule which stipulates that construction lot consists of the land on which the building is constructed and the land that is utilized for regular use of that building.[66]

The supporters of the first opinion[67] did not waver even when it was set forth in the Law on Amendments and Supplements (ZID) to ZPS[68] that the right of ownership of purchased apartment cannot be registered before formation of the construction lot on which the building is standing, or when the Constitutional Court of Croatia made the decision[69] to revoke the provision (referred to in Art. 367, Par. 3 of ZV) on establishment of the right of co-ownership when several buildings of various owners are constructed on the same land (land registry body), or even when the provisions (referred to in Art. 367, Par. 4 of ZV) on the outcome of determination of the size of co-owners' shares was erased[70] since it lost the reason for existence upon revoking of Art. 367, Par. 3 of ZV[71].

---

[65] Law on spatial regulation, NN 30/94, 68/98, 35/99, 61/00, 32/02 and 100/04 (Art. 26a, 26b, 27 – 33 and Art. 36, Par. 1 al. 1).

[66] Art.12, Par.1 of Law on basic property relations i.e. Art.36, Par.1 and 2 and Art.37 of Law on nationalization of rental buildings and construction land, referred to in Art.388, Par.2 of ZV, i.e. Art.344, Par.2 of ZSP RS.

[67] Gavella, N., Josipović, T., Pravni učinci pretvorbe društvenih poduzeća s osobitim osvrtom na imovinskopravne učinke, Informator, year LI, no. 5108 of 19 February 2003, 2nd part, Item 27, p. 12.

[68] Law on amendments and supplements to the Law on sale of apartments, NN 68/98. which was brought into force on 20 May 1998.

[69] Since 17 November 1999, NN 137/99.

[70] Law on Amendments and Supplements to ZV, NN 114/01.

[71] We pointed to the possibility of transformation of permanent right to use into right to build instead of right of ownership in 1991, Simonetti P., Vlasničkopravni režim građevinskog zemljišta u Republici Hrvatskoj-Preobražaj prava korištenja u pravo građenja, Informator, vol. L, 3921-3922, 1991 and 1992, Simonetti, P., Reprivatizacija građevinskog zemljišta i preobražaj prava korištenja, Zakonitost, year 46, no. 3, 1992, p. 403-421).

3.2. Concept of land registry body

3.2.1. Land registry body in the system of legal unity of land and building

A land registry body may consist ‘’of one or more land registry lots that are in the same cadastral district’’ (Art. 19, Par. 2 of ZZK[72], i.e. Art.16, Par.3 of ZZK FBiH and Art.16, Par.3 of ZZK RS). A cadastral lot is ‘a part of Earth’s surface that is defined in the land cadastre by a special number and the title of the cadastral district in which it is situated (Art. 2, Par. 1 of ZZK). The areas and names of cadastral districts are covered by cadastral regulations ‘’provided that one cadastral district may encompass only land in the area under jurisdiction of one land registry court. The land in the area that is under jurisdiction of one land registry court may be divided into several cadastral districts’’ (Art. 17, Par. 2 of ZZK). [73], [74]

3.2.2. Land registry body in the system of real estate legal duality

3.2.2.1. On socially owned land

Independent land registry bodies were the buildings that were, in principle, part of legal transactions while they were still socially owned (Art.1, Par.3 of ZPZZ, i.e. Art.3, Par.3 of ZPN[75]) and the socially owned land that was not a part of legal transactions (Art.1, Par.2 of ZPZZ, i.e. Art.3, Par.2 of ZPN). Condominiums on privately owned land were also independent land registry bodies.

In the real estate duality system, buildings were legally separated from socially owned land. According to the law itself, two independent real estates existed at the same time – two land registry bodies: land and building. This system applied to all buildings on a socially owned land, regardless if the buildings were privately or socially owned, because a socially owned construction land could not have been alienated and socially owned buildings participated in legal transactions under the conditions determined by ZPZZ (Art.2, Par.3).

3.2.2.2. On privately owned land

The legal duality of land and building was generally established by the Law on ownership of parts of building, and it existed even when the land was privately owned because the right of co-ownership of land that belonged to owners of separate units of building did not extend to the building. Condo owners had a joint ownership of common parts of building, and not a co-ownership. Three forms of ownership have separated not only building from land but also separate units from common parts of the building. Since the Law on ownership of parts of building ceased to be valid (1 January 1997), the legal unity has been established with the land surface to which the co-ownership right of owners of special parts of building has extended. So, it is not disputable which surface of privately owned land is merged with condominium (family residential buildings and other buildings that could have been subjects to the ownership right according to the regulations at that time). What is disputable is which surface of land that was socially owned is merged with the building according to the transitional provisions of the Law on ownership.

---

[72] Law on land registry, NN 91/96, 137/99, 114/01, 100/04, 107/07, 152/08; Law on land registry of Federation of Bosnia and Herzegovina, Official Gazette of Federation of Bosnia and Herzegovina 58/02, 19/03, 54/04; Law on land registry of RS, Official Herald of RS 74/02.

[73] See Art. 19, Par. 3, 4 and 6, as well as Art. 145– 148 of ZZK.

[74] Josipović, T., Zemljišnoknjižno pravo, p.103 and further, same in: Gavella etc., Stvarno pravo, p. 220–222.

[75] Law on real estate transactions, Official Gazette of Socialist Republic of Bosnia and Herzegovina 38/78.

3.3. Land that is merged with building

In the period from 8 October 1991 to coming into force of Law on ownership on 1 January 1997, transformation of the right to use into the right of ownership (co-ownership) of owners (co-owners) of building, i.e. separate unit of building did not raise doubts as to the surface of land that was merged with building. That surface was determined by the construction lot, which was formed on the basis of „documents" of spatial regulation, in accordance with the following legal principle: the land covered by the building and the land necessary for regular use of the building (Art.12, Par.1 of ZOSPO, Art.36, Par.1 and 2, and Art.37 of the Law on nationalization…). As a rule, construction lot was formed before the allotment of land for use for the purpose of construction, i.e. before the right to use for the purpose of construction on socially owned construction land was constituted by registration in the land registry (Art. 40-44 and Art. 51, Par. 3 of ZGZ).

Construction lot is such surface of land that is, in accordance with the implementation plan,[76] lot survey or other act of urban regulations („document" of spatial regulation), allocated for construction and use of a permanent building. The regulations on spatial planning stipulate that construction lot must have a form and surface that facilitate construction of building and its use in accordance with the plan, urban and technical regulations, and that it must have a permanent access to a street, i.e. public road..[77] It was explicitly set forth in the Law on spatial planning of the Socialist Republic of Croatia that „an act of division of construction land into lots cannot be registered in land cadastre and land registry without the certificate issued by an authority in charge of determination of requirements and spatial regulation that the lot survey has been prepared in accordance with the spatial regulation requirements" (Art. 65, Par. 1).[78]

Presuming that construction lot of the land on which building is located has not been formed, by transformation of permanent right to use the owner (co-owner) has acquired the right of ownership of such surface of land which is covered by building „and which is utilized for regular use of that building".[79] Therefore, the construction lot that encompasses just the land under the building or the land around building, which does not provide for regular use of building, is not formed in accordance with the law. A paradoxical example in practice is the form and surface of construction lot that prevents entrance to the building from the public area in the way that entrance to the building is possible only through the neighboring land. In such case, before the registration of real estate in land registry, construction lot must be formed in accordance with the law, which is a surface necessary for regular use of building; the permanent right to use extended exactly to such surface.

3.4. Opposite interpretations in the view of possible hypotheses

After coming into force of the Law on ownership (1 January 1997), the doubts have appeared as to the merger of land, as an independent land registry body, with one or several independent buildings, as land registry bodies, into one land registry body. This happened

---

[76] Nowadays, detailed plan of regulation (Art. 44. Sup-Par. 1. and Art. 69. of Law on spatial regulation, NN 30/94., 68/98., 61/00., 32/02., 100/04.).

[77] Art. 64. Par. 3. of Law on spatial planning and spatial regulation of Socialist Republic of Croatia, NN 54/80.

[78] See, Golubović-Munjaković, Lj., op. cit.

[79] Art. 9. of ZP ZOVO, i.e. Art. 12. Par. 1. of ZOVO; earlier Art. 37. of Law on nationalitzation of rental buildings and construction land, Official Gazette of FNRY 52/58 (Art.36.Par.1. and 2. and Art.37.).

because Croatian law seemingly allows two different interpretations of the concept of „land registry body", which is formed by the land on which building is located.[80] According to one, land registry body is a cadastral lot (Art. 2, Par. 1 of ZV), i.e. all the cadastral lots that are inscribed into the main land registry file and make one land registry body (Art. 19 and Art. 145 of ZZK).[81] According to another, land registry body in the system of legal duality of land and building is only such surface of land on which building is located and which is utilized for its regular use because only such surface was subject to permanent right to use, which is transformed into a right of ownership, so the building owner acquired the right of ownership only of such surface by merger of land registry bodies. Various hypotheses are possible. The first and most simple is that construction lot has been formed in accordance with the spatial regulation requirements. The second is that several buildings exist on one land (cadastral) lot, which belongs to different owners (co-owners, condo owners). Third, building is constructed on one or more cadastral lots whose form does not correspond with potential construction lot, although the surface of such land lots significantly exceeds its surface, but, in spite of this, building is constructed on the boundary of this (those) cadastral lot (lots), meaning that the land surface that is not required for regular use of the building exists on one (two, three) sides of the building, while such land is missing exactly on the other side of the building (the wall alongside the boundary). Fourth, the surface of cadastral lot on which the building is located is significantly smaller than construction lot as defined by the spatial regulation requirements. That is why the interpretation of provision „land registry body" in legal institution: *establishment of real estate legal unity* (Art. 366 – 373 of ZV) is possible only in the context of real estate legal duality. In this regard, we should bear in mind that entire land in the construction area was socially owned (Art. 3 – 7 of ZGZ)[82], so the boundaries of cadastral lots were no obstacle to formation of construction lots.

The rules of legal institution of merger of land registry bodies under possible hypotheses are interpreted in the text below.

3.4.1. Building on formed construction lot

When there is a building on a formed construction lot, which at the moment of merger has final (relatively unchangeable) boundaries, determined by the decision of competent authority in accordance with the spatial regulation acts, the merger of construction lot with the building results in creation of a real estate that is subject to the right of ownership (co-ownership) of the owner (co-owners) of the building, i.e. owners of separate units of the building, and after the merger of land and building – owners of separate units of the real estate who are also co-owners of that real estate. In such case, there is no doubt as to the surface of land that is merged with the building. The new land registry body consists of building and land (construction lot).

The procedure of formation of construction lot regularly preceded dispossession of undeveloped construction land and allotment of such land for use for the purpose of construc-

---

[80] As these interpretations relate only to Croatian law, the legal sources of Bosnia and Herzegovina entities are not quoted in continuation, because such problem did not appear there because regulations on transformation of permanent right to use and scope of its object – land belonging to the building are unambiguous *(infra)*.

[81] Law on land register, NN 91/96., and 114/01. Law on Amendment of Law on sale of apartments with tenant's righ NN 68/98., terminated by Art. 225. of ZZK, and by decision of UsRH, NN 137/99. the provision of second sentence of Art. 221. Par. 1. of ZZK is terminated.

[82] Since 26 December 1958, Art. 34 and 35 of Law on nationalization… since 8 August 1968, Law on determination of construction land in towns and urban settlements, NN 30/68 – Description of boundaries of construction land in towns and urban settlements.

tion to a physical or legal person in accordance with the provisions of the Law on construction land (Art. 40-44).[83] This Law stipulated that construction land may be „taken from the possession of former owner, i.e. beneficiary, and be given for use to a new beneficiary only after lot survey in accordance with the implementation plan is prepared for the land in question" (Art. 43, Par. 1).[84]

For the purpose of formation of new construction lots in accordance with the implementation plan, it was possible, for the purpose of allotment of construction land for use for construction of buildings and other constructions, to dispossess former owner, i.e. beneficiary of socially owned construction land, of part of such land, i.e. land that is not utilized for regular use of the building, in order to form a new construction lot by its merger with the neighboring lot (Art. 44, Par. 1.).[85] By the decision of competent authority, the holder of the right to use, to whom the land was allotted for use for the purpose of construction, could have been deprived of part of such land, which is, according to the lot survey, exceeding the surface required for regular use of building, if the land had been awarded for use before adoption of the implementation plan with which the construction lot had to be brought in accord (Art. 44, Par. 2).[86] At the request of the owner, i.e. beneficiary of the building built on socially owned construction land, competent authority could have made the decision on allotment of particular part of neighboring lot for use, the one that, according to the implementation plan, forms a new construction lot with the lot on which the building is constructed, but only up to 50% of surface of the newly formed construction lot (Art. 45).

The form and surface of construction lot were determined in principle on 26 December 1958 by the Law on nationalization… which stipulated that the right to „free-of-charge use of land", which belongs to the owner of the building that is not nationalized, extends to such land „which is covered by building and the land utilized for regular use of that building" (Art.36, Par.2 and Art.37)[87]. Before that, the form and surface of land lot allocated for building construction was determined according to the provisions of Directive on construction of residential buildings of workers and civil servants[88] of 23 August 1951, which was in force until 6 April 1965 (Art.61 of Law on Amendment of ZPZZ[89]).

---

[83] ZGZ, which ceased to be valid on 1 January 1997 (Art. 394, Par. 2 of ZV), came into force on 8 January 1981 (NN 54/80) – refined text: NN 48/88, 16/90 and 53/90. This text is quoting ZGZ according to the review by M. Žuvela, Informator, Zagreb, 1992.

[84] Implementation plan thoroughly determined requirements and method of spatial regulation within spatial plan for wider area i.e. with the decision on construction area (Art. 13 of Law on spatial planning and spatial regulation, NN 54/80, 16/86, 18/89, 34/91, 61/91 and 59/93).

[85] UpSH, Us-465/88 of 26 May 1988, PSP 39, sentence no. 241.

[86] VSH, U-3082/73 of 2 October 1974 (PSP 6/301); UpSH, Us-1707/80 of 16 July 1980, (PSP 18/318); VSH, Gž-500/1981 of 15 December 1981 (PSP 20/44); UpSH, Us-3618/84 of 20 February 1985. (PSP 26/359); UpSH, Us-7364/85 of 16 July 1986 (PSP 32/287); UpSH, Us-1467/86 of 23 July 1986 (PSP 32/290); USH, Us-5752 of 18 February 1987 (PSP 34/271); UpSH, Us-2325/88 of 28 December 1988 (PSP 41/195); UpSH, Us-1028/81 of 22 April 1981 (from: Žuvela, M., ZOVO, 4th issue, Enclosure II.j., no. 168); Legal opinion of meeting of UpSH of 12 October 1982, (from: Žuvela, M., ZOVO, 4th issue, Enclosure II.j., no. 169).

[87] Law on nationalization of rental buildings and construction land, Official Gazette of FNRY 52/58 adopted, proclaimed, published and came into force on 26 December 1958.

[88] Official Gazette of SFRY 23/51.

[89] Law on amendments and supplements to the Law on trade in land and buildings, Official Gazette of SFRY 15/65.

3.4.2. Several independent buildings on one land lot

In case that one land lot (usually a cadastral lot) hosts several independent buildings (land registry bodies), which are owned (co-owned or condo owned) by various persons, the first interpretation says that all such land registry bodies are merged into one. The co-ownership right over such merged body (real estate) is acquired by all previous owners (co-owners, condo owners) of independent buildings, i.e. separate units of building, which were independent land registry bodies before the merger. Since it was not noticed that, in the legal duality system, land registry body corresponds to such land surface that is intended for regular use of building, and not to cadastral lot (lots), ZV stipulated the principle of merger of several buildings that existed as separate land registry bodies into one land registry body with the associated land in the favor of all building owners as co-owners of the real estate created in such way, with equal co-owner's shares (Art. 367, Par. 3). Each of the former building owners who have become co-owners of unique real estate by such registration „may obtain, through a court, the determination of the size of co-owner's shares in proportion to the values of buildings at the moment of their merger into a land registry body" (Art. 367, Par. 4). This is not violating the rights that existed prior to the merger to the benefit or to the detriment of one or another land registry body, and they shall be registered, in the line of duty, to the benefit, i.e. detriment of particular co-owner's share (more precisely: its servient owner). If this is not possible, they shall be registered to the benefit, i.e. detriment of the merged land registry body, each with the precedence in accordance with the time of its creation, i.e. implemented cession of priority (Art. 367, Par. 5).

So, the merger of land registry bodies establishes, by the law itself, the right of co-ownership, even contrary to the will of previous owners of the building, i.e. separate units of the building. This legal provision has sometimes caused insurmountable difficulties in practice. It is not hard to imagine its legal effects when one or several cadastral lots, which form unique land registry body in accordance with the first interpretation, host two or more buildings with tens or hundreds of separate units. The owners of all such separate units of buildings have become, pursuant to the law, co-owners, presumably with equal co-owners' shares, on such mammoth land registry body, and the size of their co-owners' shares could have been determined only by their agreement (the agreement reached by tens or hundreds of owners of separate units). When absolute agreement was not achieved such parts could have been determined in a court procedure that involved everybody. Therefore, in time, these relations have become increasingly complicated and made legal trade in real estates difficult, as well as their encumbrance for the purpose of insurance of claim or establishment of a right of easement or real encumbrance.

That was the reason for initiation of the procedure before the Constitutional Court for an assessment of whether such legal provision is in accordance with the Constitution, which guarantees the right of ownership and its inviolability (Art. 48, Par. 1 and Art. 3).

3.4.2.1. Revoking of Par. 3 and erasure of Par. 4, Art. 367 of ZV

In the constitutionality assessment procedure, the provision of Art. 367, Par. 3 of ZV was revoked by the decision of the Constitutional Court of the Republic of Serbia of 17 November 1999.[90] The justification of this decision, among other things, quotes that merger of land registry bodies according to the provision of Art. 367, Par. 3 of ZV may lead to a change in the scope of the right of ownership „in regard to land as well as the building itself", which is established by transformation of permanent right to use into ownership right, which „is not in accordance" with the constitutional principle of guarantee and inviolability of the

[90] Decision of UsRH, no. U-I-58/1997 of 17 November 1999, published in NN 137/99.

right of ownership. Therefore, „Court establishes that when the provision of Art. 367, Par. 3 of the Law on ownership transforms owner of a thing into co-owner of the same thing, contrary to or against his will, and leads to the possibility of change in the scope of his right over land, and the building itself, it is not in accordance with the provision of Art. 48, Par. 1, the provision of Art. 50, Par. 1 of the Constitution, as well as with the provision of Art. 3 of the Constitution, by which the inviolability of ownership is established as a fundamental value of constitutional system." After the Constitutional Court revoked the provision on establishment of co-ownership right by merger of land registry bodies, the provision on determination of the size of co-owners' shares, contained in Art. 367, Par. 4, has been removed as needless by the Law on amendments and supplements to ZV (Law on ownership).[91] So a huge gap has appeared in the institution of merger of land registry bodies, which can be bridged only by interpretation of the concept of land registry body in the context of real estate duality, i.e. transformation of acquired permanent right to use into ownership right. In this case (hypothesis), before registration of the right of ownership of independent real estate, each building on socially owned construction land is an independent real estate, which is legally separated from the land. Registration of the right of ownership of real estate that consists of land and building cannot be requested before formation of construction lot for each independent building because ownership right can be registered only of particular thing (real estate), limited in space, on a construction lot. This has confirmed the thesis that land registry body, according to the transitional provisions of ZV (Art. 367, etc.), consists only of such land surface that is covered by building and the one that is required for its regular use. According to ZOVO, the right to use of the owner of building constructed in accordance with the law has only extended to such land surface (Art. 12, Par. 1), [92] and that right has transformed into the ownership right in accordance with the law (8 October 1991)[93]. The building owner cannot acquire the right of ownership of such surface of which he hadn't any right to use as the building owner, i.e. holder of the right to dispose of socially owned land, because right cannot be acquired by transformation from a non-right[94]. The building owner could have the right to use of that land surface on other basis, for instance as a former owner of socialized land (temporary right to use), which is subject to denationalization (Art. 15, t. 1, Law on compensation…), or some third person used to have the right to use, i.e. municipality had the right to dispose of such land surface (Art.25 and others of ZGZ). The legislator who has decided to transform the permanent right to use into the ownership right by renewal of ZOVO and by the Law on ownership could not have stipulated a legal basis for depriving the third person of the right to use that is transformed into the right of ownership of undeveloped construction land and „give' the building owner such land surface that is not required for regular use of the building of which he had no right to use. Such provision would be contrary to the Constitution of the Republic of Croatia, which guarantees the ownership right and its inviolability (Art. 48, Par. 1 and Art. 3)[95] and, therefore, the right to restitution of ownership right, except when restitu-

---

[91] See Art. 1, Par. 1 of ZID ZV, NN 114/01.

[92] Earlier Art. 37 of Law on nationalization of rental buildings and construction land and Art. 6, Par. 2 of ZPZZ.

[93] Art. 9 of ZOVO.

[94] *Ex nihilo nihil fit*, Sec. Lucretius – 1,155.

[95] The constitutional concept of the right of ownership encompasses all real rights, including rights over socially owned real estates, which are transformed into the ownership right.

tion violates an acquired right or when it is excluded by the law in the public interest[96]. According to the Constitution of the Republic of Croatia, one can be deprived of the ownership right in exchange for compensation of the market value, but only in the interest of the Republic of Croatia (Art. 50. Par. 1.). In such case, the Law on ownership, which guarantees the ownership and other real rights (Art. 398, Par. 1.), would contradict itself and it would be contrary to the rule of effect of the law over the period of time (Art. 388, Par. 2).

According to the opposite interpretation of land registry entity, as if the law did not determine its scope before ZV, the real estate is joined by land surface outside the boundaries within which the right to use of the building owner, i.e. the holder of the right to dispose has existed, even in the case when land outside these boundaries on no basis belongs to the building owner, i.e. holder of the right to dispose of the socially owned building.

3.4.3. Building on one or more cadastral lots

Under the presumption that there is a building (independent land registry body) on one or more cadastral lots, which all together form another land registry body, merger of those two land registry bodies may lead to appearance of various legal consequences, for instance: that owner (co-owners) of building, i.e. owners of separate units of building also acquire the right of ownership (co-ownership) of the part of land that is not utilized for regular use of the building but serves for regular use of a neighboring building, although neither they or their ancestors were owners (co-owners) of that land before the enforced transfer to social ownership[97] nor they acquired any other right before nationalization, which could be transformed into the ownership right.

In spite of existence of „excess" land that is not required for regular use of building, it is possible that one or two sides of the building are located on the very boundary of cadastral lot (lots), so the owner (co-owner) of building or separate unit of building does not acquire the right of ownership (co-ownership) of the land that, according to the requirements („documents") of spatial regulation, serves for regular use of that building. The reason for this is the fact that such land lot is not situated within the land registry body of the lot on which building is located so the owner of neighboring building or somebody else has acquired the right of ownership of it. In such case, building owner should request the establishment of the right of easement over another's land conferring a right of passage for the needs of access to building (the hypothesis that land belonging to another person by merger of land registry bodies on other basis extends to the building entrance on one side and to the public area on the other, even when this land does not serve for regular use of neighboring building).

3.4.4. Building on cadastral lot that is smaller than hypothetical construction lot

Finally, it is possible that the surface of cadastral lot on which building is located is significantly smaller than potential construction lot, and in order to acquire ownership of the required land surface (completion of construction lot), the owner of real estate, which has been created by merger of land and building, will be forced to purchase land at high price from the neighbor who has acquired ownership of such „excess" land free of charge, although the one who used to have a permanent right to use of this land is the buyer and not the seller who has acquired the right of ownership by merger of building with the land registry body that consists

---

[96] Simonetti, P., Denacionalizacija, p. 24 – 34.

[97] In this case, authorized persons would be authorized to request restitution or compensation according to the provisions of Art. 16-19 of ZN, NN 92/96. More: Simonetti, P., Naknada za oduzetu imovinu, ZPFR, vol. 18, No. 1, 1997; same: Denacionalizacija…, op. cit.; Bagić, S., Denacionalizacija…, op. cit., p. 238-246.

of one or several cadastral lots inscribed in the same land registry file. This paradox can be avoided only if the land registry body, created in the legal duality system, is identified with such surface of land to which permanent right to use of building owner, i.e. the holder of the right to dispose used to extend. In any way, only a permanent right to use could have been transformed into the ownership right in the case of merger of land registry bodies.

3.5. Determination of form and surface of construction lot that is merged with building

Facing aforementioned controversies, which emerge in the case of merger of land registry bodies by an agreement on purchase of the apartments that used to be subject to tenant's rights, in order to remove ambiguous interpretations of the concept of land registry body, legislator has stipulated the following,:

„Buyer acquires the right of ownership of apartment by registration at land registry after implementation of the procedure, during which the form and size of construction lot required for regular use of building shall be determined according to a special regulation[98] if such procedure has not been implemented before" (Art. 4 of Law on Amendments and Supplements to ZPS).[99]

By this, Law has, therefore, undoubtedly confirmed that land registry body is such land surface on which building is located and which serves for regular use of the building to which, according to the past regulations, the permanent right to use has extended and which is *ex lege* transformed into the right of ownership of the building owner. The decision by competent authority on determination of this land surface has a declarative character because it is based on the criteria established by the law. Registration of the right of ownership (co-ownership) of real estate consisting of land and building shall be done on the basis of such decision, when it becomes executive. If the real estate is subject to co-ownership, in addition to aforementioned decision, an agreement between co-owners on the size of co-owners' shares is required, which is made in the form that is legally required for clausula intabulandi, or if such agreement is missing, the substitute for clausula intabulandi is an absolute and executive decision of the court on the size of co-owners' shares of all co-owners. Since the subject of the right of ownership (co-ownership) is the particular thing (*res certa*), i.e. particular surface of land in this case, the legal duality of land and building is preserved till the registration of the right of ownership, i.e. co-ownership of real estate and the right of ownership of separate unit of real estate in the land registry, although legal unity was established outside the registry in accordance with the law itself in the period from 8 October 1991 to 1 January 1997, i.e. on 1 January 1997 if the building is condo-converted, and after 1 January 1997 by establishment of the right of ownership of building on the real estates referred to in Art. 390 of ZV. Since the right of ownership of separate unit of real estate is indivisibly connected to the appropriate co-owner's part of real estate (Art. 69 of ZV), such right cannot be inscribed in the land registry before the absolute decision of a competent authority (which is of declaratory significance) has determined „the form and size of construction lot required for regular use of building" (Art. 4 of Law on Amendments and Supplements to ZPS). This rule is of universal significance because it originates from a principal provision, according to which the permanent right to use, which is transformed into the ownership right, extends to such sur-

---

[98] The special regulation is the Law on amendments and supplements to the Law on spatial regulation, NN 68/98. More in: P. Simonetti, P., Pravno jedinstvo nekretnine i njezinih posebnih dijelova, Pravo u gospodarstvu, no. 4, 1998, p. 676-679.

[99] Law on amendements and supplements to the Law on sale of apartments, NN 68/98.

face of land that is required for regular use of building.[100] The lawyers who see exception to the rule in this provision and not the casuistic expression of the principle are facing unbridgeable obstacles to interpretation of the rule on merger of land registry bodies.[101] Before ZOVO, the rule according to which the right to use extends to the land that is covered by building „and the land that serves for regular use of such building" was also set forth in the Law on nationalization of rental buildings and construction land (Art. 36, Par. 2 and 37) of 26 December 1958.[102] According to this, the land surface that is merged with building is a land registry body that has been constituted according to the law itself, outside the registry, in the system of legal duality of land and building, so it does not have to correspond to the surface of land that is inscribed in the land registry, which is usually the case.

3.6. Presumptions for determination of form and size of construction lot according to applicable law

Law on spatial planning… ceased to be valid on 23 April 1994 when ZPU[103], [104] came into force. ZPU was amended and supplemented on 20 May 1998.[105] According to the Law on amendments and supplements to ZPU, division of construction land into lots for the purpose of establishment of construction lot is implemented in accordance with the location permit[106] if spatial interventions are envisaged (Art. 35, Par. 1), i.e. by the detailed plan of regulation.

The urban plans in force, which were implemented in the previous period and adopted before the Law on spatial regulation, are deemed to be detailed plans of regulation referred to in Art. 9 of the Law on amendments and supplements to ZPU (Art. 54 of the Law on amendments and supplements to ZPU).

If construction lot is not determined for the already constructed building, competent authority shall determine the surface of land that is required for regular use of the building. The form and size of such construction lot is determined by the County Office, i.e. the City Office of the City of Zagreb, which is competent for the affairs of spatial regulation (Art. 36, Par. 2 of the Law on amendments and supplements to ZPU).

The right of ownership of real estate in the case when construction lot is not formed extends to such land surface that is determined by competent authority, referred to in Art. 35 of ZPU, as

---

[100] Art. 12, Par. 1 of ZOVO.

[101] So Danica Damjanovic, after having concluded that the rule on merger of land registry bodies was modified by the Law on amendments and supplements to the Law on sale of apartments, concludes: „However, there is an open question concerning the way of determination of the size of land lot if the same building comprises apartments whose ownership was acquired on the basis of the Law on sale of apartments subject to tenant's right and apartments whose ownership was acquired on other basis".; Transformation of social ownership according to the Law on ownership and other real rights with regard to the provisions of other laws by which the ownership right was transformed, in: Nekretnine u pravnom prometu, Zagreb, December 2001, p. 65.

[102] Basically, this rule was determined by Art. 6, Par. 2 of ZOVO, according to which „by alienation of socially owned building, the ownership of land on which building is located is not transferred, but person acquiring the building is also acquiring a permanent right to use this land as long as the building exists on it." It is clear that not only land covered by the building is in question, but also the land which is required for its regular use.

[103] Law on spatial regulation, NN 30/94.

[104] Art. 62 of ZPU.

[105] Law on amendments and supplements to ZPU, published in NN 68/98 and came into force on 20 May 1998. (Art. 61 of Law on amendments and supplements to ZPU).

[106] Andrijašević-Rac, S., Lokacijska dozvola, Informator, no. 4257-4260; on location permit also in: Informator year XXXIX., 4923, 2001, year XXXIX, 4929, 2001 and year XXXIX., 4930, 2001.

a construction lot in accordance with the detailed plan of regulation i.e. location permit.[107], [108] Only for developed socially owned construction lot there was the right to use (permanent right to use), which was transformed into the building owner's right of ownership on the basis of renewal of ZOVO,[109] i.e. by direct merger of land registry bodies when the formed construction lot was in accordance with the provisions on establishment of real estate legal unity referred to in ZV. This also applies to the right to use of developed construction lot whose form and size have been determined after coming into force of ZV and aforementioned renewal of ZPU. The building owner cannot acquire the ownership right of land by merger of land registry bodies exceeding the construction lot's boundaries, which are determined according to the prescribed legal criteria for division of developed land into lots. In case of a dispute, the regular court shall decide in a civil procedure if the building owner has other right, which is transformed into ownership right, over the remaining, undeveloped land surface (for instance, right of management, right to use or dispose of social legal person), or right of restitution of the ownership right (for instance, former owner or his legal successor), or out-of-registry ownership acquired on a valid legal basis, or a legal basis for acquiring the ownership right by registration at the land registry (Art. 1 and 187 of the Law on civil procedure and Art. 365, Par. 6 of ZV).

3.7. Contesting the rule on determination of form and size of construction lot that is merged with building

In the opinion of those lawyers who think that, by merger of land registry bodies, the owner (co-owner) of building, i.e. separate unit of building has also acquired the right of ownership (co-ownership) of such land surface that is outside the boundaries of subsequently formed construction lot, aforementioned renewal of ZPS is contrary to the Constitution of the Republic of Croatia, which guarantees the ownership right and its inviolability (Art. 48, Par. 1 and Art. 3).[110] Some lawyers call it a new nationalization. According to their opinion, under presumption that there is a reason for dispossession of this part of land (the interest of the Republic of Croatia), the dispossessed person would have the right to compensation in the amount of the market value, guaranteed by the Constitution (Art. 50, Par. 1), although he neither paid anything for the part of land of which he did not have permanent right to use nor was obliged by law to pay compensation for the land of which he acquired the ownership right by purchasing apartment[111] or on other legal basis. The amount of compensation is determined according to the rules set forth in the Law on dispossession (Art. 32-42).[112]

---

[107] Art. 27 and Art. 28, Art. 34-40 of the Law on amendments and supplements to ZPU (see also amendments to Chapter IV, which became Chapter V).

[108] Golubović-Munjaković, Lj., Oblikovanje građevinske parcele i utvrđivanje zemljišta potrebnog za redovnu upotrebu zgrade, Informator, year XLIV, no. 4408, Zagreb, 1996; Bienefeld, J., Položaj stranaka u postupku izdavanja lokacijske dozvole, Informator (Male stranice), no. 4730-4731.

[109] Art. 9 of ZP ZOVO.

[110] Gavella, N., Josipović, T, op. cit., p. 14. Discussing the merger of building and land, as independent land registry bodies, they point out: In this we think of entire cadastral lot on which building is constructed because, according to the principle of real estate unity, "individual real estate consists of land lot including everything that is linked to its surface or under it in a relatively permanent way…" (Art. 9, Par. 1 of ZV). See doubts in Crnić, J., Žuvela, M., Pretvorba, privatizacija, denacionalizacija – pravni status neobuhvaćenih odnosno neprocijenjenih nekretnina, Informator, year XXXIX, no. 4910-4911 of 28 and 31 March 2001, p. 3.

[111] Art. 12 of the Law on amendments and supplements to ZPS, NN 68/98, which revoked Art. 371 of ZV and Art. 225 of ZZK.

[112] Law on dispossession (hereinafter: ZI), NN 9/94, 112/00 and 114/01.

So, the right to compensation in amount of the market value in case of dispossession shall also belong to, for instance, holder of tenant's right in a building with one apartment (villa) who has by agreement on purchase of apartment acquired the right of ownership of the real estate (land and building) for the price of apartment, which is ten times smaller than the market value of the building, and thus acquired the right of ownership of an attractive land, which is significantly exceeding the surface of potential construction lot, without any compensation.[113]

3.8. Legal presumptions of formation of construction lot that is merged with building

The advocates of aforementioned opinion, therefore, contest the constitutionality of the provision of Art. 4 of the Law on amendments and supplements to ZPS. Their conclusion is, however, based on an unsustainable interpretation, which is: by merger of land registry bodies, the ownership right is acquired also of such land surface that is not required for regular use of the building of which the building owner did not have or could not have the permanent right to use (Art. 12, Par. 1 of ZOVO). Adducing the rule of the land registry law, according to which a land registry body consists of entire construction lot (or several cadastral lots inscribed in the same land registry file) and everything that is permanently linked to it, they are ignoring enforced regulations that stipulated that the right to use (permanent right to use) of the owner of building on socially owned construction land extends to construction lot, that is, when this lot is not formed, the right extends only to such land surface that is covered by building and that is required for its regular use; they deem as unconstitutional the present regulations on determining surface and forming construction lot (requirements, „documents" of spatial regulation) and on its incorporating according to law itself.[114] Such opinion is ignoring rules on acquiring permanent right to use, which were in force when that right was acquired (contrary to the principle from Art. 388, Par. 2 of ZV),[115] and exactly that right is transformed into ownership right. The well-established court practice confirms that the size and surface of construction lot could not have been determined or changed by free disposition of the holders of right to use of socially owned construction land.[116] On the contrary, surface and form of construction lot, as well as a change in form and surface, were determined by a competent authority in accordance with the

---

[113] The apartment buyers were freed from the obligation of payment of land fee by law, and if they paid that fee completely or partially, they would be entitled to request restitution [Art. 11 and 14 of the Law on amendments and supplements to the Law on sale of apartments (hereinafter: ZPS), NN 68/98], which revoked the provisions of Art. 371 of ZV and Art. 225 of the Law on land registries (NN 91/96), according to which the payment of land fee, which was not included in apartment price, was a presumption for acquiring the right of ownership of the real estate that was created by merger of land registry bodies – land and building, or by transformation of the permanent right to use into the ownership right.

[114] Art. 36, Par. 2 and Art. 37 of the Law on nationalization… Art. 12, Par. 1 of ZOVO. On object of permanent right to use, change in form and surface of construction lot and its indivisibility, more in: Simonetti, P., Pravo korištenja…, op. cit., p. 194-196 and 199 and quoted legal sources and court practice in this (in details).

[115] On theory of acquired rights, Perović, S., Ogled o stečenim pravima, Pravni život, Belgrade, year XXXIII, no. 1, 1984, same: Pravda i stečena prava, in book, Pravno filozofske rasprave, Belgrade, 1995.

[116] See court practice: VSH, U-3082/73 of 2 October 1974 (PSP 6/301); UpSH, Us-1707/80 of 16 July 1980 (PSP 18/318); VSH, Gž-500/81 of 15 December 1981 (PSP 20/44); UpSH, Us-3618/84 of 20 February 1985 (PSP 26/359), UpSH, Us-7364/85 of 16 July 1986 (PSP 32/287); UpSH, Us-1467/86 of 23 July 1986 (PSP 32/290), UpSH, Us-5752/86 of 18 February 1987 (PSP 34/271); UpSH, Us-2325/88 of 28 December 1988 (41/195); UpSH, Us-1028/81 of 22 April 1981 (from: Žuvela, M., ZOVO, 4th issue, Enclosure II.j., sentence no. 168); Legal interpretation of the meeting of UpSH of 12 October 1982 (from Žuvela, M., ZOVO, IV issue, Enclosure II.j., sentence no. 169).

implementation plan, i.e. other general act of spatial regulation or prescribed requirements for surface and formation of construction lots.[117] Therefore, construction lot is significantly different from cadastral lot, of which form and surface can be changed by owners at their free disposition. ZZK, which identifies cadastral lot or several cadastral lots with land registry body by setting a general rule (Art. 19), does not have in view incorporation of construction lot on socially owned construction land pursuant to the law itself, i.e. other general act of spatial regulation in accordance with the law, following the rules that were valid before it came into force. ZZK stipulates that land registry body may consist of one or more cadastral lots in the same cadastral district. Similar to this, ZV determines that individual real estate consists of land lot (therefore, cadastral or construction one), but „several land lots inscribed in the land registry in the same land registry file as one land registry body form one real estate" (Art. 9, Par. 1). An individual real estate (land registry body) is, therefore, significantly different from a construction lot.[118] The surface of land that is merged with building is determined by an appropriate spatial plan, i.e. according to the legal presumptions that provide the basis for determination of the form and size of construction lot by a competent authority… (Art. 4 of Law on amendments and supplements to ZPU).

3.9. Compensation for dispossession of remaining part of land

The real estate owner who has acquired the ownership right of the remaining part of land outside the boundaries of a newly-formed construction lot, i.e. of the undeveloped construction land on other legal basis (Art. 359-365 of ZV), or if the ownership right was returned to him as the former owner – person authorized to receive compensation according to the Law on compensation for the property nationalized during Yugoslav communist rule (Art. 9, 16-19),[119], [120] would be entitled, in case of dispossession of this land in the interest of Republic of Croatia, to compensation for dispossessed land, pursuant to the provisions of the Law on dispossession (Art. 32-42). The same applies to the owners of separate units of real estate (apartments) who have acquired the ownership right of the remaining part of land outside the boundaries of the formed construction lot on other legal basis. The right to compensation for dispossessed land also belongs to such owners (co-owners) whose already formed construction lot is subsequently decreased in accordance with „the documents of spatial regulation".[121]

Law on amendments and supplements to ZPS (Art. 4), namely, does not exclude the owner's right to compensation for dispossessed land, and it cannot do that because such provision would be contrary to the Constitution of the Republic of Croatia, which stipulates that property can be dispossessed by law only in the interest of the Republic of Croatia and with

---

[117] See court practice: USH, Us-6837/85 of 5 June 1986 (PSP 32/289); USH, Us-5792/88 of 15 February 1989 (PSP 42/176); VSH, Rev-794/88 of 8 November 1988 (PSP 44/178); UpSH, Us-4520/86 of 10 December 1986, (from: Žuvela, M., ZOVO, IV issue, Enclosure II.j., sentence no. 192); UpSH, Us-5752/86 of 18 February 1987 (PSP 34/271); UpSH, Us-5141/85 of 27 April 1986 (PSP 32/291).

[118] „If on the day of transfer of construction land into social ownership it was not determined which land of former owner, i.e. user served for regular use of building, the municipal administration in charge of property-legal affairs should determine by its decision, at the request of interested person or in the line of duty, which land served for regular use of building in accordance with the requirements of spatial regulation, established in the way regulated by special law." Art. 40 Par. 3 of ZGZ.

[119] NN 92/96, 33/99, 39/99 and 92/99, Constitutional Court: NN 42/99, 43/00, 131/00, 27/01, 34/01, 65/01.

[120] Simonetti, P., Naknada…, op. cit.; same, Denacionalizacija..., op. cit.

[121] VSH, U-3082/73 of 2 October 1974 (PSP 6/301); UpSH, Us-1707/80 of 16 July 1980 (PSP 18/318); VSH, Gž-500/81 of 15 December 1981 (PSP 20/44); UpSH, Us-6077/87 of 24 November 1988 (PSP 41/198).

compensation of the market value (Art. 50, Par. 1). According to Art. 10 of the Law on dispossession, making decision on dispossession of the right of ownership of the construction area covered by the implementation urban plan (nowadays: detailed regulation plan, Art. 54 of the Law on amendments and supplements to ZPU) is made easier. It is deemed that this provision also concerns other plans of spatial regulation because all spatial plans must be brought in accord, not only with each other, but also with the National Spatial Regulation Strategy and Program (Art. 13, Item 2 and Art. 30, i.e. 22 of the Law on amendments and supplements to ZPU), which is published in „Narodne novine" (Official Gazette) and adopted by Croatian Parliament (Art. 17, Par. 1 and Par. 4) according to legal procedure. On the other side, in case the documents of spatial regulation for inner area are not brought in accord with the document of spatial regulation for broader area, the location permit is issued on the basis of the document of spatial regulation for broader area (Art. 26, Par. 2 of the Law on amendments and supplements to ZPU), and the location permit determines „the form and size of construction lot…" (Art. 28, Par. 1, al. 1 of the Law on amendments and supplements to ZPU).

3.10. Republic of Croatia's ownership of undeveloped construction land

In case of exclusion of restitution of the right of ownership of undeveloped construction land, the ownership right is acquired by the Republic of Croatia, unless otherwise is set forth (Art. 77; Art. 52-55 of ZN). The provisions of Art. 52 through 55 of the Law on compensation stipulate deviation from the principle referred to in Art. 77, according to which the Republic of Croatia acquires the ownership right of „property" (especially of real estate) that is subject to compensation „for which the request has not been submitted or it was rejected with absolute force, unless otherwise is set forth in the law". The Law did not explicitly deviate from aforementioned principle in regard to the undeveloped construction land.

The presumed owner of undeveloped construction land, therefore, is not a unit of local self-government (municipality or town), which is, according to the Constitution of the Republic of Croatia, deciding „particularly on spatial regulation and urban planning, regulation of settlements and residence, on public utility activities …" (Art. 128, Par. 2).

It is absurd that the Republic of Croatia is the presumed owner of undeveloped construction land and that it has that land at its disposal, appropriating town rent in legal transactions, without any obligation of investing in town infrastructure, which significantly reduces the revenues of municipalities and towns, i.e. trade companies and public companies that are established by local self-government for the purpose of execution of public utility activities, maintenance and development of public utility infrastructure.[122]

Considering that exceptions are restrictively interpreted according to the interpretive rule[123], it is hard to make conclusion, regardless of aforementioned arguments, that the owner of undeveloped construction land, which used to be socially owned – is a unit of local self-government if the request for compensation has not been submitted or if it has been rejected by an enforceable decision.

However, there is an exception in regard to the undeveloped construction land that has been legally dispossessed or voluntarily transferred to the possession of municipality if other person has not acquired the ownership right of it although it has been brought to purpose. Namely, this is the way of interpreting the end of the provision of Art. 77 of ZV, which states: „if otherwise is not stipulated by law" *(supra)*.

---

[122] Art. 3 and 4 of ZKG.

[123] Blagojević, T. B., Tumačenje izuzetaka, Arhiv za pravne i društvene nauke, year XXV, no. 5–6, 1939 (Belgrade), p. 471–475.

4. Land registry merger of land and building

4.1. In general

Land registry merger of land and building usually takes place after out-of-registry merger of these two real estates, which is established according to the law itself. The exception are condominiums – prior to 1 January 1997, which are merged with associated land upon termination of the Law on ownership of parts of buildings (Art.394, Par.1, al.2 of ZV), so it has a declarative significance and it is established according to the transitional provisions of the Law on ownership by registration at land registry. If a real estate is not registered at land registry, the ownership right is acquired by depositing with the competent municipal court a document „by which former owner allows registration of other's ownership". In this case, „the rules governing acquisition by registration are applied in an appropriate way" (Art.120, Par.4 of ZV). The same is valid for acquiring the right by registration of land charges (Art.121, Par.5 of ZV). The rules on acquiring ownership right and servitude right by registration in the book of deposited contracts are contained in the transitional provisions of ZSP RS (Art. 327, Par. 4, 332, Par. 4 and 334, Par. 4 and 5).

4.2. Land registry merger of land and registered building

Under the presumption that, on 1 January 1997, a building in „someone's possession" was registered at land registry as a land registry body separated from land on which it was constructed, „building owner shall acquire the ownership right of entire real estate by merger of all these land registry bodies into one, with registration of the ownership right of the merged body in favor of the building owner" (Art. 367, Par. 1). In the case when the right of ownership of land and building was acquired by the building owner according to the law itself, out of registry, before coming into force of the Law on ownership (1 January 1997), the ownership right, referred to in Art. 367, Par. 1, has the meaning of „land registry ownership". The merger of land registry bodies shall be ordered by a competent court at the request of the building owner. In such case, the right of ownership of merged body (real estate) is registered in favor of the owner of existing building *ex lege*. The registration at the land registry has a declarative significance because, since 1 January 1997, the legal principle of real estate legal unity is valid (*supra*), except in the case of exceptions determined by law (Art.366, Par.1 of ZV).

If the right of ownership of building, and land thereon, is acquired by an individual act, for instance, in the procedure of transformation of social company (Art.390 of ZV), the registration applicant shall deposit appropriate documents on acquiring the right of ownership of land and building in accordance with the transitional provisions of the Law on ownership (Art. 359-365).

4.3. Land registry merger of land and unregistered building

Under the presumption that, on 1 January 1997, a building in „someone's possession" existed on a socially owned land, but it was not registered at the land registry although the land was registered, the building owner shall acquire the land registry ownership „of land lot", more precisely: of the formed construction lot[124] on which the building is constructed,

[124] Which is formed or which shall be formed (form and surface determined) by competent authority in accordance with the plan and documents of spatial regulaiton Art. 4 of the Law on amendments and supplements to the Law on sale of apartments, NN, no. 68/98. On presumptions and procedure for fomration of construction lot, see: Golubović-Munjaković, Lj., Oblikovanje građevinske parcele i utvrđivanje zemljišta potrebnog za redovnu upotrebu zgrade, Informator, year XLIV, no. 4408, 1996.

by registration of the building with registration of the right of ownership of the entire land registry body (Art. 368, Par. 1). We are talking about a permanent building, which is built in accordance with the law or its construction has been subsequently legalized by an enforceable decision of a competent authority (Art. 71 of ZGZ)[125], because only such building could have been registered at land registry.[126]

Only the owner of a permanent building, which is built in accordance with the law, could have had a permanent right to use of construction lot, i.e. land that is covered by building and land that serves for its regular use (Art. 12, Par. 1 of ZOVO) [127]. Since 8 October 1991, the permanent right to use, which has belonged to the owner of permanent building that is built in accordance with the law, has been transformed into the ownership right by acquisition of the right of ownership of a socially owned building, transformation of the right of a socially owned building into the right of ownership of building, or by transfer of building, i. e. separate units of building, into private ownership on other legal basis. Therefore, it is deemed that the right of ownership of entire real estate is acquired on the day of acquisition of the right of ownership of building, but not before 8 October 1991, prior to which the principle of legal separation of socially owned land and building had been valid [128].

4.4. Land registry merger when building owner has registered right to use land

In case that the owner of unregistered building had the registered right to use socially owned construction land, i.e. privileged right to use, at the moment of coming into force of the Law, the competent court shall, at the request of the building owner, order registration of building and the right of ownership of the land registry body (real estate) „on the basis of a notice by the competent cadastral body" (Art. 368, Par. 2). The notice by „the competent cadastral body" refers to formation of construction lot by the decision of a competent authority in accordance with the provisions of Art. 4 of the Law on amendments and supplements to the Law on spatial regulation (supra)[129].

Since the Law does not make the distinction, it is deemed that the right to use in this case has a broader meaning (generic concept) so it includes a temporary right to use that belonged to the previous owner of socialized construction land before dispossession,[130] as well as a right to use for the purpose of construction,[131] both unexercised and exercised privileged right to use.[132] So, even under the presumption that he has constructed building on the particular land, former owner whose temporary right to use was not erased from the land registry and who was not legally dispossessed, although he did not have an established privileged right to

---

[125] See court practice: VSH, Rev-2618/82 and VSH, Gž-112/83 (PSP 24/31); Conclusion from the meeting of judges of UpSH of 2 March 1984. (PSP 24/572); UpSH, Us-2102/83 (PSP 24/574), Us-2111/83 (PSP 24/575); VSH, Gž-89/83 (PSP 25/36); USH, Us-1872/84 (PSP 25/402); USH, Us-2131/84 (PSP 25/411).

[126] Simonetti, P., Građanskopravni položaj građevinskog objekta izgrađenog bez odobrenja za građenje, Informator, year XLI, no. 4055, 1993.

[127] More in: Simonetti, P., Vol. 1, Prava na građevinskom zemljištu (1945-2007), p.260-263.

[128] Art. 12, Par. 1 of ZOVO, i.e. Art. 36 and 37 of the Law on nationalization of rental buildings and construction land.

[129] NN 68/98.

[130] Simonetti, P., Pravo korištenja…, op. cit., p. 55-70.

[131] Ibid., p. 119-164.

[132] Ibid., p. 52, 165-181.

use, shall establish the legal unity of land and building and, at his request, building and the right of ownership of real estate, consisting of land and building, shall be registered at the land registry. This is possible under the presumption that the construction of building was legalized by issuance of building permit during or after construction[133] because, in the legal sense, only the building constructed in accordance with the law is deemed to be a permanent building (if it has permanent purpose), and only permanent buildings are merged with land. Buildings with temporary purpose are not an integral part of land (Art. 9, Par. 3 of ZV), so they are not separated from socially owned land by permanent right to use, but by law itself, which stipulates permanent link as the presumption of legal unity of land and building.

4.5. Land registry merger when building owner does not have registered right to use land

If the right to use is not registered and the privileged right to use in favor of the owner of unregistered building is not established in the land registry, the local court competent for the land registry affairs shall order, at the request of the building owner, registration of building and the right of ownership of entire land registry body: building and land that belongs to the building „on the basis of executive decision of the authorities, by which, for the purpose of construction of building, the right to use was awarded, i.e. privileged right to use was established for its holder, agreement on mutual rights and obligations, concluded in accordance with the conditions determined by such decision, and notice by competent cadastral body that building was constructed on the particular cadastral lot" (Art. 368, Par. 3 of ZV) [134].

The right to use for the purpose of construction, which was transformed into the right to use upon construction of building (Art. 12, Par. 1 of ZOVO),[135] was registered in the land registry on the basis of agreement on mutual rights and obligations concluded between the transferee and the municipality (Art.51, Par.3 of ZGZ). The agreement was concluded on the basis of decision of „municipal assembly… after the implemented procedure set forth by this law" Art. 51, Par. 1 of ZGZ.[136] The decision on allotment of undeveloped construction land for use for the purpose of construction was made by a competent body of the municipal assembly upon completion of the procedure of open competition, or the land was assigned for construction by direct negotiation (Art. 47–50). This procedure was implemented after „taking of construction land from the possession of former owner or user".[137] The doubts as to legal nature of the allotment act (act of transaction or act of authority)[138] were removed by

---

[133] Kosović-Marković, M., Pretpostavke za izdavanje građevne dozvole u svjetlu sudske prakse, ZPFR, vol. 18, no. 1, 1997, p. 245–260; Kosijer, M., Primjena Zakona o postupanju s objektima građenim protivno prostornim planovima, Informator, year XLI, no. 4054, 1993; Simonetti, P., Građanskopravni položaj..., op. cit.; Gavella, N., Zakon o vlasništvu i drugim stvarnim pravima – bitne novosti s osobitim osvrtom na stjecanje vanjskog priraštaja nekretnine, Godišnjak 4, Aktualnosti hrvatskog zakonodavstva i prakse, Organizator, 1997, p. 53-54. (on ownership of temporary object such as construction object that is constructed without building permit).

[134] Art. 6 of the Law on amendments and supplements to the Law on ownership and other real rights, NN 79/06 of 17 July 2006 which amended Par. 3 of Art. 368 by omitting „decision on taking of construction land from the possession of former owner or user" as the presumption for registration of right of ownership of entire real estate: land and building.

[135] Simonetti, P., Pravo korištenja …, op. cit., p. 193-207.

[136] Ibid,, p. 145-163.

[137] Ibid., p. 67-70.

[138] Ibid., p. 149-153 and Volume 1.

ZGZ SRH[139], which came into force on 8 January1981, stipulating that against the decision on allotment of construction land for use, as well as against the decision on dispossession of former owner, which preceded the decision on allotment, „an administrative dispute may be initiated" (Art. 53, Par. 4, refined text of ZGZ). If on the date of coming into force of ZV the right to use construction land in the favor of building owner was not registered in the land registry, the following is requested for registration of the right of ownership of entire land registry body (land and building) according to ZV:

- Executive decision of the authorities, „by which the right to use was awarded for the purpose of construction", i.e. the privileged right to use established for its holder;
- Agreement on mutual rights and obligations, which is concluded in accordance with the conditions set forth in the decision on allotment of land for use and
- Notice by competent cadastral body that building is located on the particular construction lot (Art. 368, Par. 3 of ZV).

The established privileged right to use for the purpose of construction was acquired by an enforceable decision of the competent authority.[140] The registration of such right in land registry had a declarative significance.

4.6. Land registry merger of land and building by depositing clausula intabulandi

In case that land is not registered in the land registry at all, the building owner shall acquire the right of ownership of entire real estate (land registry body) by following aforementioned procedure and, instead of by registering at the land registry, by presenting to the court a document on the basis of which registration of the right of ownership according to aforementioned provisions could be allowed, to which the general provision of Art. 120, Par. 4 of ZV on acquisition of the right of ownership by presenting the appropriate certified document to the court (Art. 368, Par. 4 of ZV) shall be applied in an appropriate way.

4.7. Land registry merger of land and unregistered building constructed on land that is acquired on the basis of empowered legal transaction

Everything that is set forth in favor of the former owner of a nationalized (socialized) construction land (supra) concerning acquisition of the right of ownership of land on which he has constructed a permanent building, which is legalized, is also valid for the persons who have acquired the right to use undeveloped construction land (temporary right to use, privileged right to use: exercised or unexercised) by inheritance or on the basis of a legal transaction (supra).[141] This is also valid in the case when a legal transaction was null and void due to past legal limitation of disposal of a socialized undeveloped construction land (Art. 55 of ZGZ), which was in the possession of former owner or his successor,[142] because such legal transactions are empowered by Law „if they do not have other defects that make them null and void or refutable" (Art. 18, Par. 1 of ZN).[143]

---

[139] After the decision of the Constitutional Court of the Socialist Republic of Croatia, Rg. no. 38/78 of 11 May 1978, NN 24/78.

[140] More on this: Simonetti, P., Prava na građevinskom zemljištu (1945-2007), p. 233-238 (Volume 1).

[141] Simonetti, P., Denacionalizacija…, op. cit., p. 207-208.

[142] Simonetti, P., Pravo korištenja…, op. cit., p. 58-62; Bagić, S., Denacionalizacija…, op. cit., p. 327-328.

[143] Law on compensation for property nationalized during Yugoslav communist rule, NN 92/96, 39/99, 42/99, 99/99, 40/00, 131/00, 27/01, 65/01, 11/02, 80/02 and 81/02 (corrected).

But, if transfer of right on undeveloped construction land was carried out on the basis of such forbidden legal transaction, the department in charge of property affairs within the government administration offices in counties acknowledges such right, which is transformed into the ownership right of the transferee, and the transferee is obliged to pay the tax on real estate trading within 15 days from the receipt of the decision if such tax is not paid before coming into force of ZN on 1 January 1997 (Art. 18, Par. 2 and 3). These provisions are also analogously applied to the land on which the transferee has in the meantime built a building with building permit (or with subsequent approval – legalization) because somebody who has built a building on the land acquired in this way cannot have less rights than somebody who hasn't built any building. When an agreement on transfer of right to use socially owned undeveloped construction land is empowered by law, then such right is even more empowered on the land on which a building has been subsequently constructed because legalization of the building transforms the same right to use (right to use for the purpose of construction) into the permanent right to use according to the law itself.[144]

4.8. Establishment of legal unity of land and building constructed without legal basis (right to use for the purpose of construction) on socially owned construction land

Under the presumption that a person has illegally usurped some socially owned undeveloped construction land, ZGZ has stipulated that the municipal administrative sector that is in charge of property affairs shall set the deadline prior to which the usurper is obliged to surrender the land to the possession of the municipality (Art. 54, Par. 1 of ZGZ). If the person who has illegally usurped the land has constructed an „object", such „object" was transferred into social ownership without the right to compensation (Art. 54, Par. 2). The Constitutional Court of the Republic of Croatia revoked this provision in 1992 as contrary to the Constitution of the Republic of Croatia[145]. Therefore, it is deemed that the owner of such building could have requested compensation or restitution of ownership right according to the provisions of the Law on compensation (Art.2, Item 15, and Art. 22-28, as well as 40–43) if the building had been transferred into social ownership by the decision of a competent authority, made on the basis of the provision of Art. 54, Par. 3 of ZGZ, which was also revoked by the same decision of the Constitutional Court of the Republic of Croatia. This is valid under the presumption that the construction was legalized. The owner of non-legalized building does not acquire the right of ownership of land because only the building built in accordance with the law can form legal unity with the land that was legally separated from a socially owned land by the permanent right to use (Art. 12, Par. 1 of ZOVO). Non-legalized building has the legal position of a temporary building – all the time prior to legalization, and temporary buildings are, according to the law, legally separated from land (Art. 9, Par. 3 of ZV).

In the case when legal requirements for restitution of ownership right to former owner or his legal successor are met[146], the legal unity of land and building is established in the favor of builder, i.e. his legal successor, and even in the favor of the person with valid legal

---

144 On establishment of permanent right to use in relation with construction of building without legal basis, see: Simonetti, P., Trajno pravo korištenja i njegova u pretvorba u pravo vlasništva, ZPFR, vol. 20, no. 2, 1999, p. 492-502; Petrović, D., Pravo svojine na bespravno podignutim objektima, Naša zakonitost, year 38, p. 10-11, 1984, p. 1166-1167.

145 Decision of USRH no. U-14/87 of 30 November 1992, NN 44/92.

146 Simonetti, P., Prava na građevinskom zemljištu (1945-2007), p.366-386.

basis for acquiring the ownership right, regardless if the ownership right transfer could have been performed at the time of conclusion of the legal transaction, because even agreement on sale of another's thing is binding upon contracting parties, and only the buyer „who did not know and could not know that thing belongs to somebody else" can terminate it „if the purpose of agreement cannot be realized due to this" (Art. 460 of former Law on Obligations, now Art.382 of ZOO).[147] Such agreement is binding the seller to acquire the right of ownership, so he could transfer it to the buyer on the basis of the same agreement.

In the case that the owner (''possessor'') of an object constructed without legal basis on a socially owned construction land has missed the term for submitting the request for legalization (Art. 72 of ZGZ of 1980)[148], so his object is transferred into social ownership, he could have requested annulment of such decision after 2 May 1990 (Art. 18 of Law on amendments and supplements to ZGZ)[149]. In the case that this decision is annulled, the legal unity of land and building is also established in favor of the building owner, by analogous application of the provision of Art. 368, Par. 3 of ZV. These rights also belong to citizens who have acquired object on the basis of an empowered agreement or act of a state authority[150]. The same rights used to belong to social-legal persons who have constructed such object and those who have acquired it „on the basis of an agreement or acts of a state authority" but missed the two-year period for legalization referred to in Art. 90, Item 2 of ZGZ (Art. 19 of Law on amendments and supplements to ZGZ). The right of ownership of such real estate was acquired by legal successor of social-legal person by transformation in the procedure of transformation of social company or by transformation of the right of social-legal person into the ownership right of its legal successor – legal person on the basis of a special law (Art.390 of ZV).

4.9. Acquiring right of ownership of real estate by transformation of right to manage or right to use or right to dispose of building

By appropriate implementation of provisions of Art. 367 and 368 of ZV, the right of ownership of entire real estate is also acquired by legal person who has acquired the right of ownership of building by transformation of the right of management, right to use, or right of disposal (existing on the date of coming into force of ZV), according to provisions of ZV or other law (Art. 369 of ZV), and not the social legal person who used to have the right of management, right to use, or right to dispose of the land.[151] Under this hypothesis, as well, for the purpose of establishment of legal unity of land and building, inversion of the rule *superficies solo cedit* is applied. In the system of legal duality of land and building, building is the principal thing and land is an accessory. Therefore, by establishment of real estate legal unity, the building owner is acquiring the right of ownership of the land. Upon establishment of legal unity of land and building, land is the principal thing and whatever is linked to the land is its

---

[147] Simonetti, P., Rasprave iz stvarnog prava, Faculty of Law, University of Rijeka, 2001 – Pravni učinci pravnog posla o otuđenju tuđe nekretnine, p. 131–139.

[148] This term was determined by the decision of Municipal Assembly and could not have been shorter than six months from coming into force of such decision (Art. 72, Par. 2). Upon adoption of the decision, the competent administrative organ in charge of the property affairs invited interested persons to submit within the specified term the request for allotment of construction land on which the building was constructed or significant works on its construction were carried out (Art. 72, Par. 3).

[149] NN 16/90 of 24 April 1990.

[150] Art. 17 and 18 of the Law on amendments and supplements to ZGZ, NN 16/90.

[151] The hypothesis is that one social legal person had one of aforementioned rights over building and another person (usually Municipality) over land.

increment - internal (for instance, fruits of land) and external: everything that is sown, planted or constructed on the land and everything that is linked to the land in the future is its accessory *(accessorium*) because land is, without exception, the main thing (*res principale*) in the system of real estate legal unity. Land in legal sense is also the right to construct (Art. 280, Par. 2 of ZV), so the building is, logically, accessory to the right to construct as it was land (Art. 280, Par. 3) and by this is legally separated from land.

5. Separate unit of real estate according to Croatian law

The Law on ownership, which has established legal unity of land and building, has affected the legal nature of the institution of condominium ownership, following the example of the analogous legal institution in the Austrian law (Wohnungseigentumgesetz)[152]. This is a brief outline of this novelty in the Croatian law.

5.1. Concept

Contrary to the former legal institution of real estate legal duality, the Law on ownership is following the principle *superficies solo cedit* without any exception: building is always an accessory of land or right to construct as if it was land. Therefore, there is no right of ownership of building, but of real estate, and, therefore, the object of right of ownership is not a separate unit of building, but a separate unit of real estate, which consists of land and building or right to construct and building, and such real estate is an indivisible legal monolith. Indeed, building can be separated from land by right to construct, but then building is accessory of right to construct as if it was land (Art.280, Par.3 of ZV), from which it cannot be legally separated (Art. 285, Par. 3 of ZV). The right of ownership of a separate unit of real estate originates from the right of co-ownership of real estate and it cannot be legally separated from it (Art. 69 of ZV).

5.2. Object

In regard to the object of a separate unit of real estate, ZV has the following principal position: „Ownership of a separate unit may be established over a part of co-owned real estate that forms an independent unit for use, suitable for independent execution of co-owner's authorizations, like an apartment or other independent room." (Art. 67, Par. 1).

5.2.1. Legal definition of apartment

Legal definition of apartment is not provided by ZV and it was not provided by ZVDZ, but it is set forth by ZNS.[153] According to this Law, apartment is „a group of rooms intended for inhabitation with strictly required premises that form a closed construction whole and have a separate entrance" (Art. 2, Par. 1). The definition in the Law on housing relations was similar (supra).

---

[152] More on legal nature of the institution of sectional title ownership in comparative law and law of SFRY, Belaj, V., Stvarnopravni odnosi na stanu kao posebnom dijelu zgrade (Ph.D. thesis), Osijek, 1992, P. 102-120; Planojević, N., Etažna svojina, op. cit. p. 153-173; Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu, ZPFR, year 15, 1994, p. 28-35.

[153] Law on rental of apartments, NN 91/96.

5.2.2. Independent room

„Among the other independent rooms are particularly independent business premises, independent garages, or clearly marked places in the building for keeping of motor vehicles" (Art. 67, Par. 2 of ZV), so-called „garage sites".

5.3. Common parts of real estate

The common parts of real estate are serving the real estate as a whole or their purpose is opposite to an exclusive use to the benefit of a particular part of real estate (Art. 67, Par. 6 of ZV), like, for instance, entrance to the building, lobbies on the same floor, stairs serving all parts of the real estate, etc. In the case of a doubt, it is deemed that non-independent part serves as a common one and its purpose is opposite to an exclusive use of particular independent separate unit (Art. 67, Par. 6 of ZV)

Ownership right cannot be established over the common parts of real estate, regardless if they together serve the real estate as a whole – all separate units, or particular separate units or objects of two or more separate units of the real estate, because it would be contrary to its essential purpose that is opposing „exclusive use to the benefit of only particular separate unit of real estate" (Art. 61, Par. 6 of ZV), like, for instance, common entrance door to the building, common lobby, common stairs etc. A part of the lobby that is not an object of common use can be joined to a separate unit of real estate, i.e. apartment or independent room, as well as a part of attic that is bordering with this separate unit on the highest floor, or a part of basement that is bordering with apartment or independent room on the ground floor.

5.4. Subsidiary parts to which right of ownership of separate units of real estate can be extended according to ZV

ZV is making distinction between common parts of real estate and subsidiary parts of real estate, to which, under certain legal presumptions, the right of ownership of a separate unit may be extended.

„The right of ownership of a separate unit of real estate may be extended to subsidiary parts as well, like open balconies, terraces, basement or attic premises, house gardens, places for keeping of up to two motor vehicles per particular apartment or other independent room" (Art. 67, Par. 3 of ZV).

There are two general legal presumptions for extension of ownership right from a separate unit of real estate to subsidiary parts: one is objective and another is subjective one. The right of ownership of a separate unit of real estate may be extended to a subsidiary part under the presumption that it is clearly demarcated from other parts of the real estate, as well as that it is accessible from the boundary of real estate or its common parts or from such apartment, i.e. independent room, of which subsidiary part it would be (Art. 67, Par. 4). Therefore, a separate unit of real estate cannot be physically separated by other separate unit or by subsidiary parts to which the ownership right has extended from other separate unit of real estate. The subjective presumption is the consent given by the owners of separate units of real estate, to whom a particular co-owner's share belongs, for extension of the ownership right from particular separate unit of real estate to that share as a subsidiary part (Art. 41, Par. 1 and 85, Par. 1 of ZV). Such change (extension of ownership right to a subsidiary part) usually requires approval from a competent administrative authority.

5.5. Establishment of right of ownership of separate units of real estate

A right of ownership of particular part of real estate may be established only over a co-owner's share because it originates from the right of co-ownership of entire real estate and it is indivisibly linked to it (Art.68, Par.2 and 69, Par.1 of ZV). The co-ownership share, from which the right of ownership of a particular part originates, according to Art.68, Par.1 of ZV, must be „at least big enough to correspond to the ratio of useful value of such independent part to useful value of all apartments and other rooms of the entire real estate (corresponding co-owner's share)".

In case of a disagreement between the co-owners of entire real estate on whether the particular co-owner's share is appropriate to make it possible for the right of ownership of separate unit of real estate to originate from it and be established over it, this shall be determined by competent court „unless this Law stipulated otherwise" (Art.68, Par.2).

The right of ownership of particular part of real estate can be linked to particular co-owner's share, regardless of its size, only with the agreement of all co-owners of entire real estate because this is their optional right. Such agreement of co-owners is producing legal effects if it is expressed in a written document signed by all co-owners (Art.73, Par.1 of ZV). On the other side, „no co-owner may withhold his approval for establishment of ownership of a separate unit by another co-owner who has the appropriate co-owner's share, unless the establishment of such ownership of separate unit in the favor of co-owner terminates or limits the rights that are already belonging to him on the basis of his previously established ownership of the separate unit" (Art.73, Par.2 of ZV).

Since nobody's agreement (will) can be validly forced, the provision „cannot withhold his approval…" from Art.73, Par.2 of ZV, should be understood in the way that co-owner cannot successfully withhold his approval because, in the case of withholding, the other interested co-owner, with the co-owner's share that is „at least big enough to correspond to the ratio of useful value of such independent part to useful value of all apartments and other rooms of entire real estate" (Art.68, Par.1), can request from the court to establish his right of ownership of particular separate unit of real estate provided that all legal requirements are met (Art.68, Par.2 and 71, Par.1).

The ownership of separate unit cannot be established either on the basis of the court decision or on the basis of the document of approval of all co-owners „as long as competent authority does not confirm that particular apartment or room in particular building and on particular land lot is an independent useful unit". This „certificate" must include the list and description of separate units of the real estate and confirmation that they are constructed with the permit of competent authority" (Art.73, Par.3 of ZV). This certificate „may be replaced by the use permit that provides the evidence that the building is constructed according to the plan of separate units of real estate, while the building permit confirms that such separate units represent independent useful units" (Art.73, Par.4). The ownership of separate unit may be established on the basis of an enforceable decision by a competent court or the document confirming the co-owner's legal transaction (Art.73, Par.5).

The agreement of all co-owners of real estate on establishment of a separate unit (parts) of real estate is producing contractual effects if it is made in the form of a written document (Art.73, Par.1). Such agreement cannot be the basis for request for registration in land registry because it lacks the form of *clausula intabulandi*, but charges can be pressed to request the issuance of *clausula intabulandi* from any or all remaining co-owners who are withholding it, to issue it in a parity term, so in the case of failure to fulfill such obligation (determined by court decision), the court decision shall replace *clausula intabulandi*.

An enforceable court decision and an agreement of all co-owners in the form of *clausula intabulandi* are material presumptions of registration of the right of co-ownership of entire real estate and the right of ownership of separate units (Art.43 and 44 of ZZK)[154].

6. Rules for linking right of ownership of separate unit of real estate to right of co-ownership of real estate

6.1. Establishment of legal unity of land and separate unit of building

The Law on ownership of separate units of building, which separated family residential building from privately owned land and, after 8 October 1991, all other condominiums that were transferred from social into private ownership before 1 January 1997, ceased to be valid on 1 January 1997 when the Law on ownership came into force (Art. 394, Par. 1, Sub-Par. 2), so since 1 January 1997, in accordance with the law, the right of co-ownership of real estate, consisting of land and building, and the right of ownership of separate parts of real estate (of separate units of building up to that moment) are established.

The transformation of rights over buildings and land in social ownership takes place in the period from 1991 to 1 January 1997 in the procedure of transformation of social companies or according to the law itself and independently of the renewal of Art. 12, Par. 1 of ZOVO (8 October 1991), which basically expressed the principle that a privately owned building and, consequently, a building of which ownership right was acquired by transformation cannot stand on socially owned land, so transformation of the right over socially owned building into ownership right establishes legal unity of land and building, exclusive of condominiums that were legally separated even from privately owned land according to the law in effect at that time (up to 1 July 1997).

According to the Law on ownership – ownership of separate unit of building (sectional title), as well as the right to dispose of separate unit of socially owned building, acquired in accordance with the former regulations, is the ownership of separate unit of real estate since 1 July 1997 (Art. 370, Par. 1).

Since 1 January 1997, the owner of separate unit of building becomes the owner of his separate unit of real estate, while the holder of the right to dispose (right of management or right to use) of separate unit of building also becomes the owner of separate unit of real estate (Art. 370, Par. 2). The ownership of separate unit of real estate is inseparably linked to particular co-owner's share of entire real estate according to the provisions of Par. 3 and 4, Art. 370 of ZV.

Instead of previous participation in common indivisible ownership of common parts of family residential building, with the right of co-ownership of privately owned land that belongs to the building, i.e. permanent right to use common parts of a socially owned condo-converted building with the right to permanent use of socially owned land, the previous owner of the separate unit of building (real estate) and the one who has acquired it by transformation of the right of disposal or by purchase of socially owned apartment are entitled to corresponding co-owner's share of entire real estate (Art. 370, Par. 3), which consists of land and building.

The size of co-owner's share of entire real estate is determined by application of the rules of ZV on the size of appropriate co-owner's share of real estate that authorizes the owner to have in his possession the separate unit of building, or more precisely, the separate unit of real estate (Art. 370, Par. 4 of ZV). Until the size of co-owners' shares is determined

---

[154] Josipović, T., Zemljišnoknjižno pravo, Informator, Zagreb, 2001, p.188-190.

according to these rules (Art. 74-78 of ZV)[155], it is deemed that the shares of all co-owners are equal. But, each of the real estate co-owners, even if he is not the owner of a separate unit of building, may request determination of the size of co-owners' shares, which shall be distributed among them by court in a fair manner (Art. 370, Par. 4). The right to distribution, therefore, belongs also to each co-owner of a separate unit of building, i.e. separate unit of real estate, who is by this also the co-owner of the entire real estate.

The persons who are, actually, not the owners of a separate unit of building, but the previous regulations provided them with a valid legal basis[156] for acquiring the ownership of a separate unit of building, are authorized on that basis to acquire the right of ownership of that separate unit of real estate (apartment, i.e. other separate unit of building linked to land) with the appropriate co-owner's share of entire real estate, of which size shall be determined according to the provisions of Par. 4, Art. 370 (Art. 370, Par. 5 of ZV).

The ownership of a separate unit of real estate linked to the particular co-owner's share of such real estate is registered in land registry with appropriate application of the Law on ownership's provisions on establishment of ownership of separate unit. All previously completed registrations of the right to dispose (right of management or right to use) of separate unit of socially owned building are deemed to be registrations of the right of ownership of separate unit of real estate linked to co-owner's share of that real estate, which is determined according to the provisions referred to by Par. 4, Art. 370 (Art. 370, Par. 6). This means that transformation of the right to dispose of separate unit of building into the ownership right, as well as transformation of the right to permanent use of common parts of building and land that belongs to building into the co-ownership right, happened outside the registry and by law itself or in the procedure of transformation of social companies. The right of ownership of apartment as a real estate that consists of land and condominium, as it was mentioned above, was established with the cessation of validity of former Law on ownership of separate units of building and coming into force of ZV on 1 January 1997.

6.2. Obligation of owner of purchased apartment to pay compensation for acquiring co-owner's share of land

6.2.1. On obligation of payment of compensation for land

The owner who acquired a separate unit of real estate by agreement on sale of apartment and registration in land registry according to the provisions of the Law on sale of socially owned apartments subject to tenant's right (Art. 23, Par. 1) was obliged, after acquiring also the right of co-ownership of land (entire real estate) on the basis of provision of Art. 370, Par. 3 of ZV, to pay compensation to „previous land owner" in amount of the value of benefit acquired in such way (Art. 371, Par. 1).[157] The obligation of such compensation consists of

---

[155] See amendment to Art. 74, Par. 2, Sub-Par. 5 in Art. 2 of Law on amendments and supplements to the Law on ownership… NN 79/06 of 17 July 2006.

[156] Art.1, Par.3 of ZPZZ. Legal transaction, decision by court or other competent authority (Art. 20 of ZOVO).

[157] According to the Law on sale of apartments subject to tenant's right (NN 27/91, abbreviated: ZPS), before the first renewal (Law on amendments and supplements to ZPS, NN 33/92) of 12 June 1992, the appropriate part of land was sold with the sale of apartment. The purpose of renewal was probably keeping of right of ownership of developed construction land in the possession of towns and municipalities with incorporation of right to construct of the owner (co-owner) of building (real estate) while it exists, but this intervention of legislator came too late because the Law on takeover of ZOVO had already transformed right to use construction land into ownership right of building owner (Art. 9) on 8 October 1991.

payment of such amount of money in such terms and in such manner in which the apartment buyer would be obliged to pay the land price if it was included in the apartment price pursuant to the provisions of the Law on sale of apartments… Provided that terms are beginning from 1 January 1997. All this is more thoroughly stipulated by the Rules of the Ministry of Spatial Regulation, Construction and Housing (Art. 371, Par. 2 of ZV).

The prescription term of the obligation of compensation, referred to in the Par. 1 and 2, Art. 371, could not begin before coming into force of ZV (Art. 371, Par. 3), i.e. 1 January 1997.

A buyer who had acquired the right of ownership of apartment before 1 January 1997 by registration in land registry or by depositing an agreement in the competent court – registration in the book of deposited agreements,[158] acquired on 1 January 1997, according to the Law itself, the appropriate co-owner's share of entire real estate – land and building (Art. 370, Par. 3 of ZV). Therefore, registration of the right of co-ownership of real estate and the right of ownership of a separate unit of real estate has a merely declarative significance. The right of ownership of separate real estate unit is inseparably linked to the right of co-ownership of entire real estate (Art. 66, Par. 1 and 270, Par. 2 of ZV). Therefore, withholding of registration in land registry, if an evidence that the transferee of the right of ownership of a separate unit of real estate (buyer of apartment) has paid the compensation for land to the previous owner according to the price determined pursuant to the Art. 370, Par. 2 of ZV (Art. 225 of the Law on land registry)[159] is not enclosed with the application for registration, was relevant only from the standpoint of publicity of the acquired right, which is achieved by registration of right in land registry with repercussions of protection of trust in correctness and completeness of land registry (Art. 122-124 of ZV).

6.2.2. Termination of legal effect of regulations on obligation of payment of compensation for acquiring co-owner's share of land and request for return of paid amount

With the coming into force of the Law on amendments and supplements to ZPS[160] (on 20 May 1998) the provisions of Art. 371 of ZV and 225 of ZZK (Art. 12) ceased to be valid. The buyers of apartments are, therefore, freed from the obligation of payment of land price according to the law, which they were obliged to pay according to the provisions of Art. 371 of ZV, so they are not obliged to enclose an evidence on the paid price with the application for registration of the right of co-ownership of real estate and the right of ownership of a separate unit (apartment) as it was set forth in the Art. 225 of ZZK.

The owners of apartments who have purchased together with apartment the associated part of land, over which the tenant's right exists[161] according to the provisions of the Law on sale of apartments, and did not request the return of money in the prescribed term shall, at their request, receive from State budget, after renewal of 12 June 1992[162], a part of the money they have paid for such part of land, namely in two installments during year 1999. When linked to the provision of Art. 12 of the Law on amendments and supplements to ZPS on termination of the obligation of payment of land price, the text of provision „part of the money they have paid

---

158 See: Rules on establishment and keeping of book of deposited agreements (NN 42/91 and 16/94)

159 NN 91/96.

160 Law on amendments and supplements to the Law on sale of apartments (NN 68/98).

161 NN 27/91.

162 NN 33/92.

for such part of land" must be understood as – the paid amount. That is, the right to return of the paid amount, which, as a rule, represents a part of the price that the apartment buyer was obliged to pay for the apartment. The request for money return is submitted to the Ministry of Finance within 60 days from the day of coming into force of the Law on amendments and supplements to ZPS, i.e. from 20 May 1998. (Art. 11 and Art. 14 of Law on amendments and supplements to ZPS). This term is preclusive (Art. 370 of Law on contractual obligations) because requests submitted after expiry of such term shall not be taken into consideration.

6.3. Separate units created by conversion, floor addition, „addition" [163] or extension of socially owned building with competent authority's approval

Separate units of buildings (apartments or independent premises) could have also been created by conversion of common premises in a multi-apartment building (for instance attic or cellar, i.e. their parts).

Those who had at their own cost completed such conversion of common premises in a socially owned building by turning them into apartments or other independent premises before 1 January 1997, with the approval of a competent authority within its authorizations for such property disposal, have in that way acquired, on the basis and within such authorizations, the right of ownership of converted rooms as a separate unit of real estate, together with the appropriate co-owner's share of entire real estate (land and building) in terms of the rule referred to in the Art. 370 (Art. 372, Par. 1 of ZV)[164].

The above rule is applied in the appropriate way to the separate units of building (real estate) created by:

– floor addition,
– extension and
– „addition" of real estate before 1 January 1997 on the basis of valid permit at one's own expense (Art. 372, Par. 2 of ZV).

The provision: „at one's own expense" should be understood in a broader sense, it relates also to a case when some third party has paid costs of construction for the builder on some civil law basis (compensation of mutual claims, gift, etc.).

6.4. Acquiring right of ownership by floor addition, partition or extension of another's building

In the opinion of court practice, „a change in real legal relations cannot be excluded" in the case when „significant" social funds are invested in reconstruction and adaptation of a private object so the original object ceased to exist in its prevailing part.[165]

According to earlier court practice, a conscientious (fair) builder would also acquire ownership right by partition of another's building in private ownership if a new thing (real estate) was created by this from the point of view of legal transactions, under the same presumptions as he would acquire ownership right by building on another's land (§ 418 of OGZ;

---

[163] According to Rječnik hrvatskog jezika (Dictionary of Croatian language) (Anić), issued by Novi liber, Zagreb, 1991: prigraditi (addition) = additional construction, additional building, to add by building. „Addition" in this case has a more narrow meaning than floor addition or additional construction. Floor addition and additional construction relate only to independent units of real estate and addition only to subsequently constructed parts without independent legal existence like, for instance, balcony, terrace, porch, stairs, etc. or expansion of already existing independent units, i.e. addition to separate unit of real estate.

[164] VSRH Rev 1103/2004-2, of 15 December 2004, IOVSRH, no. 1/2005,14.

[165] VSH Gzz 71/84 of 16 October 1985, PSP 29/18.

of 1 September 1980 – Art. 24, Par. 1 and 26, Par. 1 of ZOVO), [166] i.e. if the owner who knew about construction did not oppose it immediately.[167]

A fair builder would acquire the right of ownership of the separate unit of building by additional construction or floor addition even without legal basis if the builder owner knew about the construction and did not oppose it. (analogous to Art. 24, Par. 1 of ZOVO).[168]

According to the principal position of the Joint Session of Highest Courts of 23 October 1990, by additional construction, floor addition or adaptation of another's or co-owner's construction object (building), a conscientious builder would acquire the right of ownership of the separate unit of building provided that the building owner knew for construction and did not oppose it (pursuant to the Art. 24, Par. 1 of the Law on basic property relations).[169]

A social legal person would acquire the right to dispose of a separate unit of building under the same presumptions. In such case, common parts of building and construction lot were transferred to social ownership pursuant to the law (Art. 2, Par. 2 and Art. 5, Par. 1 of the Law on ownership of parts of buildings).

6.5. Acquiring right of ownership by additional construction or floor addition to separate unit of building on another's building

According to the rules of the property law, a building constructed on another's land without legal basis is an accessory to land in the possession of land owner (*superficies solo cedit)*. There is only one exception to this principle in regard to land. A fair builder is acquiring the right of ownership of land and building if the land owner knew about construction and did not forbid it immediately (§ 418 of OGZ[170]).

The position expressed in court practice is that, according to the Law on floor addition of 1956[171], which referred to the rules of the property law (Art 17.), a fair builder would acquire the right of ownership of an added separate unit of a socially owned building (apartment) if the building „management organ" did not oppose the floor addition (analogous implementation of the rule referred to in the § 418 of OGZ).[172]

---

[166] Decision of County Court in Rijeka, GŽ-153/73, of 20 December 1973, PSP-'NZ' 5/39; decision of Supreme Court of Croatia, Gž-2775/76, of 31 August 1976, PSP-'NZ', 10/57, and decision of Supreme Court of Yugoslavia Gz-57/68, of 26 November 1968, Bilten sudske prakse, Vrhovnog suda Jugoslavije, no. 25/1969, p. 11.

[167] More, P. Simonetti, Građenje na tuđem zemljištu, Svjetlost, Sarajevo, 1982, p. 213-215.

[168] See: Principal position 1/90 of 23 October 1990, XLIII Joint Session of Federal Court and Supreme Courts (PSP-47); VSRH, Gzz 19/1993 of 23 September 1993 and VSRH, Rev 1675/1993 of 23 September 1993, VSRH IO, 6/1994, no. 8; VSH, Rev-750/90 of 22 August 1990 PSP-52; VSH, Rev-1533/89 of 28 November 1990 PSP-51; VSH, Rev-1902/86 of 10 September 1987 PSP-37; VSH, Rev-207/82 of 20 April 1982 PSP-21; VSH, Rev-633/88 of 22 November 1988 PSP-44; VSH, Rev-257/87 of 25 June 1987 PSP-37 and VSH, Rev-2598/86 of 2 June 1987 PSP-36.

[169] Principal position of the Joint Session of Federal Court, Supreme Military Court, Supreme Courts of Republics and Autonomous Provinces of 23 October 1990 (PSP 47/17) and in the Bulletin of Court Practice of the Supreme Court of Bosnia and Herzegovina no.1/1991, sentence no.114, p.55.

[170] §§ 418 of OGZ states: „On the contrary, if somebody has built with his material on another's land, without knowledge and contrary to the will of the owner, the building belongs to the land owner. A fair builder may request compensation of costs that are required (in original „nothwendigen"=necessary) and useful; and an unfair builder is to be treated in the same way as the one who is doing another's jobs without order. If the land owner knew about construction and did not forbid it immediatelly to the fair builder; he could not ask for the land, but the general price."

[171] NN 55/56, 46/61, and 40/64.

[172] VSH Rev-1205/86 of 5 November 1986, PSP-'NZ', 33/25.

In the case of construction of building on land in private ownership, this exception was also familiar to ZOSPO[173], which stipulated the following: „Person who can be holder of the right of ownership and who has built a building and other construction (construction object) on the land over which other person has the right of ownership (builder) would acquire the right of ownership also of the land required for regular use of such construction object if he did not know and could not know that he was building on another's land and the land owner knew about the construction and did not oppose it immediately" (Art. 24, Par. 1).

The court practice has by analogy extended application of aforementioned rule to the additional construction and floor addition to a separate unit of building. At the last Joint Session of Federal Court, Supreme Military Court and Supreme Courts of Socialist Republics and Autonomous Provinces on 23 October 1990, the Principal opinion was adopted with this text:

„By extension, floor addition or adaptation of another's or co-owner's construction, the ownership right is not acquired unless law or agreement stipulates otherwise.

As an exception, by extension and floor addition to a separate building unit, a conscientious builder would acquire the right of ownership of a separate building unit only if building owner knew about construction and did not oppose it (Art. 24, Par. 1 of the Law on basic property relations)".[174]

The Law on ownership, which *pro futuro* excludes the possibility of acquiring ownership right by extension, floor addition, conversion and investment, unless otherwise is decided by owner of the real estate with extension, floor addition or addition (Art. 156), has acknowledged the acquired rights in general by setting forth:

„The coming into force of this Law does not interfere into existing relations between owner, i.e. co-owners of the thing, on one side, and the persons who have acquired rights over such things on a valid legal basis and in a valid manner on the other side" (Art. 389, Par. 1)

Therefore, the Law on ownership also acknowledges the right of ownership of a separate building unit acquired by a conscientious builder by extension or floor addition to another's building prior to its coming into force (1 January 1997).

Request for decision that extension, floor addition, addition or adaptation of another's or co-owner's building has led to acquisition of the right of ownership according to the rules of ZOVO[175] does not lapse so it can be submitted even now[176]. The acquisition of the right of ownership and other real rights before ZV came into force is adjudged according to the rules that were applied at the moment of acquisition (Art. 388, Par. 2 of ZV).

6.6. Registration of right of ownership of separate real estate unit created by conversion, floor addition, „addition" or extension

If conversion, floor addition, „addition" or extension is completed before 1 January 1997 in accordance with the above rules, the competent court shall, at the request of an interested person, order registration in the land registry of the right of ownership of a separate real estate unit, established on the appropriate co-owner's share of entire real estate (land and building), on the basis of an executive court decision that determines that the right of owner-

---

[173] Law on basic property relations (Official Gazette of SFRY 6/80, and 36/90) which came into force on 1 September 1980.

[174] Žuvela[5], p. 564 no. 120, and in: Informator, year XXXIX, no. 38/86 of 5 June 1991.

[175] Appropriate implementation of provision of Art.43, Par.3 of ZOVO.

[176] Revindication claim is also included in the request for establishment of right of ownership if the claimant is not registered as the owner of particular real estate, and revindication claim does not lapse unless otherwise is set forth by the law (Art.161, Par.2 of ZV).

ship of the separate real estate unit has been acquired, as well as such decision that determines the size of co-owner's share, i.e. on the basis of the document signed by all co-owners of the real estate, by which they acknowledge acquisition of the right of ownership of the separate real estate unit and in agreement determine the size of the appropriate co-owners' shares on which such ownership is established (Art. 372, Par. 3).[177]

The right of ownership of separate real estate unit acquired by conversion, floor addition, addition or extension shall be registered on the basis of an enforceable and executive adjudication that establishes that right or legally valid document on agreement (settlement) concluded between the transferee and the real estate owner, by which the size of co-owners' shares is determined.

The Law on ownership allows registration of right of ownership of separate real estate unit on the basis of executive court decision that determines that such right has been acquired according to the above rules. In such case, adjudication determines that ownership right has been acquired outside the registry, on the basis of law itself, when all legal requirements for this are met. The enforceable adjudication is, therefore, just declaring, in an authoritative manner, that right of ownership has been acquired on the basis of law itself. In addition, if the preclusive terms within which regular and special legal remedies may be filed against the adjudication have expired, nobody can dispute the sentence of the enforceable adjudication.

6.6.1. Acquiring right of ownership with trust in land registry

In spite of what was mentioned above, the owner with such adjudication is not protected from the third person who has acquired right of ownership with trust in the land registry and in good faith. The reason for this is that the transferee (in this case, the third person) „acquires real estate by registration as if from its owner if he has acquired it, while acting in good faith and with trust in land registry, from the person who was registered as the owner of such real estate, although he wasn't, provided" that „registration is not deleted due to invalidity" (Art. 123, Par. 1 of ZV).[178] The transferee was in good faith if at the moment of conclusion of legal transaction and also at the moment when he requested registration he did not know and, considering the circumstances, did not have enough reason to suspect that thing did not belong to the transferor (Art. 122, Par. 2 of ZV).

6.6.2. Notation of dispute

An unregistered property owner may protect himself from any third-party transferee of real estate by submitting a proposal to the land registry court for notation of the dispute at the same time or after filing a petition to determine if he has acquired the ownership right (Art. 187 of the Law on Civil Proceedings) or when he initiates a proceeding „before other competent authority", on the outcome of which „the registry right depends" (Art. 81, Par. 1, and 2 of ZZK). In such case, the enforceable adjudication that has adopted the claim shall act

---

[177] See Art. 388, Par. 2 of ZV, which states: „Acquisition, change, legal effects and termination of real rights before coming into force of this Law are adjudged according to the rules that were applied at the moment of acquisition, change and termination of rights and their legal effects."

[178] Art. 123, Par. 2 states: „Deletion of registration referred to in Paragraph 1 of this Article may be requested because of falseness, invalidity of predecessor's registration by petition for deletion within three years from the moment of submission of request for prececessor's registration; but somebody who has been duly informed on prececessor's false registration may request deletion of registration because of falseness of predecessor's registration only if he has requested notation that such registration is disputable and immediatelly, within 60 days from the expiry of term for appeal at the latest, pressed charges against those who have acquired the right by the disputed registration or on the basis of it acquired further registrations in the land registry."

against such persons „who have acquired registry rights after the request for notation of the dispute reached the land registry court" (Art. 81, Par. 2 of ZZK). „The adjudicated right gets such place in the preference order that was secured to it by notation of the dispute" (Art. 81, Par. 3 of ZZK). The presumption that an unregistered transferee submitted request to the competent court for notation of the dispute on the same day when he filed a lawsuit to determine the ownership right or initiated a procedure before other competent authority, or after that, for instance, on 12 February 2009 at 1 PM, and that a third party submitted on the same day at 2 PM the request for registration (transfer) of the ownership right, which is disputed by the petitioner, and that the procedure before court or other competent authority is finalized by an enforceable decision that determines that the disputed right belongs to him, he will get the first place in the preference order, obtain deletion of the registration of the later transferee and register his ownership right. So, the person who wins registration of ownership right over the registered land owner at the request submitted to the court after the request for notation of the dispute shall acquire the ownership right under the termination condition. If the person who has submitted request for dispute notation obtains the disputed right by an enforceable decision of the court or other competent authority, this right shall be registered with previous deletion of the conditionally acquired ownership right of the third person.

6.6.3. Suspension of principle of acquiring right of ownership with trust in land registry

The rule on protection of trust in land registry is not applied till 1 January 2010, for full ten years from the day of coming into force of the Law on ownership, which regulates it, if the real estate acquired in this way was the subject of social ownership that was not erased before 1 January 1997 (Art. 388, Par. 5 of ZV) regardless of the fact it had been terminated before that outside the registry by transformation or on other legal basis, but it was erased after 1 January 1997 or it has not been erased at all till the present day. The suspension prior to 1 January 2007 concerns only real estates in cadastral districts for which EOP land registry was opened, as well as real estates that are entered into the Land Registry Database according to the special provisions of the Law on land registry[179].

The suspension of this rule is protecting transferees of ownership right (and other real rights) originating from former right of management, right to use or right of disposal. *Ratio legis* of this suspension is that there was a much bigger discrepancy between legal situations in the land registry and outside it in regard to real estates in social ownership than in regard to real estates in private ownership. The biggest discrepancy exists regarding agricultural land, forests and forest land because the Republic of Croatia has acquired the ownership right over them by law[180], and not the legal successors of social legal persons who had the right of management, right to use or right of disposal of such real estate, but this discrepancy is easier to notice and prove. The legal relations of such legal discrepancy in regard to construction land are far more complicated and even more in regard to buildings and separate units of buildings (real estate).

Such suspension is, therefore, protecting all the persons: legal and physical (the latter in the view of the right over construction land in social ownership), and not only privileged persons referred to in the Art. 159, Par. 4 of ZV, against which ownership right is acquired by maturity by expiry of double period of time.

---

[179] Art. 3 of Law on amendments and supplements to the Law on ownership…, NN 141/06.

[180] Of forests and forest land on 16 October 1990 (Article 6 of the Law on amendments and supplements to the Law on forests, NN 41/90) and of agricultural land on 23 July 1991 (Art.3, Par.1 of the Law on agricultural land, NN 34/91).

The Law on real rights of the Republic of Srpska has suspended application of the principle of trust in the land registry (Art.55 and 56) for the period of three years from coming into force (Art.346, Par.3). The same was done by Draft ZSP of the Federation of Bosnia and Herzegovina (Art.55, 56 and 363, Par.3).

6.7. Accessories of separate unit created by conversion, floor addition, „addition" or extension

The right of ownership of separate unit of the person who had before 1 January 1997 completed at his expense, on the basis of the approval issued by a competent authority within the limits of its authorizations for such property disposal, conversion of common rooms in a socially owned building „to a unit that would serve his separate real estate unit" (for instance, extension of apartment or separate room to attic or basements, i.e. parts of attic or basement), extended to such unit „as accessory", except in the case when it cannot be accessory of such separate unit according to the provisions of ZV. (Art. 373, Par. 1). This provision is also applied in an appropriate way to floor addition, „addition" or extension of real estate completed before 1 January 1997 on the basis of valid approval of competent authority and at one's own expense (Art. 373, Par. 2 of ZV).

6.8. Legal effects of extension, floor addition, conversion or investments in another's building according to Law on ownership

After 1 January 1997, the Law has excluded acquisition of ownership right by extension, floor addition or alteration of building, i.e. premises in co-owners' common or others' buildings, as well as by „their addition, building in or investments in them … if otherwise is not decided by the owner of the real estate with extension, added floor or addition" (Art. 156, Par. 1 of ZV).[181] In such cases, the principle *superficies solo cedit* is valid without exception. Not even a conscientious builder can acquire ownership right by such intervention, not only of another's building, but also of the building over which he has a co-ownership right. By building, a co-owner acquires only the right of co-ownership proportional to his share of the part of building with addition or floor addition or of altered building or altered units, unless the constructed part is removed at the request of other co-owners. The Law on ownership in the Art. 156, Par. 2 sets forth: „The rules of the law of obligations determine if the right to compensation belongs to a person who has extended, added floor or altered the building, i.e. room referred to in the Par. 1 of this Article (in co-owners', common or others' buildings) or invested in such building or room".

Therefore, the Law has, in this case, excluded inversion of the principle *superficies solo cedit*, which is allowed by ZV in the case of construction on another's land or on the basis of another's right to construct if the builder was fair and the land owner knew abut the building „and did not forbid further construction without any delay" (Art. 153 and 157).[182] „By extension, floor addition or alteration (adaptation) of buildings, i.e. rooms in co-owners', common or other's buildings, as well as by their partition, building in or investments in them, the ownership right cannot be acquired" also according to ZSP RS, „unless the owner (co-owners, common owners) of the real estate with extension, floor addition or partition done did not determine otherwise" (Art.61, Par.1). The investor of such works „is entitled to compensation according to the rules of the law of obligations" (Art.61, Par.2). The same is set forth in Art.61 of Draft ZSP of the Federation of Bosnia and Herzegovina.

---

[181] Gavella etc., Stvarno pravo, p. 398-399.

[182] Gavella etc, Stvarno pravo, p. 394-395.

§3 Illustration of legal institutions pertaining to establishment of ownership rights and legal unity of land and buildings in the Federation of Bosnia and Herzegovina and in the Republic of Srpska

1. Legal separation of land and building

In the FPRY/SFRY, i.e. in the PR of B&H/FR of B&H, buildings were legally separated from the socially owned land by the permanent right of use of that land. This principle had no exceptions[183]. Buildings that were condominiums (mostly family residences) were legally separated even from the privately owned land, as the right of co-ownership of land did not extend to the building: owners of separate units shared a joint ownership of common parts of the building. Therefore, the separate units within the building are the principal items, while common parts of the building and the land are their accessories. Conversely, in the system of legal unity of land and building, the ownership right over separate units is derived from the right of co-ownership of the real estate, which comprises the land and the building, or the right to construct and the building.[184]

2. Establishment legal unity of land and building

2.1. Establishment of legal unity of land and building in the Federation of Bosnia and Herzegovina

In the Federation of Bosnia and Herzegovina, the legal unity of land and building in condominiums built on privately owned land was established on October 10, 1995, when the Law on Basic Property Relations[185] („ZOSPO", Art. 7) came into force. The same principle is confirmed by the present Law on Property Relations of the Federation of B&H[186] (Art. 12). This, of course, relates only to the condominia built on privately owned land. The Law on Basic Property Relations of the Federation of B&H of 1998 stipulated that owners of separate units within a building have an inseparable ownership of common parts of the building, which serve the purposes of separate units, as well as a joint right of ownership and not a right of co-ownership (ideal part), as was the case in the ZOSPO, over the land on which the building is situated and that serves for its regular use (Art. 22, Par. 1). This derogated the provision of Art. 6, Par. 2 of the Law on Ownership of Separate Units within Buildings[187]. ZOSPO, however, was in force (and applied) in the Republic of Srpska without this amendment until July 1, 2009.[188]

---

[183] P.Simonetti, Prava na građevinskom zemljištu (1945-2007) („Rights on construction land (1945-2007)"), pp. 259-282.

[184] Simonetti, P., Prava na nekretninama (1945-2007) („Rights on real estates (1945-2007)"), pp. 86-96.

[185] Sl.list R B&H, 37/95.

[186] Sl.novine F B&H, 6/98, 29/03.

[187] Sl.list SRB&H 35/77 which stipulated: If a building in condominium ownership is constructed on land owned by citizens or civil legal persons, each condo owner has an ownership right over an ideal part of the construction plot, proportional to the value of his separate unit compared to the total value of the building (Art. 6 par. 2)

[188] It ceased to be applied on July 1, 2009, when the application of the Law on Real Rights („ZSP"), Sl.glasnik RS 124/2008, Art. 355 par. 1 item b) and Art. 357 commenced.

2.2. Establishment of legal unity of building and land in social/state ownership in the Federation of Bosnia and Herzegovina and in the Republic of Srpska

2.2.1 Laws on construction land of 2003 in both entities

Legal unity of land and building pertaining to socially/state-owned construction land[189] was established in 2003 in both entities, under identical legal assumptions, pursuant to the Law on Construction Land of the Federation of B&H[190] (Art. 39-41) and the Law on Construction Land of the RS („ZGZ")[191] (Art. 39-41), with regards to the buildings that were privately owned on the day of coming into force of the law, as well as those that were transferred from social/state ownership into private ownership after this date through privatization, legal transactions or by force of law[192]. Exceptions are the buildings referred to in transitional provisions of Art. 87-92. Even though the laws are not explicit (Art. 39, par. 11), it is understood that the building is constructed pursuant to the law, as a building that is not constructed pursuant to the law is not considered a permanent building until it is legalized and only permanent buildings are merged with the land, pursuant to the rules of Civil Law (§§ 294 and 297 of the OGZ)[193]. Illegal construction on socially-owned construction land did not even yield the permanent right of use: it was only acquired by the act of legalizing illegal construction[194]. In case of legalization, the building acquired permanence and a permanent building is separated from the socially/state-owned land by the permanent right of use, regardless of whether the building is privately or socially owned.

2.2.2. Law on Construction Land of the Republic of Srpska of 2006

The right of ownership, acquired pursuant to Art. 39 of the ZGZ of 2003, will be inscribed into the land registry on the basis of a request submitted by the building owner (Art. 42, par. 1 of the ZGZ of 2006). The surface area of the land, over which the owner (co-owner) of a building or its separate units acquires the right of ownership (co-ownership), unless it has been established in the regulation plan, will be determined by the body in charge of transactions in the field of the property law, after having acquired an opinion from the administrative body of the urban planning office (Art. 42, par. 2). The competent body cannot refuse to give this opinion as it is its legally prescribed obligation.

---

[189] In the Republic of Bosnia and Herzegovina, i.e. in the future Federation of Bosnia and Herzegovina, in 1992 the real estates that were socially owned were proclaimed the state property, but the kept rights were established, including the rights over construction land as well. Moreover, these rights were equally established until the identical laws on construction land were passed in both entities.

[190] Sl. novine FBiH 25/03.

[191] Sl. glasnik RS 86/03.

[192] More on the subject: Simonetti, P., Prava na građevinskom zemljištu (1945-2007) („Rights over construction land (1945-2007)"), pp. 417-464; same author, Reintegracija načela pravnog jedinstva nekretnine u Bosni i Hercegovini („Reintegration of the principle of legal unity of a real estate in Bosnia and Herzegovina"), Pravna riječ, Year III issue 2/2006 (Banja Luka).

[193] The Austrian General Civil Code was applied in B&H until April 6, 1941, as a positive legislation and since 1945 its provisions have been applied as legal rules on the grounds of Art. 4 of the Law on Invalidity of Legal Regulations Adopted Prior to April 6, 1941, and during the enemy occupation, edited text, Sl.list FNRJ, 86/46.

[194] Simonetti, P., Prava na građevinskom zemljištu (1945-2007) („Rights over construction land (1945-2007)"), pp. 266-267.

ZGZ of the RS of 2006 (Art. 47, par. 1) explicitly stipulates that, in case of a building constructed on a state-owned construction land prior to its coming into force (December 1, 2006):

- without the right of use for the purpose of construction, i.e.
- without a building permit, if it can be issued at a later date, the assembly of the local self-government unit shall establish the right of ownership in favor of the builder, or his legal successor, with the obligation of payment of a compensation „for the land sold in amount of the market value of construction land, costs of the equipping of construction land, and compensation for natural resources of that land (rent)".

Legal unity of land and building may not be established prior to the issuing of a final decision on a retrospectively issued building permit (legalization). By the letter of the law, the builder who had the right of use for construction purposes, but proceeded with construction without a building permit, is obliged to pay a compensation „for the land sold at the market price". This is not in accordance with the provisions of Art. 39-41 of the ZGZ of 2003, pursuant to which the building owner was not obliged to pay a compensation for the land in case of establishment of the legal unity of land and building. Being that the building owner is not obliged to pay this compensation pursuant to the ZPS of the RS (Art. 330 - 335) either, it can be expected that this obligation will be revoked by the Law on Amendments and Supplements to the ZGZ, which would have to be adopted by October 1, 2009, as prescribed by Art. 335, par. 3 of the ZPS of the RS. If the holder of the right of use for construction purposes who has built a building without a building permit is not exempt from paying the compensation for the land, the question of decreasing his obligation by the amount paid for the acquisition of the right of use for construction purposes will arise. In any case, the previous owner of the land or his legal successor who has constructed a building without having first established that he is entitled to a right of use for construction purposes, while the building has subsequently been legalized, is exempt from the obligation of paying a compensation for the land if the right of ownership of the land in question would have been restored to him even if he had not built the building (Art. 46 of the ZGZ).

2.3. Establishment of legal unity of land and building pursuant to the transitional provisions of the ZPS of the RS

Buildings that remained in social/state ownership until January 4, 2009, when the ZSP of the RS came into force, were transferred, in principle, into the ownership of persons within private and public law on that day (Art. 18 and 22 of the ZSP of the RS), together with the associated land. This is the essence of Art. 330, par. 1 of the ZSP.[195] It is necessary, however,

[195] Art. 330 states: „This law establishes legal unity of land and building if it has not been established on the basis of a special law (par. 1). The owner acquires the right of ownership of socially or state owned construction land belonging to his building (par. 2)". According to Art. 331, „If, prior to this Law's coming into force, permanent unity of land and building had not been established pursuant to the provisions of the special law, the building owner would have acquired the right of ownership of the land directly beneath the building, as well as of the surface area of land intended, pursuant to the regulation or subdivision plan, for the regular use of the building (par. 1). If the regulation plan or the subdivision plan do not regulate an area of land necessary for the regular use of the building, this surface area will be determined by a competent body of the administration for property affairs, after having acquired an opinion from the municipal administrative body in charge of urban planning affairs (Art. 2). The unity of land and building, on the land referred to in Par. 1 of this Article, will not be established prior to the completion of a review procedure, pursuant to the Law on Construction Land of the Republic of Srpska" (par. 3).

to make a distinction between the state ownership, to which the social ownership has been renamed, and the right of ownership that the Republic of Srpska has as a legal person of public law, pursuant to the ZSP of the RS (Art. 22).

If the linguistic differences are abstracted, the transitional provisions of the ZSP of the RS, quoted in this treatise, coincide with the transitional provisions of the Law on Real Rights of the Federation of Bosnia and Herzegovina (Art. 338-360)[196].

2.3.1. Establishment of right of ownership through merger of permanent building with land by inverting the superficies solo cedit principle

Only permanent buildings that are constructed pursuant to the law are merged with land.

Until it is legalized, a building is considered temporary even though it might be permanent by its intended use, as it can be removed at any moment based on an enforceable and executive order of a competent body. Therefore, as a temporary building, it cannot be legally merged with land. In this case, general provisions of the civil law pertaining to accession are applied, pursuant to which the owner of the principal thing has the right of ownership of the proportionally permanently merged thing (Art. 9).

Even though, pursuant to the rules of the civil law (§§ 294 and 297 of the OGZ) and pursuant to the ZSP of the RS (Art. 14, par. 1 and 2)[197], the land is the principal thing, giving the land owner the right of ownership of the permanent, or proportionally permanent building (*superficies solo cedit*), the legal unity of building and state/socially owned land is established by inverting the *superficies solo cedit* principle, by which the building owner acquires the right of ownership of the land that the building is built on and that serves the purpose of its regular use, because in the legal dual system comprising the land and the building - the building is the principal thing.

2.3.2. Specific provisions on legal merger of land and building

Specific provisions on merger of land and building that have not been entered into the land registry and were socially/state owned on January 4, 2009, will be described in detail below. The law provides for the following hypotheses.

2.3.3. Legal merger of land and non-registered building

Presuming that the building constructed on socially/state owned land has not been entered into the land registry and the land on which it stands has, the building owner who has not acquired the right of ownership of the land belonging to the building prior to January 4, 2009, will acquire it on January 4, 2009, pursuant to the provisions of Article 331 (Art. 332, par. 1).

2.3.4. Legal merger of building and socially/state owned land over which the building owner possesses a registered legally recognized right of use

Presuming that the owner of a building constructed on a socially/state owned land has a registered „temporary right of use, right of use for the purpose of construction, pre-emptive right of use for construction or permanent right of use" that has been granted to him by the force of Law, upon his request, a competent body will „order the inscription of the right of

---

[196] The difference in numeration of articles is a consequence of omitting the institution of land debt from the Draft (Art. 186 - 197)

[197] More on the subject: Simonetti, P., Prava na nekretninama (1945.-2007.) („Rights on real estates (1945-2007)"), pp. 46 - 56.

ownership into the land registry in his favor, of the whole real estate" (Art. 322, par. 2). This does not refer to permanent right of use pursuant to the ZGZ of the FR B&H of 1986 (Art. 40-43), as this right was acquired outside the registry, by constructing a building on a socially owned land pursuant to the law (Art. 57 of the ZGZ and Art. 12 of the ZOSPO), as well as at the moment when the developed construction land passed into social ownership, as the building had always been legally separated from the socially owned construction land by the permanent right of use[198]. Permanent right of use was inscribed in the land registry, along with the right of ownership or right of disposal of the building. This refers to the right over undeveloped construction land, registered in former times when the right of use for the purpose of construction was also called „permanent right of use".[199] Thus, for example, the Law on Trade in Land and Buildings[200] stipulated that the people's board of a municipality (district) may grant the right to permanent use of socially owned construction land to an individual for the purposes of construction (Art. 43), i.e. the right of use for construction, as per the nomenclature from the ZGZ from 1986.[201]

2.3.5. Merger of building and land over which the building owner does not possess a registered right of use

If there is a building constructed on a socially owned land and the building owner does not have a registered right of use for the land, the competent court shall, at his request, „order the inscription of the right of ownership of a real estate" comprising the building and the land referred to in Art. 331, Par 1 „if the requirements prescribed by the special law have been met". This provision has a principal significance, so it applies to other hypotheses of establishment of the legal unity of land and building as well. This refers to a permanent building, constructed with a building permit, for which the use permit has been issued after the construction, which confirms that the building is constructed in accordance with the building permit. This also refers to a permanent building constructed without a building permit if the competent body has subsequently legalized its construction by an enforceable decision[202]. All this is subject to the condition that a construction plot is formed according to the adequate spatial plan or by a decision of a competent authority.

2.3.6. Merger of unregistered building and land

Presuming that a building had been constructed on a socially/state owned land prior to January 4, 2009, but that „the land that the building had been constructed on has not been entered into the land registry", the owner acquires a right of ownership of the real estate,

---

198 See the positive legal expression of this principle in Art. 37 of the Law on Nationalisation of Buildings for Lease and Construction Land and Art. 70, par. 1 of the ZGZ. More on the subject: Simonetti, P., Pravo korištenja na građevinskom zemljištu u društvenom vlasništvu („Right of use of socially owned construction land"), Informator, Zagreb, pp. 201-207; same author: Prava na građevinskom zemljištu (1945-2007) („Rights on construction land (1945-2007)"), pp. 210-232.

199 See Art. 43. of the Law on Trade in Land and Buildings, Sl.list FNRJ 26/54; later, the same right was called simply „the right of use" (Art. 37 of the Law on Trade of Land and Buildings, edited text, Sl.list SFRJ 43/65, 57/65 and 17/67).

200 Sl.list FNRJ 26/54.

201 More in: Simonetti, P., Prava na građevinskom zemljištu (1945-2007) („Rights on construction land (1945-2007)"), pp. 57-68.

202 See the Uredba o legalizaciji bespravno izgrađenih objekata („Ordinance on legalization of illegally constructed facilities"), Sl.glasnik RS 55/2005.

comprising the building and land belonging to it (Art. 331) „pursuant to the provisions on acquiring rights over real estates that have not been entered into the cadastre" (Art. 332, Par 4). In such case, the rules on depositing a contract (clausula intabulandi) to the Book of Deposited Contracts (Art. 327, par. 4 and 334, par. 4) are applied.

2.3.7. Legal merger in case when right of management, use or disposal of land belongs to one person, while right of management, use or disposal of building belongs to another

Presuming that on January 4, 2009, one person held the right of management, use or disposal of a building, while another held one of these rights over the land, the right of ownership of the real estate will be inscribed, pursuant to the provisions of Art. 332, in favor of the building owner, i.e. the person in whose favor this right was transformed into the ownership right once the construction had been legalized (Art. 333).

2.3.8. Legal separation of permanent building and land through application of institutions of rights of construction and concession

According to the ZSP, permanent buildings are legally separated from the land in someone's possession by the application of the institution of right of construction (Art. 14, Par. 3 and Art. 286 of the ZSP of the RS). However, in such case, the building will unconditionally belong to the holder of the right of construction, as there is no right that could separate the building from the right of construction (Art. 291, Par. 3 of the ZSP of the RS).

Permanent buildings are separated by a concession from the land that is, by its intended use, general or public property, and they are completely independent real estates for the duration of the concession (Art. 7, par. 4 of the ZSP).

In the former case, the building is the property of the construction right holder, while in the latter, it is the property of the concessionaire. The holder of the construction right may at any time dispose of the building freely, on the grounds of the construction right, while the concessionaire can only do so if the person that the rights are transferred to can meet the concession requirements, i.e. with consent from the grantor, regardless of whether the consent is given under certain conditions, set forth in the concession agreement or lease contract (anticipated), or is granted subsequently, through an amendment and supplement to the concession, or through an amendment to the contract, pursuant to the legal regime of the said concession.[203]

3. Establishment of legal unity of real estate and its separate units in the Republic of Srpska

3.1.Establishment of legal unity of building and privately owned land

Pursuant to the civil law, permanent buildings are a constituent part of the land, owned by the land owner (§§ 294 and 297 of the OGZ). It was already stated that in the FPRY/SFRY and PR B&H/FR B&H, condominiums (practically, family homes) were legally separated from the privately owned land pursuant to the Federal Law on Ownership of Building Parts[204]

---

[203] Simonetti, P., Prava na nekretninama (1945-2007) („Rights on real estates (1945-2007)"), pp. 97-105.

[204] Sl.list FNRJ 16. and 48/1959.

and pursuant to the subsequent Law on Ownership of Building Parts of the FR B&H[205], [206], while this legal dualism was maintained in the RS until July 1, 2009, when the application of the Law on Ownership over Building Parts ceased (Art. 355, par. 1 t.b. ZSP of the RS).

Federal Law on Ownership of Building Parts (Art. 5, par. 3 and 6, par. 2) as well as the subsequent Republic Law on Ownership of Building Parts (Art. 4, par. 3 and Art. 6, par 2) stipulated that the owner of a separate part (unit) within a building (apartment or business premises) has the right of co-ownership of land and a shared right of ownership of common parts of the building. The right of co-ownership of land, therefore, does not extend to the building, of which common parts are in joint ownership, while the joint ownership of these parts does not extend to the separate units that are exclusively owned. In fact, there are several real estates: one is the land, another one is the building, and then there are as many real estates as there are independent units within the building, with different forms of right of ownership of these individual units: co-ownership, joint ownership, self-ownership. Conversely, pursuant to the ZSP, „ownership of a separate part of a real estate" (condominium) „stems from and remains inseparably linked to the adequate share in co-ownership (ideal part) of the real estate over whose separate part the ownership has been established, so it can only be transferred and encumbered together with it" (Art. 80, par. 1 of the ZSP).

3.1.1. Ownership right over separate parts of real estate

While the right of co-ownership of the privately owned construction lot, in the system of legal duality of land and building, was derived from the right of ownership of a separate unit of a building, in the system of legal unity of building and land (German and Austrian legal model, applied by the Croatian law as well as the ZSP of the RS), the right of ownership of a separate unit of a building stems from the right of co-ownership - co-owner's share of the „entire real estate". In the dual system, owners of separate parts had a joint right of ownership of common parts of residential buildings, or a joint right of use of common parts of family multi-residential buildings. Pursuant to the ZSP, co-owners of the real estate, comprising the land and the building or the right of construction and the building, have a right of ownership of separate parts (units) of the building. Right of ownership of a separate part of the building is inseparable from the co-owner's share of the entire real estate (Art. 80 and 334, par. 2).[207], [208]

---

[205] Sl.list SR B&H 35/77, 38/78 and 22/84

[206] Simonetti, P., Prava na nekretninama (1945-2007) („Rights on real estates (1945-2007)"), pp. 89-96.

[207] See Art. 81 of the ZSP RS.

[208] More on the subject: Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu („Legal nature of condominium ownership in national and comparative law"), Zbornik Pravnog fakulteta Sveučilišta u Rijeci, year 15, 1994., pp. 25-35; same author: Pravo građenja („Right of construction"), pp. 271-280. and O pravnoj prirodi etažnog vlasništva u usporednom pravu („On legal nature of condominium ownership in comparative law"): Planojević, N., Etažna svojina („Condominium ownership"), Kragujevac, 1997, pp. 153-182; Belaj, V, Stvarnopravni odnosi na stanu kao posebnom dijelu zgrade („Real law relationships on apartments as separate units within a building", doctoral thesis), Pravni fakultet u Osijeku, 1992. Differently, in the countries of Roman tradition, where units within a building are legally separated from the building that is co-owned by the separate units owners: Basile, M., Regime condominiale ed esigenze abitative (L´evoluzione dell´regime condominiale nei maggiori paesi dell´occidente europeo), Giuffrè, Milano, 1979, p.p. 87-155.

3.2. Establishment of ownership rights over real estates and separate building parts

3.2.1. General notes

Excluding family residential buildings, all other buildings, except for smaller business facilities, were socially owned and socially-owned buildings could not have been constructed on private property (argument from Art. 36 of the Law on nationalization of buildings for lease and construction land). A socially owned building is always separated from the socially owned land by a permanent right of use. This rule has no exceptions.

Therefore, multi-residential buildings (comprising more than two apartments or three smaller apartments) that were, by force or on the grounds of a legal transaction or on some other grounds, transferred into social ownership (prior to the nationalization), remained in social ownership even in those cases in which, after the nationalization (December 26, 1958), all separate parts were excluded from the nationalization. Registration of real estate in the land registry was performed accordingly[209]. Owners of separate units held a permanent right of use of the land belonging to the building and common parts of the building[210].

Multi-residential buildings transferred into social ownership, as well as those that were constructed subsequently, could not exist on a privately owned land; they were all, without exceptions, built on socially owned land. In a multi-residential building, therefore, all separate units or some of them could be privately owned, leaving others in social ownership (coexistence of private and social ownership), or all separate parts could be socially owned. Social legal persons had the right of disposal of socially owned separate units.[211] The majority of separate units in social ownership were transferred to private ownership based on the apartment purchase agreement, while a significant number of buildings, especially business facilities, were transferred to private ownership in the process of privatization of socially owned companies or on the grounds of a legal transaction outside such a procedure. Such condominiums were subject to establishment of legal unity of land and buildings in the RS on July 1, 2009, when the Law on Ownership of Building Parts ceased to be valid and the application of the ZSP began (Art. 355, par. 1, t.b and Art. 357).

3.2.2. Establishment of legal unity of real estates and their separate parts pursuant to the transitional provisions of the ZSP of the RS

As described above, legal unity of privately owned buildings on socially owned land was established pursuant to the rules of the ZGZ of 2003 by transformation of the permanent right of use to the right of ownership of the land belonging to the building (Art. 39 - 41).

Over those buildings that remained, as entities, socially/state owned until the ZSP came into force (January 4, 2009), legal unity of the real estate was established pursuant to the transitional provisions of that law (Art. 334). Right of ownership as well as right of disposal of separate units within a building „becomes the property of the separate part of the real estate" (Art. 334)[212], while the real estate represents the legal unity of land and building.

---

[209] Art. 5 par.2 Uputstvo o zemljišnoknjižnim upisima, nacionaliziranih najamnih zgrada i građevinskog zemljišta („Instruction on inscription into land registry, nationalized buildings for lease and construction land"), Sl.list FNRJ 49/59.

[210] Art. 5 par. 1 and 2 and Art.6 par. 1 of the Federal Law on Ownership of Building Parts

[211] Art. 1-7 Law on Ownership of Building Parts.

[212] Art. 334 par. 1 states: „Ownership of a separate unit in a building (condominium ownership) as well as rights of disposal of separate untis in the socially or state owned building, which have not been transformed into ownership rights until the day of coming into force of this Law, by its coming into force become the property of the separate unit within the real estate, pursuant to the provisions of this law".

Ownership of a separate part of a real estate is inseparably linked to a certain co-owner's share of the real estate as a whole, comprising the building and the land, regardless of whether the building passed into private ownership on the day the ZSP came into force (January 4, 2009) or subsequently, which is referred to in the final part of Art. 34, par. 2 that states: „over which the owners of separate units within the building had a joint ownership right prior to the day of coming into force of this law".

3.2.3. Registering a separate unit of a real estate

Inscription of a separate part of a real estate into the land registry is performed „with the adequate application of the provisions of this Law to the establishment of an ownership right over a separate part of the real estate" (Art. 334, par. 3). Therefore, ownership right over a separate unit of a real estate is established pursuant to Art. 81 - 89 of the ZSP of the RS, which coincides with the rules on the establishment of ownership of a separate unit from Art. 71-78 of the ZV of the RC *(supra)*.

3.2.4. Inscription of rights over separate building units to date

The law prescribes that „inscriptions of ownership rights over separate units within a building that have already been completed, or those of rights of disposal of a separate unit within a state owned building, are to be considered as inscriptions of ownership rights over the separate unit within the real estate„ (Art. 334, par. 3). This means that the co-owner's shares of the whole real estate will be determined at a later date and inscribed into the land registry. The right of ownership of separate units of a real estate, as well as the right of co-ownership of the whole real estate, shall be brought in accord with such inscription.

3.2.5. Inscription into the Book of Deposited Contracts

If a real estate, comprising land and building, has not been entered into the land registry, inscription of the right of ownership of a separate unit of the real estate, as well as the right of co-ownership of the whole real estate, is done by submission of an „ownership acquisition certificate", pursuant to the rules from Art. 85 of the ZSP (Art. 334, par. 5)

Art. 334, par. 2 states: „If the Book of Deposited Contracts is not kept in the Land Registry Office, the competent body in charge of keeping these records is obliged to submit the originals of deposited contracts to the Land Registry Office within 6 months of the day of coming into force of that Law". This deadline expired on July 4, 2009.

3.2.6. Costs of inscription of ownership rights over separate units within a building

In principle, costs of inscription of ownership rights over separate units within a building (i.e. real estate) are to be paid by the separate units owners. The ZSP of the RS prescribes: „Costs of inscription of ownership rights over separate units within a building are paid by the condo owners, proportional to the value (usable surface area) of the apartment or another independent unit in comparison to the whole building" (Art. 334, par. 6).

Bearing in mind the significant number of impoverished owners of separate units (apartments), or, more precisely, owners of separate units of real estates, who do not have the means to bear the costs of inscription into the land registry, the Law prescribes that „Government of the Republic of Srpska will adopt a bylaw defining the conditions under which the Republic of Srpska will cover the costs of inscription of condominium ownership into the land registry" (Art. 334, par. 7).

3.2.7. „Right of pre-emption" of co-owners of separate parts of a real estate, co-owners of an inseparable real estate and co-owners of a „family" home

The ZSP of the RS regulates a specific legal institution, which is not recognized by the Croatian ZV – „the right of pre-emption" of „condominium" (Art. 90). The ZSP RS prescribes that the right of pre-emption is granted to the „co-owners of a condominium" (Art. 90, par. 1). This provision is not entirely true, since the right of pre-emption is granted to the co-owners of:

- separate units within a real estate;
- inseparable building (that cannot be divided into separate independent parts) and
- „family residence" (Art. 90, par. 2 and 7).

In addition, in the system of legal unity of land and building, it is always a matter of a real estate comprising land and building, i.e. separate unit within a building, stemming from the right of co-ownership of a condominium real estate comprising the building and the land.

„Family residence" is, as a rule, synonym for „family home", which was used in the legal sources of the former FPRY/SFRY in the system that limited ownership rights to the buildings as well.

Right of co-ownership of a separate part of a building, of an inseparable building and a „family residence" is, as a rule, established pursuant to the law itself - by inheritance or acquisition through joint labor in a marriage. The institution of the right of pre-emption limits, to a certain degree, the principle of freedom of disposal, in order to protect certain other values. *Ratio legis* of this legal institution is to decrease the number of co-owners by the realization of the right of pre-emption, or to reduce the number of owners of a real estate in co-ownership to a single owner. Without this institution there is a danger that the co-owner's share will be acquired by a third party, based on a sales agreement, which then takes the place of the prior co-owner, which can further complicate an already complicated legal relationships. For this reason, limiting the principle of freedom of disposal by introducing the right of pre-emption of co-owners of such real estates, or independent units within real estates, is justified.

The co-owner selling his co-owner's share:

- in a separate part of the real estate;
- in an inseparable building (real estate);
- in a „family residence";

must make a written offer to other co-owners. The offer comprises „land registry or cadastral information on the real estate or the separate part of the real estate" that is put up for sale (Art. 90, par. 3).

Co-owners receiving this offer may, within 60 days of having received the offer, inform the „offerer on acceptance in writing".

„In writing" is an essential component of the „offer" and „acceptance". This means that both the offer and the acceptance are legally void if not submitted in writing.

If the offeree does not notify the offerer „on acceptance" „in writing" within 60 days of having received the offer, the offerer is free to „sell his share" to a third party, but not at a lower price or under more favorable conditions (par. 4).

Holders of the right of pre-emption may request that the „court declare the contract null and void allowing them to purchase the share under the same conditions" if the offer is not submitted to them pursuant to the law, or if the co-owner sells his share „to a third party under more favorable conditions" (par. 5).

Traditionally, penalty for a breach of the right of pre-emption is refutation (annulment) of the contract and the deadline for annulment is, most often, 6 months. This is the case, pur-

suant to the Law on Obligations (ZOO) in force (Art. 532, par. 1). Increasing the sanction to a degree of annulling the contract without a set deadline for the request (lawsuit) for annulment of the contract *ex officio* (Art. 109 and 100 of the ZOO) is contrary to the interests that are protected by the legal institution of the right of pre-emption.

For this reason, these rules will probably be interpreted in practice in accordance with subsidiary rules on legal pre-emption, pointing to the adequate application of the rules on sale with the right of pre-emption (Art. 533 par. 4).

According to these rules, if the buyer has transferred an item to the ownership of a third party without having informed the seller (holder of the right of pre-emption), even though the third party has been informed or could not have remained uninformed that „the seller has a right of pre-emption", the seller may, within 6 months of the day that „he learned of the transfer, request that the transfer be annulled and that the item be transferred to him under the same conditions" (Art. 532, par. 1). In case of misinformation on the conditions of sale, on which the third party has been informed, or could not have remained uninformed, the 6 months deadline starts from the day that the seller learned of the exact conditions of the contract. „The right of pre-emption ceases, in any case, after 5 years of the transfer of ownership of the item to the third party" (Art. 532, par. 3).

The right of ownership of a real estate is transferred on the grounds of a legal transaction, by the inscription into the land registry. It seems that, in this case, the interpretation of the „transfer of ownership" (as defined in the ZOO), instead of the transfer of ownership right through the inscription into the land registry is more appropriate, as the transfer of ownership of a real estate through the land registry can be prolonged indefinitely.

Unless agreed otherwise, co-owners are entitled to the right of „pre-emption" proportional to the share of all co-owner's shares of the entire real estate (par. 6).

3.3. Units created by conversion, floor addition, partitioning or extension

3.3.1. General note

Conditions, manner and procedure of acquiring ownership rights through conversion, floor addition, partitioning or extension of socially owned buildings, as well as through the conversion of common premises to apartments, were regulated by special Law[213]. Conversion of common premises to apartments „with regards to that Law, is construed to comprise the conversion of attic, laundry rooms, basements, terraces and other common parts and premises within a building into one or more apartments" (Art. 4). Floor addition is construed as „the construction of one or more apartments on top of a building, such that these apartments form an entirety with the existing building" (Art. 3).

„Approval" (i.e. constitution of right) of conversion of common premises to apartments, as well as floor addition and extension of socially owned buildings, was issued by the competent authority under the conditions, in the manner, and within the procedure prescribed by the Law.

The syntax *conversion of common premises* from the special law encompasses the terms *conversion* and *partitioning* from the ZSP (Art. 335). In addition to floor addition, the ZSP recognizes extension of socially owned buildings as a manner of acquiring ownership rights over the extended/added separate units within a building.

---

[213] Zakon o nadziđivanju i pretvaranju zajedničkih prostorija u stanove u zgradama u društvenoj svojini (Law on floor addition and conversion of common spaces to apartments in socially owned buildings), Official Gazette of the SR BiH 32/87.

3.3.2. Original acquisition of rights over separate units of real estates

Property rights over converted premises are acquired by the person who has, prior to January 4, 2009, converted common space in a socially owned building „to an apartment or another type of individual unit", with the consent of the competent authority and bearing the full costs. A person who had acquired property rights over an individual unit within a building by January 4, 2009, became on January 4, 2009, a co-owner of the whole real estate, comprising the land and the building, proportionally to the value of that person's individual unit when compared to the whole real estate (Art. 335, paragraph 1). Property rights over an individual unit of a real estate are inseparable from the co-owner's share and can only be transferred, inherited and encumbered together (Art. 80 of ZSP RS).

3.3.3. Rights of ownership (co-ownership) acquired by conversion, floor addition, extension or partitioning

„A person" who had, by January 4, 2009, „based on the consent given by a competent authority, converted common space in a socially owned building to an apartment or another independent unit at his own cost has thereby acquired the ownership right over the converted space as a separate unit within the real estate in question, together with the appropriate co-owner's share of the whole real estate" (Art. 335, paragraph 1).

A person who had, based on the consent given by a competent authority and bearing all costs, constructed a separate part of a building by floor addition, extension or partitioning[214] before January 4, 2009, became, on January 4, 2009, a co-owner of the whole real estate and owner of the separate part of that real estate, which is inseparable from the co-owner's share (Art. 335, par. 2 invokes the rules from par. 1).

In such a case, the competent court will, „at the request of the interested party, order that the property rights over the individual unit of a real estate be entered into the land registry", wherein the said real estate comprises the land and the building (Art. 80, par. 3 and Art. 331), pursuant to a decision of the Court „whereby the acquisition of the ownership right over the separate unit of the real estate is acknowledged", or pursuant to an agreement of all co-owners of this real estate whereby „the corresponding co-owner's share is determined" (Art. 335, par. 3).

3.4. Acquisition of ownership rights over an annex to the separate unit created through conversion, floor addition, partition or extension

Subject of an ownership right over a separate unit within a real estate that was created prior to January 4, 2009, through conversion of common premises in social/state ownership with the owner of the separate unit bearing all the costs and with the consent from the competent court also extends to the part of that real estate that would only serve aforementioned separate unit within that real estate, if, pursuant to the provisions of the ZSP „it can be an accessory to the said separate unit" (Art. 336, par. 1). The same goes for a dependant part constructed prior to January 4, 2009 through floor addition, extension or partition of the building - real estate (Art. 336, paragraph 2).

---

[214] According to the Croatian dictionary by V.Anić, Novi liber, Zagreb, 1991; to partition - to divide, by a physical obstacle or construct, reconstruct or adapt (a house, an appartment) in another appropriate manner. In the draft of the ZSP of the Federation of Bosnia and Herzegovina, in the title of Art. 352, as well as in Art.353, paragraph 2, in addition to the term „partitioning", the term „addition" is used. According to aforementioned Dictionary, to build an addition is to add, extend or adjoin to a building/construction. Therefore, the term addition should be substituted with the term to partition to avoid repetition, as we already have the term „extension", which would fill in the gap created by the term partition, partitioning. This was done in the ZSP RS. A real estate, or its individual part may be added, e.g. terrace, awning, staircase, heating system etc.

3.5. Real easements on construction land

Real easements on construction land and on buildings constructed on such land are established „though a court decision in an out-of-court procedure pursuant to the regulation plan or subdivision plan" (Art. 343, par. 1).

Similarly, by applying Art. 188 of the RS ZSP, real easements are also acquired based on a legal transaction concluded pursuant to „the regulation plan or subdivision plan".

Until „the regulation plan or subdivision plan" is adopted, „real easements are determined by the court in an out-of-court procedure, pursuant to a previously acquired opinion of the body in charge of urban planning and spatial development" (Art. 343, par. 2).

The competent body is not to withhold its opinion from the court on establishment of real easements or on the size and shape of the construction lot, as it is both authorized and obliged to do so by the law.

§4 Critique of establishment of ownership rights of building owners over construction land in social/state ownership. Alternative solution

1. Acquirers of ownership (co-ownership) rights over land

By transformation of the permanent right of use of socially owned construction land into the ownership right, the owner of the building has become the owner of the land belonging to the building, while the owners of separate units in this building have become co-owners. Land and building are transformed into a single real estate owned by the owner (co-owners) of the building, or co-owners of separate units of the real estate.

By transformation of a permanent right of use to an ownership right, or by merging cadastral lots - ownership of the land has been transferred to all owners of buildings (owners of individual units in buildings) that were constructed after the construction land had been transferred to social ownership. Same applies to those whose buildings had been constructed prior to the transfer of land to social ownership if they have kept the ownership rights or if their ownership rights that had been taken from them have been restored to them through denationalisation (restitution).

Equally, ownership rights have been acquired by those who were building owners (owners of individual units within buildings), as well as those who have acquired such a right through a direct transformation of social companies, the holders of management rights, rights of use or rights of disposal of buildings, or through direct transformation of such rights, as well as those who have, as holders of the tenant's right, redeemed their apartments or acquired ownership rights over a building (separate unit within a building) through construction, or on any other legal grounds, on the grounds of a legal transaction, decision of a competent authority, through inheritance or pursuant to the law itself.[215]

The procedure of merging a building and land in social/state ownership by the transformation of a permanent right of use to an ownership (co-ownership) right over a real estate in

---

[215] Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva vlasnika zgrade („Permanent right of use and its transformation to a right of ownership of a building"), ZPFR, vol. 20/2, 1999; same author: Rasprave iz stvarnog prava („Discussions in the Field of Real Law"), Pravni fakultet Sveučilišta, Rijeka, 2001, pp. 179-201.

the Republic of Srpska is made complete by the Law on Real Rights, and it will be completed in the Federation of Bosnia and Herzegovina with the adoption of nearly identical rules as prescribed in the ZSP FB&H – judging by the Draft ZSP (Art. 347-353).

2. Negative legal and economic consequences of transforming a permanent right of use to an ownership right

Only a small percentage of the ownership rights acquirers are among the former owners of the land or their legal successors to whom their rights had to be restored or adequate compensation paid in the denationalization process[216],[217]. The vast majority of legal persons and, as a rule, all natural persons, have acquired the right of ownership of a building or separate unit within a building at a symbolic cost, while, for the most part, they have acquired the right of ownership without any compensation - through a direct transformation, merger of land registry bodies, or through redemption of their apartments.[218] Thus, an enormous wealth of the people has been alienated, while the acquirers of ownership rights over construction land have acquired, without payment, a source of constantly increasing value (construction land), owing to real estate location and permanent incorporation of others' capital in communal infrastructure and other components influencing the increase in value of construction land, without the owners of construction lots having made any personal investments or having borne any of the risks.

Those who had, for a legally determined price (which is a few percent of the market price), redeemed their apartments in a more or less depreciated building, which was then, with the consent of the owners or by a decision on dispossession in the public interest, torn down to make way for the construction of another adequate building or construction pursuant to the detailed regulation plan or another town planning act, are in the possession of a very valuable land, or, in the case of dispossession in the public interest, receive compensation in the amount of the market value of such land. An especially large amount of wealth was amassed by those who had redeemed and commercialized an apartment in a small building with few apartments, or an apartment in a villa, which was, as a rule, built in a very attractive location and on a relatively large land lot (nationalized or expropriated), over which they have acquired an ownership right without any compensation.

It was not only those who had redeemed their previously socially owned apartments that acquired the ownership rights over construction land without compensation, but all those social legal persons as well, which were transformed, pursuant to the law, into privately owned legal persons - owners of land and buildings over which they had a permanent right of use. In this way, the right of ownership of huge complexes of land was transferred to trading companies created by the transformation of socially owned companies or in the process of privatization of state owned companies, most frequently with only a symbolic fee, while

---

[216] Art. 9, par. 1of the Law on compensation for the property nationalized during the Yugoslav communist rule.

[217] Simonetti, P., Denacionalizacija („Denationalisation"), pp. 115 – 180.

[218] By Art. 12 of ZID ZPS, NN 68/98, which came into force on May 20, 1998, Art. 371 of the ZV and Art. 225 of the ZZK were revoked. Apartment buyers were released from the obligation of paying a compensation for the land, while they had the right to seek restitution for the payments already made from the state budget.

all other legal persons who were legal successors of socially owned persons received them without any payment (direct transformation).

In contrast, prior owners of land pursuant to the Law on Compensation[219] (ZN) of the Republic of Croatia are not entitled to any compensation, as the ZN, which came into force on January 1, 1997, prescribes no right to compensation for a developed construction land (Art. 15)[220], except in those cases in which the land is owned by a repossessed company (Art. 45-47 of the ZN).[221] The more liberal interpretation of the Law on Compensation (ZN), according to which the previous owner is entitled to a compensation for a constructed land as well[222], has lost all grounds after the regulation on the obligation of paying a compensation for the land, in the course of redemption of an apartment[223], was deleted. The deleted Art. 371, par. 1 stipulated that the apartment buyer would be obliged to pay „for the value of thereby acquired benefit to the previous owner of the land" „if the price of land was not included in the apartment price". An amendment to the Law on Compensation was expected, to remove the discrimination of previous land owners - holders of the right to compensation for a developed construction land, by entitling them to adequate compensation, but one that would be paid from the state budget, i.e. by the tax payers.[224] However, the Government withdrew this proposal from the legal (parliamentary) procedure.[225]

In this manner, building owners (owners of separate units within buildings) have legally became owners (co-owners) of land, in most cases without any compensation, while the previous owners of this land, with a few aforementioned exceptions, have no right to compensation for a developed construction land; with regards to them, effects of nationalization were prolonged. At the same time, cities and municipalities lost valuable land, their perma-

---

[219] Law on compensation for the property nationalized during the Yugoslav communist rule, NN 92/96, 92/99, 80/02, corr. 81/02.

[220] Art. 15, t. prescribes that, on the grounds of „this Law, the right of compensation for ... undeveloped construction land (is) recognized".

[221] Simonetti, P., Naknada… (Compensation...), op. cit., pp. 6-9. The land that belonged to a company reposessed in the process of transformation (privatization) is included in the value of the capital of the socially owned company, which was paid by the repurchase of stocks or shares from the members of the newly founded trading company, while the previous owner of the reposessed company received, in the process of denationalization, compensation in shares or stocks of the trading company, as the universal successor of the socially owned company, or from the portfolio of the Croatian Privatization Fund (Art. 45-47 of the ZN). See: Jelinić, S., Naknada za oduzetu gospodarsku imovinu (Compensation for repossessed economic property), ZPFR, vol. 18, issue 1, 1997, pp. 44-46 (Naknada za oduzeta poduzeća - Compensation for repossessed companies).

[222] Bagić, S., Šeparović, M., Žuvela, M., op. cit., pp. 46-47.

[223] With the coming into force of the Law on amendments and supplements to the Law on Sale of Apartments, NN 68/1998, on May 20, 1998, provisions of Art. 371 of the ZC and art. 225 of the ZZK (art. 12) were revoked. More on the subject in Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva vlasnika zgrade (Permanent right of use and its transformation into the ownership rights over buildings), ZPFR, vol. 20, issue 2, 1999, pp. 519-521.

[224] Final Bill for the Draft of the Law on amendments and supplements to the Law on Compensation ... (no. 286, class: 943-01/01-01/01; Urbr. 61-01-14 dated November 30, 2001), which, by deleting the word „undeveloped" in Art. 15 item 1 of the ZN (Art. 10) recognizes the right to compensation for the developed construction land as well, in the form of state bonds, from the state budget. In this manner, the payment of the compensation for construction land is transferred to the tax payers.

[225] See the letter by the President of Croatian Parliament, class: 943-01/01-01/02, dated June 27, 2002, which informs the representatives of the Croatian Parliament and presidents of the Parliament's Work Bodies on the matter

nent source of revenue in light of the constantly increasing city rent, which they could have kept if the permanent right of use had been transformed into the right of development, which would last for as long as the building existed (as did the right of permanent use that had previously existed), without disturbing the principle of legal unity of the real estate - building and right of development. [226] For a developed land, which would have remained the property of cities and municipalities, it could have been prescribed that the previous owners would be compensated in bonds, similarly to what is now prescribed for the compensation for undeveloped construction land in those cases in which it is not restituted to the previous owners (Art. 19, par. 2. of the ZN).[227]

Trading companies that were formed by transformation of socially owned companies are an exception. Holder of the right to compensation for a repossessed company - value of real estate repossessed (Art. 45, par. 1 and 2 of the ZN), including the right to compensation for a developed construction land, pursuant to the law currently in force, „exercises the right to compensation in bonds or shares of that company from the portfolio of the Croatian Privatization Fund" (Art. 47 par. 2 of the ZN), which are, for the most part, devalued. Hence, trading companies acquired ownership rights over valuable areas of construction land, which had been redeemed by their founders at a low price during the transformation (privatization) process of, most commonly, over-indebted socially owned companies that often ended up undergoing bankruptcy. This was the worst consequence of social ownership transformation and it could have been avoided by transformation of the right of use to the right of construction, whereby the holder of the right of construction, owner of the building, would pay a periodic rent to the previous land owner or local self-government unit, which would thus have a secured source of income for maintenance, modernization and expansion of communal infrastructure. In this way, the constantly increasing rent belongs to the trading company, which was constituted in the transformation process, or to its legal successor, which does not participate directly in bearing the communal infrastructure costs, but harvests the fruits of these investments through city rent.

In accordance with the principle of the building ownership restitution, during the denationalization process, only the permanent right of use, separating the non-nationalized building from the nationalized land of previous land owners (or, more precisely: holders of compensation rights), could have been transformed to the ownership (restitution) right, i.e. into

---

[226] A building belongs to the right of construction, as if it were land (Art. 280, par. 3 of the ZV, Art. 286, par. 3 of the ZSP RS).

[227] Stvarnopravni zakonik Republike Slovenije (Real Law Legislation of the Republic of Slovenia), Uradni list 87/02. dated October 18, 2002, prescribes that, when the building owner and land owner are not the same person, the building owner, pursuant to the Law, acquires a right of construction on the land for as long as the building exists (Art. 271 par. 2). In the Republic of Slovenia, before the Stanovanjski zakon (Law on Occupancy), Uradni list 18/91, came into force (October 19, 1991), the Zakon o pogojih za prodajo stanovanjskih hiš in stanovanj v družbeni lastnini, Uradni list SRS 38/86 was in force, prescribing the conditions for the sale of residential buildings and apartments in social ownership, to citizens and civil legal persons, pursuant to the regulations on real estate trade (Art. 1, par. 1 and 2). Being that buildings and apartments in social ownership were, without exception, built on socially owned land and that there was absolutely no manner of alienating socially owned land, acquisitors of right of ownership of the purchased buildings also acquired the permanent right of use of the land, which separated the building, in a legal sense, from the land, as a completely independent real estate. Owners of such buildings and apartments, therefore, did not acquire the right of ownership of the land belonging to the building, as they did in the Republic of Croatia, but rather a right of construction, which authorized them to have their own building or apartment on this land, as the right of construction exists for as long as the building does. In Slovenia, the Austrian Law on construction rights was in force from April 26, 1912, to April 6, 1941.

the right that had been taken from them by nationalization or transferred to social ownership on other legal grounds against their will.

Cities and municipalities now face hundreds of thousands of new land owners that were not the owners of their land at the moment when the land was forcedly transferred to social ownership, which they, as a rule, acquired without compensation or by paying just a symbolic fee. They, objectively, oppose the establishment of an adequate legal regime on the construction land[228], e.g. by construction land regrouping,[229] to ensure the maximum market gain from rent, freely disposing of the construction land at market prices. To implement the spatial regulation plan, construct buildings and other constructions of interest to the Republic of Croatia, expropriation will be necessary, by which the new land owners will be paid compensation in the amount of market price, even though they have acquired the land for free, as it was given to them by the state, as a gift. This is a significant obstacle to the realization of spatial regulation plans and affects, to a great degree, the construction cost, i.e. the costs of real estate (apartments, business premises). Hence, the gap between the lessors - land owners and non-owners is deepened, which has a negative impact on the economy as a whole. The city rent cycle is broken, now flowing directly into the pockets of new land owners, instead to the estate (funds) of those public entities that are, by law, obliged to maintain, modernize and expand the public utility infrastructure. This loss needs to be compensated by increasing the fees and allowances collected from the citizens, in various forms,[230], [231] as without this increase, there is simply not enough funds for the public utilities to function, for the construction of buildings and maintenance and improvement of public utility *infrastructure;* so that the new owners, to whom the land was given as a gift, could collect the constantly increasing city rent unhindered, through the high cost of real estate, lease or rent, without any risk, i.e. investment. Naturally, there is no benefit to the owners of apartments in large residential buildings who inhabit their apartments without any opportunity to commercialize them in any way (by sale, trade or lease) since they are, practically, their only homes and they are situated in buildings that will not be torn down in any foreseeable future (which would give the owners an opportunity to commercialize the land) or expropriated with compensation in the market value amount. On the contrary, owners of such apartments as well (and they are a vast majority) must compensate for the significant funds necessary for the public utility *infrastructure* and normal functioning of public utilities (Art. 19-25 of the ZKG)[232], through various public utility fees and contributions for construction land equipment. It was, therefore, in their interest as well to have the right of permanent use

---

[228] Simonetti, P., O pravnom režimu građevinskog zemljišta („On the legal regime of construction land"), ZPFR, vol. 17, issue 1, 1996, pp. 1-5.

[229] Urban land regroupment is prescribed by the Spatial Planning Bill, Ministry of Environment and Spatial Planning, Art. 112-155 (source: http://www.mzopu.hr), while, in practice, it is implemented with either direct or implied consent of the land owners, even though it has not yet been regulated by Law.

[230] Art. 15-25 of the Law on Public Utility Administration (ZKG), NN 35/95, 70/97, 128/99, 57/00 and 129/00, 59/01, 26/03 (edited text), 82/04, 178/04, 38/09; Art. 62-75 of ZGZ FBiH, Sl.novine 25/03; Art. 21-33. ZGZ RS, Sl. glasnik RS 112/06.

[231] Sarvan, D., Primjena Zakona o komunalnom gospodarstvu – praksa Upravnog suda Hrvatske (Application of the Law on public utility administration - Practice of the Constitutional Court in Croatia), Informator, Male stranice, year IL, no. 4929 and 4933 of 2 and 16 May 2001; same author: Postoji li pravna osnova za naplatu troškova pripreme građevinskog zemljišta za izgradnju od strane jedinica lokalne samouprave (Is there legal ground for local self-government units to charge for the costs of preparation of construction land), Informator, year. XLV, no. 4545, 1997.

[232] See ZKG RH, ZGZ FB&H (Art. 62-75) and ZGZ RS (Art. 21-33).

transformed into the construction right, with the obligation of paying a minimum monthly rent, which would go to public utility funds. This would allow cities and municipalities to procure basic means for public utility infrastructure. By disposing of the „freed" area of land, once the buildings are torn down, by establishing a right of construction, cities and municipalities would amass a significant amount of funds in the form of a periodic fee for the right of construction, to meet their legal obligations with regards to regulation and equipping of urban spaces, for *infrastructure,* etc. This would create the opportunity to reduce the financial burdens borne by many citizens at this time to collect the necessary funds for public utility infrastructure.[233]

This mostly affects those who do not own their homes, which have to compensate, through the high leases and rents, for the high costs imposed on lessors for public utilities and contributions. It also affects those who manage to take out a loan for the purchase or construction of their apartment and, in addition to the cost of the apartment, have to pay for the high cost of land at the same time, instead of paying a small periodic rent for the right of construction.

3. Alternative legal solution

It was, therefore, possible to apply a more adequate legal solution, to transform the permanent right of use to the right of construction, which would last for as long as the building existed, as did the permanent right of use[234] (Art. 12 par. 1 of the ZOVO). Permanent right of use was limited by the duration of the building, separating it from the socially owned construction land and can therefore not be the equivalent of the ownership right, but rather the equivalent of the right of construction, which, from the viewpoint of the ZV, would be limited by a termination condition - lasting until the building was demolished.[235]

In this case, holders of the right to denationalization would have the right of ownership of land, i.e. cities and municipalities, as legal successors of previous municipalities,[236] which had the right to administer and dispose of socially owned construction land, [237] once the building was demolished[238]. Therefore, the right of use of construction land „owned by the people" in the region of new German provinces (former German Democratic Republic) was transformed into an inheritable right of construction (Erbbaurecht), regulated through the

---

[233] Due to its large volume, the final text in this treatise, published in Croatian language ZPFR, vol. 23, issue 1, 2002, has been omitted. This text refers to the legal regime of construction land use and to the possibility of increasing the surface area of the land owned by cities and municipalities *de lege ferenda*.

[234] See: Simonetti, P., Reprivatizacija građevinskog zemljišta ili preobražaj prava korištenja (Reprivatization of construction land or transformation of the right of use), Zakonitost, year. 46, no. 2, 1992, pp. 403-421; same author, Vlasničkopravni režim građevinskog zemljišta u Republici Hrvatskoj - preobražaj prava korištenja u pravo građenja (Legal regime of ownership of construction land in the Republic of Croatia - transformation of the right of use to the right of construction), Informator, year XXXIX, 3921-3922/91. dated October 5, 1991.

[235] Art. 292 par. 1 of the ZV prescribes that the right of construction ceases with the fulfillment of the termination condition.

[236] Art. 67 and 87 of the Law on local self-government and administration, NN 90/92, 117/93.

[237] See ZGZ, NN 48/88 (edited), 16/90, 53/90 – US RH 44/92 which had been in force until January 1, 1997 (Art. 394 par. 2 of the ZV)

[238] Simonetti, P., Pravo korištenja… (Right of use...)op. cit. pp. 203 – 207

Ordinance (with power of the law) on the inheritable right of construction of January 15, 1919. The building owner may, pursuant to the German law, buy the developed land, but at 50% of the market price.[239] According to our law, however, those who have redeemed their apartments in villas and small residential buildings based on their tenant's rights, as well as those who have purchased, at symbolic prices, their apartments in dilapidated buildings in city centres are in a favored position since they have acquired, for free, plots of very expensive land that they can sell or commercialize in another manner.

Even more privileged are the legal successors of socially owned companies, which have, often with only a symbolic payment, most frequently paid from social capital (bank loans), acquired huge plots of construction land. Especially privileged are those legal entities that have, pursuant to the letter of the law, without any compensation, acquired ownership rights over developed land over which their predecessors - socially owned companies - had had right of use that was to last for as long as the facilities built on the land were in existence.

Had the permanent right of use been transformed into development rights of the owner (co-owner) of the building or individual parts of the building, the right of ownership of land could have been restored to the previous owner, or the holder of the right to denationalization; local self-government units, as legal successors to the socialist municipalities, would have had the right of ownership of the remaining construction land and therefore a right to periodic fees paid by the holder of construction rights to the owner of the land throughout the duration of such right. Being that the right of use lasted for as long as the building existed - the right of construction would cease with the destruction of the building.

§5 Management and disposal of socially owned construction land and land owned by local self-government units in the Republic of Croatia and Bosnia and Herzegovina de lege lata and de lege ferenda

1. State-owned construction land and land owned by cities and municipalities (local self-government units)

Being that undeveloped construction land, which had previously been socially owned and managed and disposed of by municipalities, has partly been restored to prior owners, i.e. their legal successors, and partly became the property of the state or other persons, the current local self-government units - cities and municipalities - are owners of small plots of this land, especially due to restitution through litigation and misinterpretation of ZV provisions.[240]

In Bosnia and Herzegovina, undeveloped construction land that has not been established as private property is owned by the state, but is managed and disposed of by the local

---

[239] In the new German provinces (territory of the former German Democratic Republic), pursuant to the Law on Purification of Real Rights (Sachenrechtsbereinigungsgesetz), building owners who had the right of use of the land owned by the people had the right to choice: to seek establishment of a hereditary right of construction (Erbbaurecht) or to purchase the land at market prices, which would be reduced up to 50%. See more in Karl-Friedrich Thöne, Raffael Knauber, Boden - und Gebäudeeigentum in den neuen Bundesländern, Verlag Kommunikationsforum GmbH Recht Wirtschaft Steuern, Köln, 1994., pp. 116-118.

[240] More on the subject: Simonetti, P., Prava na građevinskom zemljištu (Rights over construction land) (1945-2007), pub. Pravni fakultet Sveučilišta u Rijeci, 2008, pp. 331-465.

self-government units.[241] Local self-government units administrate only those plots of developed construction land on which the buildings that these units own have been constructed (*supra*).

Local self-government in the Republic of Croatia and in Bosnia and Herzegovina, at the beginning of the 21st century, face similar problems to those faced by local administrations in developed European countries at the end of 19th century when municipalities or cities began repurchasing undeveloped land[242] or expropriating it[243] for the needs of spatial planning, as well as to construct social housing, establishing the right of construction or related rights of builders (investors) or construction companies (trading companies, cooperatives, foundations, etc.) which develop social housing for the market. This is a good pointer for local self-government units in the Republic of Croatia and Bosnia and Herzegovina.

2. Rational disposition of construction land owned by cities and municipalities

2.1. Disposition of construction land owned by local self-government units in the Republic of Croatia

Contrary to the long-term practice of well organised cities in Central and North Europe, which have repurchased large surface areas of undeveloped construction land, our cities and municipalities, as can be seen from numerous tenders published in daily newspapers, are selling the small areas of undeveloped construction land that they own, instead of establishing the right of construction and keeping the ownership rights, contributing to a decrease in construction cost for residential and other buildings and ensuring a permanent inflow of revenue from rent to the city „funds" intended for infrastructure development,[244] by instituting a monthly payment for the right of construction in the amount of an average rent (Art. 281 par.

---

[241] Uspostavljanje prava vlasništva na nekretninama i na građevinskom zemljištu u Federaciji Bosne i Hercegovine i Republici Srpskoj (Establishment of ownership rights over real estate and construction land in the Federation of Bosnia and Herzegovina), in: Zbornik Aktuelna pitanja građanskog zakonodavstva u Bosni i Hercegovini (Collection: Contemporary issues of civil legislation in Bosnia and Herzegovina), pub. Udruženje sudija Republike Srpske, Banja Luka, 2009.

[242] Historija čovječanstva (History of mankind), op. cit., p. 336. The land was repurchased also by some cities in countries outside of Europe, e.g. in Turkey and in some Latin American countries.

[243] Messineo, F., Manuale di diritto civile o commerciale, nona ed., Giuffrè, Milano, 1965., Vol. 2, p. 345. Law on expropriaton was enacted in Italy, on November 30, 1919, to build the so-called „people's houses" (case popolari), for schools in 1992 and for residential buildings for agricultural workers in 1960. Information taken from: De Martino, Commentario del Codice civile diretto di Scialoja/Branca, 4. ed.., Zanichelli, 1976, p. 163, footnote no. 4, which states that, as far back as 1885 for Napoli and 1907 for Rome, the first regulations on expropriation for the planning of facilities of general interest were enacted. In the FR of Germany, on August 3, 1953, a special Law on Acquisition of Construction Land was adopted (see: Ring, J, Staudinger, Kommentar zum BGB, III Band, II Auflage, 1956. (Erbbaurecht) p. 890). On acquisition of construction land by purchase or expropriation, see: Mihaljević, G., Finansiranje uređenja gradskog zemljišta (Financing of construction land equipping), Savremena administracija, Belgrade, 1978, pp. 55.-57; Blagojević, B., Eksproprijacija, pravo na stan i stambena izgradnja (Expropriation, right of residence and construction of residential buildings), Anali Pravnog fakulteta u Beogradu, year IX., no. 4., 1961.

[244] I.e. to the property of trading companies handling maintenance, reconstruction, modernization, expansion and construction of public utility infrastructure.

2 and Art. 287 par. 2 of the ZV), if no other agreement has been made.[245], [246] Even in those rare cases when they are establishing the right of construction, certain cities agree on the obligation to pay the lease for land in advance, for 99 years, which then often ends up being used for some budget expense or another non-profitable investment[247]. This deprives the future generations from their right to collect city rents on aforementioned land, which ought to be used for the development and maintenance of public utility infrastructure. However, there are some positive examples as well. In the centre of Opatija, right of construction is being established for an underground garage (339 parking spaces) and business premises on two floors, which will bring the city 1.6 million kunas in annual rent, while the city will acquire ownership of the garage after 30 years.[248]

2.2. Local self-government units' right of administration and disposal of state-owned construction land in Bosnia and Herzegovina

City construction land owned by the Federation of Bosnia and Herzegovina is managed and disposed of by municipalities (Art. 6 of the ZGZ of 2003) and municipalities and cities (local self-government units) in the Republic of Srpska (Art. 7 of the ZGZ of 2006). In the Federation of Bosnia and Herzegovina, municipal council „awards non-developed construction land for the construction of facilities for a fair compensation" (Art. 44). In the RS, „physical and legal person who is the construction investor" on a city construction land is obliged to pay for both the costs of equipping the land and compensation on the grounds of the natural benefits of the land and the advantages of the already developed public utility infrastructure, which are not the result of investments made by the real estate owner (Art. 21 par. 1). The local self-government's municipal assembly is obliged to prescribe the payment of rent for permanent land use for undeveloped land as well (permanent rent). This type of rent is prescribed by a decision defining the bases and measurements based on which the amount of compensation will be determined (Art. 30 par. 1). Local self-government units can also prescribe an obligation of paying the compensation set forth in Art. 21 and 30 of the ZGZ for the use of „other construction land" (Art. 39). A similar system of paying the compensation for city construction land also exists in the Federation of Bosnia and Herzegovina (Art. 62 - 75 of the ZGZ). ZGZ

---

[245] More in: Simonetti, P., Pretpostavke, funkcije i priroda prava građenja (Presumptions, functions and nature of the right of construction), ZPF Sveučilišta u Rijeci, vol. 19, issue 2, 1998; same author: Osnivanje prava građenja (Establishment of the right of construction), ZPF Sveučilišta u Rijeci, vol. 20, issue 2 1999.

[246] Thus, e.g. in Novi list of May 10, 2001, the request for offers was announced by the city of Rijeka for procurement of construction land, surface area of 15,001.25 m^2 in the cadastral municipality of Plase (Rijeka), with the total starting price of: DEM 5,262,551.01, while the right of construction was established over the cadastral plot 71/6, cadastral municipality of Kozala (Rijeka) on the surface area of approx. 8.00 m^2 (eight) to construct a monument (this appears almost like a mockery of the right of construction). In Glas Istre, in November and December 2001, there have been several articles on the sale of about a million square meters of land of the municipality of Vodnjan at the seaside, opposite Brijun, for a price of approximately 7,500,000 euros, which were, in only a few months, transformed into construction land in the spatial plan of the cantonal assembly and is now worth approximately a billion five hundred million euros (HTV, Kontraplan dated May 8, 2007).

[247] Thus, in the third (repeated) tender, the right of construction for a period of 99 years is being offered for the price of 528 euros per square meter (original price was EUR 791.56) in the location of „Viktor Benčić" opposite to the railway station in Rijeka (Novi list, dated May 16, 2007, p.12). Similarly, the right of construction has been established in the location of Gomila, in the immediate vicinity of the Bonavia hotel in the centre of Rijeka, also for 99 years.

[248] Novi list of February 28, 2007.

of the FB&H stipulates the obligation of payment for the assigned construction land, for equipping of construction land, and compensation for use of construction land (Art. 63 par. 1). The obligation of paying this compensation can be instituted for: use of other construction land over which there is the right of ownership; equipping of other construction land over which there is a right of ownership. A decision of the Municipal Council can encompass only the construction land referred to in Art. 65 par. 2 of this Law and non-developed construction land encompassed by the construction land equipping program (Art. 83 par. 1 and 2).

This model is impossible after the establishment of right of ownership in the Federation of Bosnia and Herzegovina and Republic of Srpska, as it limits the owner's right to dispose of his/her real estate, while it had been possible up to the moment the ZSP RS came into force, as since 1992, state ownership had essentially been just a different name for social ownership. This became even more apparent when the ZSG RS of 2006 came into force, authorizing the assembly of the local self-government unit to sell or trade undeveloped state-owned construction land to allow for the construction of permanent buildings (Art. 15) or that the local self-government unit may lease the land (Art. 20); to manage and dispose of city construction land that is „owned by the state" in a manner prescribed by the law (*ex imperio)*, and not in the manner that it would chose as the land owner.

The right of alienation of undeveloped construction land is granted even to the „legal entities that hold the right of disposal of state-owned construction land" (Art. 19). This right is also granted to the legal successors of management rights or rights of use (Art. 45 par. 1). Pursuant to the transitional provisions of the ZSP RS, the right of management, use or disposal, as basic rights over socially/state-owned property that had not become the property of another person prior to coming into force of this Law, was, with its coming into force, „transformed into the ownership right of the previous right holder, or his legal successor" (Art. 324. par 1). This also pertains to undeveloped construction land, even though the transformation of the right of use, as a typical right over construction land, has been prescribed separately (Art. 325). In this case, this is a right of disposal that had been the right of social legal persons over undeveloped land before this land was included within the city limits, i.e. city construction land, or before the right was transformed from the right of use pursuant to the provisions in Art. 45, par 1 of the ZGZ RS of 2006.

Keeping the remaining construction land in social ownership, or in the ownership of local self-government units, and expanding the surface areas owned by the local self-government units by repurchase and even expropriation, if the legal requirements have been met, instead of land alienation - as well as establishment of a right of construction, or allowing concessions and lease over the land, is imposed as a necessary solution for rational management of this irreplaceable common good, which belongs to all citizens in a given local self government unit.

3. Legal regime on use of construction land upon establishment of right of ownership de lege lata and de lege ferenda

3.1. In general

Establishment of ownership rights over construction land in the RC and B&H have raised all the issues encountered by the developed European countries at the beginning of the 20th century, as well as those that later gained in importance by the continuously growing modifications to the environment, for example, the issue of sustainable development and environment protection, which has a global significance. These issues need to be answered by establishment of an adequate legal regime on construction land.

In accordance with the contemporary constitutional principle - the right of ownership comes with an obligation to be used for common good (Art. 48 par. 2 of the Constitution of the RC). A legal regime of use of construction land of local self-government units would have to be established, such that it would facilitate realization of spatial development, spatial planning in particular, directing of city rent income into infrastructure and acquisition of construction lots free of charge, with small periodic fees, by establishment of a right of construction of construction land.[249].

Contemporary legal regimes of construction land use have three important components:

- the system of spatial planning, with the spatial plan(s) as its important aspect. These plans regulate the manner in which space is used, especially construction land, taking in consideration sustainable development and protection of integral values of space, separate nature reserves and cultural monuments, as well as ensuring better life conditions and harmonization of interests of space users;
- the system of directing city rent into construction and modernization of city infrastructure, as well as preparing the land for future construction;[250]
- the system of rights over construction land, enabling those who do not own the land to use others' land for a small periodic fee, to develop buildings for their own needs or for the market, as everyone has the right to dwell and work on the land to satisfy their own needs[251]. This system frees up a part of capital for investment in production activities and services and other profitable undertakings that create new jobs, instead of investment in purchasing the land.

3.2. Presumptions of adequate legal regime on construction land in the Republic of Croatia and Bosnia and Herzegovina

An adequate legal regime on construction land in the Republic of Croatia and in Bosnia and Herzegovina can be developed on the grounds of experiences of local self government units of developed countries in continental Europe, especially Austria, Germany, Netherlands, Denmark, Sweden and other North-European countries, with well regulated cities with a long tradition of local self-government from Vienna to Stockholm, taking into consideration specific domestic conditions, especially the difficult situation (with regards to residence) in which a large number of citizens of our country find themselves.

A presumption of an adequate legal regime on construction land is that the construction land is mostly owned by the municipality or the city, or, as advocated by functionalism - the last coherent theory of urban planning, completely controlled by the state, as „individual interests must yield to collective ones", as is stated in the Athens Charter.[252]

In the Republic of Croatia, instead of keeping the ownership of construction land in the hands of local self-governments, or in state ownership, as is the case in Bosnia and Herzegovina, with an adequate compensation paid to the previous owners, individual ownership

---

[249] Art.280-296 of the ZV, Art. 286-302 of the ZSP RS, Art.300-316 of the ZPS FB&H bill.

[250] From the aspect of the earlier system: Krstin, M., op. cit, pp. 208-239; Jovančević, M., Gradska renta kao faktor pri rješavanju bazičnih problema komunalne infrastrukture („City rent as a factor in solving basic problems with public utility infrastructure"), Belgrade, 1982, pp. 214– 234, 298 and onwards.

[251] Supek, R., Grad po mjeri čovjeka („City tailor made for a man") op. cit, p. 106 and onwards.

[252] Quote and paraphrase from the book of: Supek, R., Grad po mjeri čovjeka („City tailor made for a man"), op. cit, p. 117.

rights have been established so that there are now tens of thousands of owners of small land lots, resisting the introduction of an adequate legal regime on construction land, so that they could amass the largest amount of profit in legally trading the land that they own, disposing of it at market prices, without adequate influence and control of the state, i.e. municipalities or cities. It is pointless to expect from small land owners to establish a right of construction in order to collect a small monthly fee for their land. They would much rather sell the construction land at a high price. This increases the cost of construction for residential and other buildings, apartments and business facilities by the price of the land, which is not paid when a right of construction is established. Accordingly, a large portion of population without their own apartments are put in an even more difficult position, whether they have to take out loans to purchase their apartments or pay a constantly increasing lease for renting one. Entrepreneurs who are unable to bear the large costs of construction are forced to pay constantly increasing rents for business premises, which they, in turn, compensate for by raising the prices of their products and services, diminishing their competitiveness in the market.

3.3. Obstacles to expropriation of construction land

To implement a spatial plan at the present, especially to subdivide construction land pursuant to a detailed regulation plan, it is necessary to expropriate the land and pay the owner of the expropriated land a compensation in the amount of market price of that land, as is guaranteed by the Constitution of the RC (Art. 52 par. 1), or the laws on expropriation in FB&H and RS[253]. Due to lack of funds, payment of this compensation is a large obstacle to expropriation and the high price of land increases construction costs and prices of apartments and business facilities significantly. This widens the social gap between lessors (individual owners of city real estate) and those who do not own their own apartments, which has a negative impact on the economy due to the increase in office space costs. On the other hand, expropriation can only take place if it is ascertained, pursuant to the Law, that it is in the interest of the Republic of Croatia[254], or that it is in the public interest in Bosnia and Herzegovina[255]. City rent is calculated into the compensation for expropriated land because everything that is incorporated into the land, by civil law, belongs to the land owner, thus including the capital incorporated into the public utility infrastructure that had been invested by the city or municipality, i.e. the taxpayers, over decades and centuries.

3.4. Limitation of individual appropriation of city rent de lege ferenda

In the circumstances in which other persons, especially RC, and not municipalities and cities, are owners of the majority of construction land, the discussion on taxation of city rent that is appropriated in legal transactions and on its directing into city infrastructure[256] and indirectly into the construction of social housing[257] becomes inevitable. This comprises the discus-

---

[253] Art.2. ZE FB&H, Sl.novine FB&H 70/07 and Art.2 of the ZE RS, Sl. Glasnik RS 112/06.

[254] Art. 6 of the Law on Expropriation, NN 9/94, 35/94, 114/01, 79/06.

[255] Art.1 ZE FB&H and Art.1 ZE RS.

[256] Mihaljević, G., op. cit.; Montana, M., Novi prilozi stvaranju gradske rente („New contributions to the establishment of city rent"), ZPFR, vol. 17, issue 1, 1996, pp. 81–102; Konjhodžić, H., Oporezivanje gradske rente („Taxation of the city rent"), ZPFR, vol. 17, issue 1, 1996, p. 103-110.

[257] Unfortunately, there have been no discussions on the matter at the scientific symposium entitled „Modifications to the Public Revenue System", held on March 27, 2003 and organized by the Croatian Academy of Sciences and Arts (HAZU). The collection of treatises under the same title has been published by HAZU, Zagreb, 2003.

sion on the reach of aforementioned constitutional provision on the compensation paid to the land owner and on the taxation of this compensation. Within the constitutional principle of social justice, as one of the highest values of the constitutional order of the Republic of Croatia (Art. 3 of the Constitution), and obligation of participating in covering public expenses, pursuant to one's economic possibilities (Art. 51 of the Constitution), as well as the obligation of construction land owner to exercise their rights by contributing to the general good (Art. 48 par. 2 of the Constitution), it is necessary to prescribe adequate legislative solutions to accomplish these objectives. Analogous solutions apply to Bosnia and Herzegovina as well.

Being that the Republic of Croatia and entities of Bosnia and Herzegovina have decided, in principle, on complete denationalization and transformation of right of use to ownership rights over construction land, by establishment of owner rightship over a large number of construction lots it is necessary to limit, by law, the individual appropriation of city rent, others' capital, which are appropriated in legal transactions by the land owners, in a „parasitic" manner, without any investment or business risk. This can be achieved by adequate taxation of city rent that is appropriated in legal transactions[258].

Prices of apartments and office space, rent and lease are increasing rapidly, exclusively due to the increase in price of construction land, without any investment or risk undertaken by the land owners (owners of apartments and office spaces). High rent is compensated by the increase in prices of products and services, increasing the costs of living of the impoverished population, constantly increasing in number, especially those that are forced to pay the high leases for apartments as well, from their small salaries or pensions.

3.5. Increase of land owned by cities and municipalities and prohibition of alienation de lege ferenda

Bearing in mind the aforementioned points, future regulation of right of ownership of construction land, in accordance with the constitutional position of cities and municipalities[259], should be based on the following principles:

1. prescription of a presumption of the right of ownership of construction land for municipalities and cities (local self-government units) instead of for the state;
2. legal transfer of the ownership right of the RC and entities of B&H over construction land to municipalities and cities;

---

[258] Žunić Kovačević, N., Trebaju li nam promjene u nekim aspektima oporezivanja (nepokretne) imovine („Do we need changes in certain aspects of taxation of (real) property"), ZPFR, vol. 28, issue 1, 2007, pp. 493 – 509.

[259] Constitution of the Republic of Srpska prescribes that the „Municipality, through its bodies and pursuant to the law:

1. adopts a development program, urban plan, budget and balance sheet;
2. regulates and ensures the fulfilment of public utility activities;
3. regulates and ensures the use of city construction land and office space;
4. takes care of construction and use of local roads, streets and other public facilities of municipal interest …" (Art. 102).

Pursuant to the Constitution of the Federation of Bosnia and Herzegovina, „local self-government is practiced in municipalities" (VI Art. 1) and the Law determines the competence of municipalities, among others, those that are prescribed in Art. 102 paragraphs 1-4 of the Constitution in the RS.

Pursuant to the constitution of the Republic of Croatia "the right to local self-government encompasses the right to decide on needs and interests of citizens of local importance and, especially, spatial planning and urban planning, regulation of settlements and residence, on public utility activities... and improvement of the environment" (Art. 128 par. 2).

3. prohibition of alienation and encumbrance of construction land owned by municipalities and cities, which have acquired that land free of charge by law, by the transfer of ownership rights of the Republic of Croatia or entities of the B&H or by the transformation of social ownership;
4. stimulate the establishment of a right of construction, long-term lease and concession over the land owned by local self-government units.

With regards to this, the right of pre-emption of construction land should be prescribed for local self-government units.

3.6. Presumption of ownership right over construction land in favor of municipalities and cities instead of the Republic of Croatia

It is not in the spirit of the Constitution to have the presumption of ownership right over real estate, prescribed to be in favor of the Republic of Croatia, extended to the construction land. In this case, the city rent is appropriated by the state and not the local self-government unit (municipality, city) that is, pursuant to the RC Constitution, obliged to provide for spatial planning, urban planning, planning and equipping of settlements and residences, as well as for public utilities (Art. 128 par. 2). It would be in accordance with the Constitution to prescribe, under the presumptions from Art. 362 par. 3 of the ZV, a presumption of the right of ownership in favor of municipalities and cities for undeveloped construction land that had previously been socially owned. It would also be in accordance with the Constitution to have a legal regulation by which an abandoned real estate, undeveloped and developed construction land would be transferred to the ownership of the municipality or city, pursuant to the presumptions from Art. 123 par. 2 and 3 of the ZV. Amendments and supplements to Art. 77 of the Law on Compensation... are desirable, by which a local self-government unit (municipality or city) would acquire the right of ownership of construction land for which a request for compensation (restitution) was not timely submitted, or for which such a request has been refused by an enforceable decision, if the right of ownership has not been acquired by other persons.

3.7. Transfer of right of ownership of construction land to local self-government units

Due to the aforementioned, it is necessary to legally transfer the developed and undeveloped state-owned construction land into the possession of municipalities and cities, with a prohibition of alienation, and to have, by force of law, a right of construction constituted over developed construction land in favor of the state and entities of B&H, as well as other public legal persons, which would separate the land from the building they own, until such time when the building would be demolished or removed.

Over undeveloped construction land, the RC would acquire the right of construction (Art. 280-296 of the ZV) by the right of pre-emption, with the obligation of paying a compensation to the land owner, municipality or city, in the amount of average lease of such land, unless it is prescribed otherwise (Art. 281 par. 2 of the ZV). It is possible to diverge from the market compensation for the right of construction via a legal transaction between the Republic of Croatia and the local self-government unit, under the presumptions from the Law on Ownership (Art. 391 of the ZV).

3.7.1. Establishment of local self-government unit's right of ownership of city construction land in the entities of Bosnia and Herzegovina

In the entities of Bosnia and Herzegovina, where the social ownership of all real estates was nominally transformed to state ownership, thus including the city construction land,

even though the local self-government units have kept the right of administration and disposal, a solution that emerges as logical is to constitute the right of ownership of local self-government units of those plots of land over which no other person is acquiring the right of ownership. All other persons in public law, including the state of B&H and its entities, would have the right of construction on the already developed land, which would separate the buildings that they own from the land owned by the local self-government units, with the obligation of paying a periodic rent into the public utility infrastructure fund.

3.8. Inalienability of construction land owned by local self-government units

To preserve a permanent source of income for investment in public utility infrastructure, municipalities and cities should not be allowed to alienate even those parts of construction land over which they have, by transformation or transfer, acquired the right of ownership free of charge, except in exceptional cases that would be prescribed by the law. In this case, establishing a right of construction and long-term lease, concessions and real easements, with a periodic compensation, would ensure permanent sources of revenue through the collection of city rent that would be directed into public utility infrastructure through adequate trading companies in the utility economy, founded by municipalities and cities. This would stimulate the establishment of construction rights over undeveloped and developed land, which would reduce the construction costs and the prices of existing buildings or their separate units (real estates) owned by municipalities and cities, by the enormous price of construction land.

Introduction of the right of construction does not endanger the principle of legal unity of a real estate, as the right of construction is, in a legal sense, a real estate[260], and the building is its accessory, as if it were land[261]. Therefore, the real estate comprises the right of construction with a building that may not be legally separated from the right of construction[262].

Concessions can be created on public land in general use, administered by the state, or entities of the B&H, through their bodies and institutions, as well as local and regional self-government units, to separate the buildings and other facilities owned by the concessionaires[263]. Concessions may also be established on construction land in tourist camps and other technological complexes owned by the Republic of Croatia or local self-government units.

3.9. The local self-government units' right of pre-emption de lege ferenda

With the prescription of the right of pre-emption in favor of local self-government units, municipalities and cities would be enabled to increase the surface area of undeveloped construction land they own, within their economic power. Thus, the municipalities and cities in Central and North Europe, from Vienna to Stockholm, have acquired the right of ownership of vast surface areas of construction land in the last 100 years, over which they have established rights of construction or other related rights that allow them to amass an ever increasing amount in city rent and reduce construction costs by the value of the expensive land that the building owners (investors) or buyers of buildings and special parts of buildings, pay as

---

[260] Art. 280 par. 2 of the ZV, Art. 286 par. 2 of the ZSP RS, Art. 300 par. 2 of the ZSP FB&H Draft.

[261] Art. 280 par. 3 of the ZV, Art. 286 par. 3 of the ZSP RS, Art.300 par. 3 of the ZSP FB&H Draft.

[262] Art. 285 par. 3 of the ZV; Art. 291 par. 3 of the ZSP RS; Art. 305 par. 3 of the ZSP FB&H Draft.

[263] Art. 3 par. 4 and Art. 9 par. 4 of the ZV, Art.7 par. 4 of the ZSP RS; Art.7 par. 5 of the ZSP FB&H Draft.

a periodic compensation for the right of construction or another related right, during several decades of the existence of such a right.

The municipality also had a right of pre-emption of undeveloped construction land, encompassed by the adequate spatial plan, pursuant to the Law on Real Estate Trade of the SR B&H (Art. 29), which is still in force in FB&H. In the same way, the local self-government unit now has such a right over city construction land pursuant to the ZGZ RS of 2006 (Art. 8 par. 3).

4. Disposal of state-owned construction land and land owned by local self-government units de lege ferenda

Based on all that was said above, it can be concluded that the social imperative of a social state is to keep the remaining undeveloped construction land in the ownership of local self-government units, or in state ownership but administered and disposed of by the local self-government units, as well as to increase the surface area of such land through repurchase and, when legal prerequisites are met, expropriation, with the establishment of a right of construction for permanent buildings, lease for temporary buildings and concessions for buildings and other constructions on public property.

Bearing in mind that the scope of this treatise is limited, we will only demonstrate the functions of the right of construction, and not the institution of the right of construction, and, in short, institution of concessions for permanent buildings and other constructions on public property and institution of construction land lease for temporary buildings.

4.1. Functions of the right of construction

By its purpose, the right of construction is different from other limited real rights. It allows for the achievement of three important purposes: social, economic and legal, and must, therefore, be observed as means (function) to realise these ends.

4.1.1. Social function of the right of construction

In the conditions of enormous prices of construction land, building construction costs will increase proportionally, as will the prices of apartments or rents. The right to appropriate personal residence, this basic right of man and family, in these circumstances, remains unattainable to many.[264]

---

[264] The Holy Seat Charter on family rights of October 22, 1983, proposed to all persons, institutions and representatives in charge of respecting the family in a contemporary world, invites all states and competent institutions to promote the respect of rights and effective acknowledgement, among others, of the right to residence. Right to residence has been defined in Art. 11 of the Charter: „A family has a right to a decent residence, suitable fot the life of that family and appropriate to the number of family members, in an environment ensuring the bare necessities for the life of that family and community (Sto godina katolickog socijalnog nauka ("One hundred years of Catholic social studies"), "Kršćanska sadašnjost", Zagreb, 1991, pp. 568 and 569). Member states of the United Nations have, however, barely agreed that everyone has a right to a standard of living that is sufficient for them and their families, including adequate food, clothes and ***residence***, as well as to constant improvement in living conditions. The states that have signed this agreement will undertake adequate measures to ensure excercise of this right, recognizing the importance of international cooperation, based on free approval - International Pact on Economic, Social and Cultural rights (Annex to the Resolution OSUN 2200 A (XXI) of January 16, 1966). The pact came into force on January 3, 1976 (item 28 of the Decision...), NN 19/93, International agreements).

In socially oriented developed countries, different modalities are sought out to stimulate cheaper construction of buildings, especially social housing and family homes and one such modality is the right of construction. This is the purpose that our right of construction should serve, in accordance with the social component of ownership rights and all other rights proclaimed in the Constitution of the RC, prescribing that the holders of ownership rights and its users are obliged to contribute to the greater good (Art. 48 par. 2) and that social justice is one of the highest values of constitutional order of the Republic of Croatia (Art. 3). This is especially directed at local self-government units, which, compared to other persons, commonly own the largest surface area of construction land and are, pursuant to the Constitution, obliged to provide for social care of their citizens[265] .

The acquirer of the right of construction acquires the construction lot by registering with the land registry, without any compensation, but with an obligation to pay a small monthly fee (Art. 281 par. 2 of the ZV; Art. 287 par. 2 of the ZSP RS)[266]. Being that this right can be used as the base for a mortgage[267], by acquiring this right one acquires, at the same time, the possibility to take out a mortgage loan to construct a building. This allows not only for cheaper construction, but also for financing construction through loans, i.e. construction using someone else's funds. This greatly decreases the prices of residential and commercial facilities, opening up the possibility to sell apartments and office spaces in instalments, which would start during the construction or following the construction.

For this very reason, the right of construction is established primarily for the construction of family homes or for the construction of social housing (in residential buildings) that are sold or leased at favorable prices to those whose right to an adequate residence is endangered (so-called social housing).

The right of construction, as a rule, is established by the owners of large surface areas of construction land. In our country, these are mostly municipalities and cities, as well as economic entities, but not those whose business activities are directed towards fast profiting from the sale of land. By establishing a right of construction, cities and municipalities decrease the construction costs of family residential building as well as the costs of construction of social housing. This promotes residential building and building of business facilities, especially those intended for non-profit activities. By establishing a right of construction, land owners, therefore, encourage positive social and economic effects.

4.1.2. Economic function of the right of construction

Land owners, especially municipalities and cities, regularly do not have the necessary funds for residential and other types of construction, but by establishing the right of construction, they promote such construction using others' funds, whether to satisfy their own needs, whether to sell in the market (construction of buildings and parts of buildings for the market).

Being that they keep the ownership rights over land, land owners establishing a right of construction will collect, albeit small, permanent and relatively secure rent in monthly payments of average lease for such land, unless it has been prescribed otherwise[268]. Once the right of construction is terminated, the land owner becomes the building owner pursuant to

---

[265] Art. 128 par. 1 of the Constitution of the Republic of Croatia

[266] The holder of the right of construction is obliged to pay a monthly fee to the land owner for the land used, in the amount of average lease for that land, unless specified otherwise (Art. 281 par. 2 of the ZV).

[267] Art. 285 par. 2 relating to Art. 280 par. 2 of the ZV; i.e. Art. 291 par.2. relating to Art.286 par. 2 of the ZSP RS.

[268] Art. 281 par. 2, Art. 287 par. 2 of the ZSP RS.

the *superficies solo cedit* principle, which the last holder of the right of construction is obliged to pass on in good condition, as rules governing the relations after the cessation of the right of enjoyment of benefits apply in an adequate manner to these relations as well, unless special considerations have been implemented[269]. The owner of the land is obliged to pay a compensation for the building if the real estate he owns is more valuable with the building than without it[270]. However, this grants him the right of disposal of his real estate: land with the building on it, allowing him to alienate it, encumber it or lease/rent it at market prices, if other provisions have not been made (e.g. when it comes to „social housing" developed by municipalities and cities, as well as other persons which do not operate for profit, the so-called non-profit legal entities).

In this manner, the cycle of city rent is established and maintained, as is the cycle of capital incorporated into city land, allowing for maintenance, modernization, enrichment and expansion of city infrastructure, construction of social housing, etc.

4.1.3. Legal function of the right of construction

The right of construction legally separates the building from the land, on the surface of the land or below it[271]; by annulling the attractiveness of the right of ownership of the land, it merely takes over the role of the land as the building is now its accessory „as if it were land"[272]. By establishing a right of construction, therefore, the principle *superficies solo cedit* does not cease, only the object attracting the building is replaced. The right of construction takes the place of natural land, as different land, or different real estate if the building had previously been constructed[273], so the building constructed on the basis of the right of construction or separated from the land by such right is its accessory.

The right of construction is established to allow for legal separation of an existing permanent building from the land, or to construct such a building that would, without the right of construction, be a constituent part of the land, as in both cases, the holder of the construction right will be the owner of the building, for the duration of such right.

Being that the right of construction can be established on the surface or below the surface of land (Art. 280 par. 1), there is a possibility that one person may hold the right of construction on the surface of the land, another below the surface, and that the third person be the owner of the land. The first person will be the owner of the building built on top of the land, the second will own the building constructed below the surface, while the third will become the owner of these buildings once the right of construction expires pursuant to the *superficies solo cedit* principle.

By building an extension on the basis of a right of construction, ownership rights over the separate units in the real estate and co-ownership rights over the real estate are acquired.

4.2. Concessions for buildings and other constructions

A suitable form for acquiring and holding the right of ownership over a building or another construction built on state owned land or land owned by the local or regional self-government units are concessions, which completely separate the buildings and other constructions from the land, without constituting a right of construction.

---

[269] Art. 295 par. 2 of the ZV; Art. 300 par. 2 of the ZSP RS.

[270] Art. 295 par. 3 of the ZV; Art. 300 par. 3 of the ZSP RS.

[271] Art. 280 par. 1 of the ZV; Art. 286 par. 1 of the ZSP RS.

[272] Art. 280 par. 3; Art. 286 par. 3 of the ZSP RS.

[273] Art. 280 par. 2, Art. 286 par. 2 of the ZSP RS.

The legal institution of concession is regulated by the Law on Concessions (1992)[274] with a whole range of special regulations on concessions of different purposes that are irrelevant to the matter at hand.[275]

This discussion is limited to concessions for the construction of buildings and other constructions on the public property, but also on the construction land owned by the Republic of Croatia and local and regional self-government units. These concessions allow for the construction of buildings and other constructions owned by the concessionaires, for the duration of the concession, so that a concessionaire may encumber them by a mortgage or let them out into fiduciary ownership, except if this is contrary to the terms of concession. By establishing a concession, a right of ownership can be acquired over the already constructed buildings, as well as over other constructions, such as warehouses in ports. The Law on Ownership prescribes that „legally, those buildings and other constructions that have been constructed on public property on the grounds of a concession are not part of the public property, constituting a separate real estate for the duration of the concession" (Art. 3 par. 4, Art. 7 par. 4 of the ZSP). This also relates to buildings and other constructions that are „legally separated from the land or public property by a concession based on the law, which authorizes its holder to own such a building or other construction on this land" (Art. 9 par. 4) regardless if they have been constructed on the grounds of a concession or have been separated from the land for the duration of the concession.

The concession acquires public character when it is entered into the registry of concessions, while the concession that separates the building or other construction from the land gets such character by inscription into the land registry as well (Art. 31 par. 1 of the ZZK), so that, following the submission of a request for the inscription of this concession into the registry, no one could claim that he has not been informed that the building, or other construction, in question is legally separated from the land on which the concession is formed[276] and that it is owned by the concessionaire.

The weakness of a concession is that it is limited in legal transactions, as it can only be transferred to a person providing guarantees for fulfilling all obligations stated in the concession and, as a rule, with the consent from the grantor. Therefore, the possibility of encumbering the concession to secure a loan by mortgage, or by the transfer of ownership of the construction separating the concession from the land, is almost impossible.

4.3. Lease of land for temporary construction

A temporary building is legally separated from the land pursuant to the law (Art. 9 par. 3 of the ZV)[277]. Such buildings may be kept on another's land on the grounds of a lease agreement or on some other legal grounds, i.e. with the consent of the land owner. Lease agreement acquires legal publicity with its inscription into the land registry (Art. 31 par. 1 of the ZZK of the RC). This largely allows for legal security in legal transactions.

Without a permanent link, the land and the building are two entirely separate items that may belong to different owners, even though they are not separated by the right of construction. When, pursuant to the law, the building is not an integral part of the land, it is not entered

---

[274] NN 89/92.

[275] More on concessions, Đerđa, D., Pojam i obilježja koncesija („Definition and characteristics of concessions"), ZPFR, vol. 24, issue 1, pp. 617 – 638.

[276] Josipović, T., Zemljišnoknjižno pravo („Land Registry Law"), issue 270–272 and 274.

[277] More in: Prava na nekretninama (1945-2007) („Rights over real estates (1945-2007)"), p.52.

into the land registry. The Law on Land Registry (ZZK) prescribes that land and all that is permanently linked to the land is entered into the Land Registry (Art. 2).[278] Security in legal transactions, which is based on trust in land registry, in the truthfulness and completeness of the land registry, requires a permanent link as the presumption of legal unity of land and building. On the other hand, there is a need to use the land owned by others, among other things, for the construction of temporary facilities. With the regime of segregated ownership of land and temporary facilities, two requirements are met at the same time: the interest of legal security, demanding that only permanent constructions are to be seen as integral parts of the land, while economic and other uses of land owned by others, especially construction land, require allowing for separate ownership of land and temporary construction built on it, so that the owner of such a construction may dispose of it freely. Legal relationship that allows for such a manner of use of others' land is formed between the land owner and the owner of the temporary construction, most commonly through a lease contract and sometimes through a contract on loans or precarious detentions (the loan lasting until it is recalled).

4.4. Right of easement for devices and equipment on another's land

4.4.1. The need for establishment of a right of easement

In a contemporary society, characterized by a high degree of technological development, there is a whole range of specific devices and equipment that can be set up on, below or above the surface of land owned by another person, which are, pursuant to urban planning or function (intended use) connected to adequate telecommunication systems, to transfer and distribution of electric or heating energy, for different pipelines such as: oil pipelines, gas pipelines, water supply lines, sewers etc.

These devices, from the viewpoint of property law, are an extension or accessory of the adequate plant, legally separated from the land. On one plot of land, there is the plant, as a constituent part of land or as a separate real estate, while devices and equipment, on another plot of land, are always separated from the land. The plant, a privileged property, as an independent permanent construction, is separated from the land by the right of construction (Art. 280 - 296 of the ZV), or the prior permanent right of use of socially owned construction land, while its accessories or extensions, that are constructed on land lots belonging to other people, are, as a rule, separated from the land by the right of real easement (Art. 196 of the ZV). A plant may also be separated from the land through a concession.

4.4.2. Definition and authorizations of right of easement

The right of real easement, entitling the holder to construct permanent devices, extensions of a plant or its accessories, on another's' property, also comprises another authorization: the right to maintain these constructions on another's' land. Conversely, real easement separating an independent construction from the land over which there is ownership right, does not comprise the right of construction or the right of reconstruction (when the existing construction is removed) of the same or similar construction. This easement is simply terminated with the demolition of the construction (privileged property). Easement in question is connected to the existing plant (privileged property), thus existing independent of the device for whose construction it has been established.

---

[278] In § 7 par. 4 of the Rulebook on regulating land registries, of February 17, 1931, it was explicitly stated that temporary buildings are not entered into land registry and are to be considered movable assets. Such a provision is found in the Swiss Law as well (Art. 677 of the Code Civil Suisse), pertaining to light constructions, such as stands, stores, barracks, constructed on another person's land (Art. 677 par. 1).

The easement holder, giving the consent to construct the extension or a constituent part of a certain plant on another person's land, authorizes its holder to perform all construction works, or implement all modifications necessary to construct the said devices and allow them to function normally, in accordance with their intended use, in future. The holder of such a right of easement is also authorized to remove, or request removal, of all those natural or man-made modifications that would hinder the normal functioning of devices for which the right of easement has been constituted, e.g. to cut down trees or any other plants at a certain distance from the long-distance power lines, or to request removal of constructions endangering the functioning of the system (e.g. pollution of water in the water supply line).

4.4.3. Legal nature of the right of easement

The right of real easement that is discussed herein comprises two authorizations: the right of construction and the right of maintenance of a permanent construction (extension or accessory of a certain plant) on another person's land (property in service). The first authorization does not cease with the construction of the device, it is put on hold while the device is in existence and when the device falls into decay, the holder of the right of easement has the right to construct another adequate device.

The comparison between such easement and permanent right of use of socially-owned construction land is presented elsewhere.[279]

A more detailed discussion can be found elsewhere on the legal nature of the right of real easement of socially-owned construction land, as well as on this specific easement[280].

4.4.4. Protection of the right of easement

In a legal system recognizing the right of real easement, such as our law (Art. 10 par. 5), the holder of a real easement in question enjoys the protection of ownership and petitioning from the moment of establishment of such a right to the moment of its termination. The right of real easement belongs to a person who uses another person's real estate in the extent corresponding to the content of this easement.

The owner of the privileged property may require, through a lawsuit, that a right of real easement be established towards the owner of the property in service, but he has to prove that he holds the right of real easement and that the owner of the property in service is not interfering with this right.

4.4.5. Termination of the right of easement

The right of real easement, constituted for the purpose of construction of devices or equipment that are an extension or accessory of a device located on another plot of land is, as a rule, never terminated, as the right of real easement is usually terminated once the property it refers to is demolished. In this case, if the property it refers to (the plant) is demolished, there are two possible situations:

a) when there is an obligation of reconstructing the plant (the property in service) because its owner performs a public duty (activities of special social interest), to which the same easement applies;

---

[279] Simonetti, P., Pravo građenja („Right of construction"), NIO Sl. list SR B&H, Sarajevo – NIO Sl. list SFRJ, Belgrade, 1986, pp. 236–238.

[280] Simonetti, P., Pravo korištenja građevinskog zemljišta u društvenom vlasništvu („Right to use socially owned construction land") (part 3, Chapter: Pravna priroda prava korištenja građevinskog zemljišta u društvenom vlasništvu „Legal nature of the right to use socially owned construction land"), Informator, Zagreb, 1985, pp. 231 – 233.

b) when the plant owner objectively cannot restore the plant, or decides not to restore it, when he is not obliged to do so and when the same easement does not apply to another plant performing a similar function, if such a plant exists.

In the former cease, the right of easement remains; in the latter, it is terminated by the force of law. In the latter case, devices and equipment lose their permanence, they are considered movable property, autonomous objects that the plant owner may remove, or may be forced to remove by the land owner.

Summary

Right of ownership is established over socially owned construction land by transformation of a permanent right of use into the right of ownership (co-ownership) of the owner (co-owner) of the building and its separate units. The rights registered over undeveloped construction land, on which permanent buildings have been constructed pursuant to the law, are also transformed into ownership rights (legalization of illegal construction). This transformation took place pursuant to the force of law, outside the land registry, establishing the legal unity of the real estate on the land that the permanent right of use referred to, which is the land beneath and surrounding the building, that is necessary for its regular use, pursuant to the adequate spatial plan. Inscription of the real estate into the land registry is performed pursuant to extensively defined rules, whether the land or the building have been entered into the land registry or not. The legal unity of the real estate is established *ex lege*, by merging the building that is owned by condominium owners with the land that is privately owned, as the right of co-ownership now extends to the whole real estate, giving rise to the right of ownership of separate units of that real estate. The author advocates legal prohibition of alienation of state-owned construction land and construction land owned by the local self-government units, as well as for the application of the institutions of the right of construction, concessions, lease and easement, allowing for a permanent inflow of a constantly increasing city rent into the public utility funds and a decrease in construction costs, price of buildings and separate units within those buildings, by the price of land.

Keywords: construction land, building, real estate, ownership

Rodna Živkovska, PhD*
Full Professor at the Iustinianus Primus Faculty of Law in Skopje
Tina Pržeska, MA*
Assistant professor at the Iustinianus Primus Faculty of Law in Skopje

ESTABLISHMENT OF PROPERTY RIGHT AND RIGHT OF LONG-TERM LEASING OF DEVELOPED BUILDING LAND OWNED BY THE REPUBLIC OF MACEDONIA

I. CONCEPT, GENESIS AND LEGAL NATURE OF THE RIGHT OF PERMANENT USE IN THE PEOPLE'S REPUBLIC OF MACEDONIA AND THE SOCIALIST REPUBLIC OF MACEDONIA

The legislators and civil doctrine of the Federal People's Republic of Yugoslavia, and the former Socialist Federal Republic of Yugoslavia (of which the PR of Macedonia and SR of Macedonia were integral parts) considered the right of permanent use as the **right authorising the owner of a building erected on socially-owned land to use the land underlying the building and that serving for regular of the building for as long as it exists**[1]**.**

1. The development of the right of permanent use originates from the nationalisation of building land conducted pursuant to the 1958 Law on Nationalisation of Rental Buildings and Building Land. That nationalisation introduced the superficiei solum cedit principle that implies a dual legal regime: social ownership of building land and right of ownership of a building built on that land. **However, even though the land and building are permanently fused, they are separated by the right of permanent use of state-owned building land.** Due to the linkage existing between land and a building (until its removal or demolition), in the civil doctrine, civilists, like Professor Simonetti, believed that *"although it was not a classical property law, this is still a property law."*[2] Furthermore, Professor P. Simonetti also claimed at that time that *"immediateness and absoluteness are a common feature of both the right to construction-oriented use and the right to permanent use, since the object of both rights is the matter – the building particle that is precisely determined – res certa"*. The position of Professor Andrija Gams was that *"it is difficult to claim that the option to buy is a classical property right"*[3].

---

* Original text is in local language.

[1] Hence: *"When a building with established ownership right is erected lawfully on socially-owned land, the building owner has the right to use the land on which the building was erected and the land serving for the use of that building for as long as the building exists"* (Art. 12, para. 1 of the Law on Fundamental Property Relations, SFRY Official Gazette, Nos. 6/80 и 36/90). A similar definition to this one was also voiced by the then civilists in the former SFR of Yugoslavia. In doing so, they named this right in different ways: The term right to use building land is used by almost all Macedonian civilists. The term right of construction is used by M. Vedriš, Elements of Property Law, Zagreb, 1976, p. 207, as well as V. Spaić, Civil Law (General section and Property Law), Sarajevo, 1971, p. 669. Professor P. Simonetti, quite rightly made a distinction between the term *right to use socially-owned building land for construction purposes* and the term *right to permanent use of socially-owned building land*. See: *Pravo građenja*, Sarajevo, Belgrade, 1986.

[2] See: P. Simonetti, op. cit., pp. 231 and 234.

[3] A. Gams, Introduction to Civil Law, Belgrade, 1963, p. 150.

2. With regard to the legal nature of the right to permanent use, particular importance is attached in the civil doctrine of the SR of Macedonia and the Republic of. Macedonia to the position taken by Professor Stefan Georgievski that *"the right of use is permanent since it is based on an indefinite time frame, without any compensation whatsoever for the use of building land, that it is legally determined, that it ceases with the building's ruination or if the building has not been built yet, whereby this right is transferred only by the transfer of the ownership of the building built on that land"*. However, Professor S. Georgievski concludes that *"although this right is within the property law, it is not independent, since the right is tied to erection of the building and shares the fate of the building"*[4]. Professor Dimitar Pop Georgiev is also of the same opinion, whereby, *"the right of use is within the content of social ownership of building land with a property character, since the owner had used that land according to its purpose thereby having the authority to exclude any third person from using the land"*[5]. Unlike these authors, Professor Asen Grupce takes the right of use as *"a kind of easement with elements of property and personal easement, or to be more precise, a mixed, transitional kind of easement the quintessence of which is in the use of somebody else's property, where the bearer of the serving good (the state) has a passive attitude, i.e. it is under no obligation to act objectively"*[6]. On the other hand, Professor R. Živkovska believes that *"the right of use, being a derived one, is a sui generis right which, due to its effect on everybody and its object – property, has an absolute and immediate (property) character"*[7].

3. The genesis of the right to permanent use of socially-owned building land in the PR of Macedonia took place in four stages. The first stage was in the 1950-1954 period, i.e. from the adoption of the Basic Law on the Management of State-owned Enterprises and Higher Level Business Associations by Work Collectives (Official Gazette of the FPRY, No. 43/50), to the adoption of the 1954 Law on Land and Building Transfers (Official Gazette of the FPRY, No. 26/54), under which the right of use may be given to any citizen of the FPR of Yugoslavia, thus giving initial encouragement to individual housing construction in a way that allowed the sale of state-owned residential buildings to citizens of the FPR of Yugoslavia, thus granting them the right of ownership of the purchased building, while the land underlying the building and yard remained in the so-called Social Property Fund. The second stage ran from the adoption of the 1954 Law on Land and Building Transfers to the adoption of the Law Amending the Law on Land and Building Transfers in 1965 (Official Gazette of the SFRY, No. 15/65), when the circle of the holders of the right of use and of permanent use was expanded to cover legal entities.. The third stage includes the period between the 1965 Amendments to the Law on Land and Building Transfers and adoption of the 1967 Amendments to the Law on Land and Building Trade (Official Gazette of the SFRY, No. 17/67) stipulating that the right to use the socially-owned building land may be created also for the purpose of constructing of business buildings and premises. The fourth stage includes the period between the 1967 Amendments to Law on Land and Building Transfer and the 1991 Amendments to the Law on Land and Building Transfers (Official Gazette of the SFRY, No. 21/91) stating that building land in the Republic of Macedonia is state-owned, i.e. it is the property of the Republic of Macedonia (Art. 5, para. 1).

---

[4] S. Georgievski, *Aspects of transformation of the right to use the building land owned by the Republic of Macedonia, The* Jurist, Association of Jurists in the Economy of the Republic of Macedonia, July-August 2002, p. 11.

[5] D. P. Georgiev, *Development of the Right to Use Socially-owned Building Land,* Yearbook of the Skopje Faculty of Law, 1967, p. 203.

[6] A. Grupce, *Property (Civil) Law, Part Two,* Kultura, Skopje, 1983, pp. 107-108.

[7] R. Živkovska, *Property Law,* Evropa 92, Skopje, 2005, pp. 87-88.

It is indisputable that paragraph 1 of Article 5 of the Law Amending the 1991 Building Land Law, denotes in the legal sense the transition of social ownership of building land into its state ownership and therefore, the right of use as a state ownership element, i.e. as a content-derived right from social property, should cease also in practice, i.e. de facto. However, Macedonia's legal life has shown that even after the adoption of Amendments, the competent ministry, i.e., the Ministry of Transport and Communications, kept letting building land for permanent use on the basis of the 2001 Building Land Law (Official Gazette of the Republic of Macedonia, 52/01).

II. OUTLINE OF THE TRANSFORMATION OF THE RIGHT TO PERMANENT USE OF BUILDING LAND INTO PROPERTY RIGHT AND THE RIGHT OF LONG-TERM LEASE

The legislation of the Republic of Macedonia shows that the transformation of the right to permanent use into property right or right of long-term lease, within its legal system was taking place in three stages. The first stage began with the 2001 Building Land Law which dealt comprehensively with transformation of the right to permanent use into property right or the right to long-term lease. The second stage began with the Decree on the Method of and Procedure for the Transfer of Developed Building Land Owned by the Republic of Macedonia of 7 March 2003, regulating only the transfer of developed building land owned by the Republic of Macedonia to domestic individuals and legal entities (i.e. transformation of the right to permanent use against a compensation). The third stage commenced with the adoption (and enforcement) of the 2005 Law on Privatisation and Leasing of State-owned Building Land (Official Gazette of the Republic of Macedonia, No. 4/05) regulating the privatisation of state-owned building land (both developed and undeveloped) to which the right of use (with or without compensation) and the right of long-term lease exist (in the case of unexecuted privatisation), as transformation types.

The means of and conditions for transforming the right to permanent use of state-owned building land into the property right or right of long-term lease, in accordance with the three successive regulations, will be presented in greater detail in separate chapters below.

I. Tranformation of the Right to Permanent Use of Developed Building Land into the Property Right and the Right of Long-Term Lease According to the 2001 Building Land Law

1. **The 2001 Building Land Law regulates the legal regime of both developed and undeveloped building land, as matters of common interest** (Art. 3)[8].

[8] The proclamation of building land as an asset of common interest for the state is presented in paragraph 1 of Article 2 of the Building Land Law, which is in keeping with paragraph 1 of Article 16 of the Law on Ownership and Other Property Rights. The latter proclaims building land, among other things, as an asset of common interest: *"Building land is an asset of common interest to the Republic and it enjoys special protection, in the way and under the conditions provided by this law"*. Paragraph 1 of Article 16, on the other hand, is in keeping with paragraph 1, Article 56 of the Constitution of the Republic of Macedonia where building land is referred to as *"an asset of common interest"*. *"All natural resources, flora and fauna, goods in common use, building land, forests and agricultural land, pastures and waters, as well as things and structures of outstanding cultural and historical significance determined by law are things (assets) of common interest to the state"*. (Art. 16, para. 1, of the Law on Ownership and Other Property Rights). *"All natural resources of the Republic, flora and fauna, goods in common use, as well as things and structures of outstanding cultural and historical significance determined by law are assets of common interest to the Republic and they enjoy special protection"* (Art. 56, para. 1, Constitution of the Republic of Macedonia).

According to the Building Land Law, the things in common use, as a subgroup of things of common concern, being exclusively reserved to be things owned by the Republic of Macedonia[9], can be used by all individuals and legal entities. In that case, **the building land in common use is managed by the Government of the Republic of Macedonia on behalf of the Republic of Macedonia, which can transfer its right of management to some other authority** (Art. 11).

For the purposes of the Law, developed building land means the building land on which a building of permanent nature has been erected in conformity with law and the land serving for the regular use of that building. The Building Land Law clearly defines building land as a thing arising from the provisions of Article 7 of the Law: *"The ownership of building land covers its surface area and everything linked with it permanently, existing on ground or underground, unless otherwise provided by law"*.

2. **According to the provisions of the Law, building land can be state-owned (owned by the Republic of Macedonia) and privately owned** (owned by domestic individuals and legal entities) (Art. 6). The Law actually individualises the building land by expressing it in building plots. A building plot is a part of the building land designated as such in plans and the documents replacing plans and it can consist of **one or several cadastral lots**, or **parts of cadastral plots** established by a detailed city plan, i.e. an authorised urban project and numerical data for the surface area of the building plot (Art. 9). This provision points at **the importance of the cadastral system in the Republic of Macedonia,** which at the time of adoption of the Building Land Law was regulated by the 1986 Law on Land Survey, Cadastre and Registration of Real Estate (Official Gazette of the Republic of Macedonia, No. 27/86)[10].

3. **For the first time, the Building Land Law has allowed the trading of building land:** *"The trading of building land shall be in keeping with the conditions set by this and other laws"* (Art. 8, para. 1) (However, the Macedonian legal community is still undecided about the following question: What is traded, the building land or the building lots on it?

As an exception, the building land trading can be restricted in the case of expropriation of the building land owned by individuals and legal entities, on which buildings of public interest to the Republic are planned to be erected in keeping with law. In such cases, there is a limitation concerning the choice of contracting party (a relative limitation of the right of ownership) in favour of the Republic of Macedonia, which has the right of pre-emption concerning building land. With regard to the conditions for and way of exercising the right of pre-emption, the Building Land Law makes a reference to the provisions of the Law of Obligations (Art. 8).

4. **The superficies solo cedit principle is explicitly expressed in Article 10 of the Building Land Law:** "**The buildings erected on or below the surface of building land and intended to stay there permanently make up parts of that building land until they are separated from it**, *unless they are legally separated from the land by the property law, which authorises the holder of that right to own buildings on somebody else's, land, or if based on a concession, the bearer of that right is authorised to have his own buildings on it"*.

---

[9] *"Things in common use are state-owned things used by all individuals and legal entities"*, Art. 16, para. 4, Law on Ownership and Other Property Rights...

[10] It was valid until the adoption of the Law on the Real Estate Cadastre in March 2008 (Official Gazette of the Republic of Macedonia, No. 40/08), which once again is based on the cadastre system for registration of real estate rights.

The provision of Article 10 provides that buildings erected on or below the surface of building land (if they are in keeping with town plans[11]) are additions to the main thing, i.e. the building land[12].

5. **The Law allows an exemption from the superficies solo cedit rule** if the real right of construction (right of long-term lease) to that land has been established or if the right of concession to a given person has been established. In these two cases, the holder of the right to a long-term lease and the right to concession has the right to build on somebody else's land (in accordance with the then valid 1990 Capital Project Law (Official Gazette of the SR of Macedonia, Nos. 5/90 и 11/91 and Official Gazette of the Republic of Macedonia, No. 11/94, 18/99 and 25/99), where they can erect buildings which are to be owned by them for the duration of the long-term lease or concession right. From the legal point of view, the exemption from the superficies solo cedit principle should be understood to mean that the **thus erected buildings on or under the surface of building land, follow the fate of the right to a long-term lease**, not the fate of the land owned by another party (individual, legal entity or the state). This means that in these cases, the right to a long-term lease should be treated as a *"feigned real estate"* so as to say that buildings follow the fate of that *"feigned real estate"*.

The provision of Article 10 applies only to permanent buildings, i.e. the buildings intended *"to stay there permanently"*, not to temporary buildings[13]. The Law clearly stipulates that the latter are not *"parts of building land"* (Art. 10, para. 2)[14].

1. Tranformation of a State-Owned Building Land into the Right of Ownership or Right of Long-Term Lease

The transformation of the right to use building land is dealt with by Section IV of the Building Land Law, the title of which reads as follows: TRANSFORMATION OF THE RIGHT TO USE BUILDING LAND (Art. 49-67).

In setting up the legal regime for transformation of the right to use building land, the Law differentiated several categories of persons holding the right of use or the right to transformation of the building land they used. The first category is the persons using the building land on the basis of former ownership. The second category are the users of building land on the basis of purchased residential or other buildings on socially-owned land, i.e. the land owned by the Republic of Macedonia (with or without defined paid-for yard space). The third category includes the users of building land to whom that land has been allotted for the purpose of

---

[11] Pursuant to the then valid 1996 Spatial and Town Planning Law (Official Gazette of the Republic of Macedonia, No. 4/96), spatial planning had to be conducted on the basis of the State Spatial Plan and the following plans: general city plan, detailed city plan, settlement town plan documentation and town plan for border crossing (Art. 7).

[12] This is actually a case of an originary way of acquiring the ownership right by building, which is regulated by Article 116, paragraph 1 of the Law on Ownership and other Property Rights: *"A land owner, as stipulated by law or according to the given law on architectural structures, shall obtain the ownership right to the architectural structure erected upon the land, pursuant to building regulations, by registering the right in public books for the registration of real estate rights"*.

[13] Pursuant to the Law on Ownership and Other Property Rights, an addition to property is: *"its every part which is permanently fused with it"* (Art. 15, para. 3).

[14] *"The temporary buildings erected on building land on the basis of documents issued by the competent authority up to the effective date of the Building Land Law, shall carry on standing until expiration of the deadline set in the document allotting the land for temporary use, or until implementation o the city plan"*. See: Art. 71.

erecting buildings. The fourth category is the users of land who bought the so-called socially or state-owned apartments. The latter are actually the owners of the buildings or apartments sold in accordance with the Law on Sale of Socially Owned Apartments and Office Premises owned by the Republic of Macedonia or sold on other grounds or transferred by the state in some other way, for which building lots had not been designated before construction.

1.1. The category of building-land users on the basis of former ownership

The users of building land on the basis of former ownership were able to transform the right of use into the right of ownership of building land **by filing a request to that effect with the Ministry of Transport and Communications** (Art. 50). Based on the requests for transformation, the Ministry of Transport and Communications would render **decisions on the transformation of the right of use into the right of ownership** which constituted legal grounds for entering the right of ownership into the real estate cadastre. The persons using the land in the capacity of its former **o**wners were those who owned the land until its nationalisation, i.e., when it became socially owned on the basis of a document adopted by a competent authority (law, decision of a district people's council or decision by a municipal council), as well as the users to whom the right to permanent use of undeveloped building land has been transferred, pursuant to the Law on Nationalisation of Rental Buildings and Building Land (Official Gazette of the FPRY No. 52/58). In the case of transferred right of permanent use pursuant to the Law on Nationalisation of Rental Buildings and Building Land, it should be noted that transformation was possible if one of the following requirements was met: 1. that the transfer contract was verified by the competent verification authority, 2. that the agreed price is paid through a bank or 3. that the person to whom the right of use has been transferred has been discharging his obligations to the community in connection with that land (tax payment).

CONSLUSION: The building-land users on the basis of former ownership have transformed their right to use building land exclusively into the right of ownership without any compensation, on the basis of a decision.

1.2. The category of building-land users on the basis of purchased residential and other buildings on socially or the Republic of Macedonia owned land

The users of building land on the basis of purchased residential and other buildings on socially or the Republic of Macedonia owned land (with or without defined yard space), who have paid the compensation for building land, were able to transform their right of use into the right to ownership, subject to presentation of evidence that compensation has been paid (Art. 51). If the compensation for allotted building land was not paid, these persons could transform their right of use into the right of ownership, subject to payment of the compensation set in keeping with the provisions of the Building Land Law. If the users failed to pay the compensation in the transformation procedure, their right of use was transformed into the right of long-term lease on the building land owned by the Republic of Macedonia, in keeping with the provisions of the Building Land Law.

CONCLUSION: Guided by the principle of conscientiousness and honesty, the legislators have rightly provided for the category of users of socially-owned building land who have paid compensation for land when purchasing a residential or some other building, to transform their right of use into the right of ownership. If they failed to pay compensation, they could transform the right of use into the

right of ownership, if they have paid the compensation or into the right of long-term lease on the building land owned by the Republic of Macedonia if they have not paid the compensation.

1.3. The category of users of building land to whom building land has been allotted for the purpose of erecting a building

a) The user of building land to whom **building land has been allotted for the purpose of erecting a building and who has paid the compensation and erected the building,** was able to transform the right of use into the right to ownership, subject to presentation of evidence that the compensation for the building land let has been paid (Art. 52). The right to use building land was transformed into the right of ownership **only within the limits of a building plot defined by the city plan** or valid spatial planning regulation in that period. Thus, the law provides that in the transformation of the right of use into the right of ownership of the building plot, the factual or legal changes occurred on the building plot on the basis of the documents adopted by competent authorities, should also be taken into account.

b) If the users of the building land allotted for construction of buildings did **not pay the compensation and erected buildings,** they could transform the right to use building land into the right of ownership (of the whole or a part of that land), if they paid the compensation which was set then in accordance with the provisions of the Denationalisation Law, i.e. the provisions of the Decree on the Method of and Procedure for Setting the Value of Property Undergoing Denationalisation (Art. 51, para. 3 and 4).

c) When the users of building land acquired the right to **use that land by public bidding or direct contract**, (meaning that the allotted right of use is paid for), **their right of use was always transformed into the right of ownership.** The requirement for this was the presentation of evidence that payment has been made in either case (Art. 55, para 1).

COCLUSION: In the first case, in keeping with the principle of conscientiousness and honesty, the legislators have made it possible for the users of the building land allotted to them for the purpose of erecting buildings, who have not paid compensation for it, to transform their right of use into the right of ownership.

In the second case, in keeping with the principle of equality of mutual liabilities, the users of the building land allotted to them for permanent use and who have erected buildings without paying compensation, can transform their right of use into the right to ownership if they pay compensation in accordance with the denationalisation regulations (if developed, this land cannot be restored to previous owners).

In the third case, in keeping with the principle of conscientiousness and honesty, the state has no right to seek compensation from the category of persons who had paid compensation for the allotted building land by public bidding or a direct contract.

1.4. The category of the users of land who had bought a so-called socially or a state-owned building or apartment

The building land transformation also includes a situation in which the holder of the right of ownership of an apartment or some other building has not acquired the right of use of the land underlying that apartment or some other building. This is a case of a transformation of building land owned by the Republic of Macedonia, which underlies a building or apartment

which has been sold in accordance with the Law on the Sale of Socially Owned Apartments and the Law on the Sale of Business Premises owned by the Republic of Macedonia, as well as sale of buildings sold or otherwise alienated by the state, and for which no building plots had been defined before construction (Art. 53). This is actually a case of the **category of persons whose right of permanent use is not registered or entered in the public books for the registration of real estate rights).** In these cases (i.e., when the building plots of erected buildings were not defined before construction), the building land area for which the right of use was transformed into the right of ownership, was set by a transformation contract on the basis of town plan (Art. 53, para. 2). Since the building plot area for which the right of use was transformed into the right of ownership was defined by the transformation contract, the Ministry of Transport and Communications delimited the individual building plots by **adopting decisions** (Art. 53, para. 3). Any disputes to do with determination of the area of transformed building land and the building land for which the right of ownership existed were dealt with by courts in extrajudicial proceedings for lot line regulation, in keeping with the provisions of the 1979 Extrajudicial Proceedings Law (Official Gazette of the SR of Macedonia, No. 19/79).

If there were several owners of a building erected on building land, it was transformed according to the size of ownership shares, i.e. the ownership of the separate parts of the building, **thus into ownership right or right to a long-term lease set in ideal shares.** In the case of the buildings erected on state-owned building land being co-owned, the right of use was transformed into the right of co-ownership. (Art. 53, para. 4).

CONCLUSION: Since the owners of apartments or other buildings had not gained the right of use, the legislators have quite rightly provided for them to acquire the right of ownership (co-ownership, joint ownership) or right of long-term lease, even though they had not acquired the right of permanent use at the moment of purchase of an apartment or some other building, provided that they pay compensation for the newly formed building plot underlying that building or apartment.

2. Transformation of State-Owned Developed Building Land Exclusively into the Right of Long-Term Lease

The transformation of the right of use into the right of a long-term lease is exclusively reserved for the following three cases: 1. **for building land in municipalities and the City of Skopje** on which there exist the buildings which have been transferred to municipalities and/or the City of Skopje on the basis of separation balance sheets, 2. **for acquired right of use of building land of a social legal entity or some other entities holding the socially owned capital** (on the basis of allocation or on the basis of use of a building erected on that land for the purposes of conducting business or some other activities), which could not be the holder of the right of ownership and 3. **for foreign persons** (individuals and legal entities) to whom the building land has been allotted on the basis of public bidding or direct contract.

1. The local self-government units (municipalities and the City of Skopje) which have acquired the right of ownership of the buildings transferred to them on the basis of separation balance sheets, could transform the right to use the building land underlying such buildings only into the right of long-term lease, since according to the provisions of law, building land could be owned only by the state and private individuals, not also by local self-government units (Art. 6). They acquired the right of long-term lease pursuant to the 2001 Building Land Law **on the basis of contracts** with the Ministry of Transport and Communications, as the authority managing the building land owned by the Republic of Macedonia **with the means of an immediate compensation-free settlement** (Art. 31, para. 2).

2. The social legal entities who had acquired the right to use socially-owned building land with means of socially-owned capital on the basis of allocation or on the basis of using buildings for business operation or some other activities of social legal entities and other persons (when such legal entity could not be the holders of the right of ownership), **transformed that right into the right of long-term lease on the building land owned by the Republic of Macedonia, regardless of whether the transformation of that legal entity's social capital has been conducted or not** (Art. 54, para. 1). In making this provision, the legislators quite rightly took as starting point the fact that the compensation for allocated building land was paid using socially owned capital, i.e. the assets of the community (property of the society), which, as it is well-known, were *"everyone's and no one's"* (and were not a property right).

3. As for foreign individuals and legal entities, regardless of whether building land had been allocated to them on the basis of public bidding or on the basis of direct settlement (paid for), **they transformed the right to use that land exclusively into the right of long-term lease** (Art. 55, para. 2). This legal solution arises from the general provision of Article 245 of the 2001 Law on Ownership and Other Property Rights that does not allow foreign persons to own building land, but only to lease it on long-term basis[15]. Actually, the 2001 Building Land Law provides explicitly that the right of ownership of building land is reserved for **domestic individuals and legal entities** exclusively[16].

CONCLUSION: In the three given examples, the right to use building land was transformed exclusively into the right to long-term lease in the following three cases: 1. for the local self-government units which have acquired on the basis of separation balance sheet the right of ownership of the buildings erected on state-owned building land; 2. for the legal entities which were operating using socially owned capital and which acquired the right of use on the basis of allocation or on the basis of use of a socially owned building erected on that land, and 3. for the foreign individuals and legal entities who had acquired the right to use the building land on the basis of public bidding or a direct settlement.

The right to a long-term lease as a civil law institution was introduced in the Macedonian legislation by the 2001 Building Land Law. It is defined in Article 21 of the Law as follows: *"The right to a long-term lease on building land is the right to somebody else's building land authorising its holder to erect his own building on or below the surface of that land and the land owner shall abide by that"*. According to provisions of law, the right to a long-term lease can last for up to 99 years. During that time, the building erected on the basis of this right is the property of the holder of the right of long-term lease and from the legal aspect; the building is treated as an addition to the right to a long-term lease, and not as an addition to the land[17]. The right of long-term lease is an exception to the superficies solo cedit principle. Following the expiration of the right of long-term lease, the Building Land Law

---

[15] *"Subject to reciprocity, foreign individuals and legal entities may acquire the right to long-term lease of building land for the construction of business buildings and premise, and residential buildings and apartments in the territory of the Republic of Macedonia with the consent of the minister of justice based on the prior opinions of the minister responsible for town planning and building construction and the minister of finance"*, Art. 245.

[16] *"Building land may be owned by the Republic of Macedonia or domestic individuals and legal entities on the conditions provided by this and other laws"*.

[17] *"A building erected on the basis of the right of long-term lease may be transferred, inherited and encumbered together with the right of long-term lease"* Art. 25, para. 3, of the Building Land Law…

proclaimed the restitution of unity between building land and everything erected on it[18]. This means that a building erected on the basis of the right of long-term lease becomes the property of the owner of building land after expiration of the right of long-term lease.

With regard to the right of long-term lease, the following question is posed in civil doctrine: Is the right of long-term lease a property or obligatory right? Professor Rodna Živkovska, as a co-author of the Law, believes that *"the long-term lease regulated by the 2001 Building Land Law is a property subjective right, since with regard to acquisition[19], protection[20], transfer[21] and expiration[22] of the right of long-term lease, the legislators themselves refer to analogous application of the provisions of the Law on Ownership and Other Property Rights"*. Likewise, Professor R. Živkovska stresses that *"the right of long-term lease on building land as a property subjective right can only be established on undeveloped building land and not on developed one"*. With regard to the right of long-term lease acquired in the transformation procedure of the right of permanent use of building land, Professor R. Živkovska says that *"this long-term lease, being established over building land where a building owned by an individual or a legal entity, has been erected, is an obligatory right. Namely, upon expiration of the 99-year period, the already erected building cannot be considered an addition to land, i.e. to be nationalised, and therefore the long-term lease in the transformation process is an obligatory subjective right"*[23]. It is an established fact that the 2001 Building Land Law makes no difference between long-term leases on developed and undeveloped building land (it refers to building land only). However, the most important is the provision of the legal definition according to which the right of long-term lease is the **right to build on building land,** so that it is wrong to think that the Law implies only the long-term lease on undeveloped building land. Basically, these are two types of long-term leases: one is to do with leasing undeveloped building land owned by the Republic of Mace-

---

[18] *"With the expiration of a long-term lease contract, what was by that right legally separated from land, shall become an addition to the building land, or actually the property of the land owner"*, Art. 37, para. 1.

[19] *"The right of long-term lease shall be entered in the public book for registration of real estate rights (hereinafter: the public book), as an encumberance on encumbered land and as a separate right. The long-term lease contract produces legal effect from the day of entry in the public book. The registration of the right to a long-term lease into a public book as an encumberance shall be conducted on the basis of the long-term lease contract. If the right of a long-term lease could harm the already registered limited rights to land, it may be entered only with the consent of the holders of these rights. The erected building shall be entered in the public book as a building erected on the land encumbered by the right of a log-term lease"* Art. 29.

[20] *"The right of a long-term lease shall be protected, until erection of the building, and thereafter by proper application of the provisions on property rights protection of the Law on Ownership and Other Property Rights"*, Art." 33.

[21] *"The provisions dealing with the acquisition of the right of ownership of real estate on the basis of a legal act, court decision or inheritance shall apply to the transfer of the right of long-term lease, unless otherwise provided by law. The right to a long-term lease shall be accompanied by the transfer of the ownership right to the building erected on the land based on the right of long-term lease. Any contract which is contrary to paragraph 2 of this article shall be null and void",* Art. 32.

[22] *"The right to a long-term lease shall cease upon the collapse of the building, cancellation of the right by the holder of the right to long-term lease and meeting of the conditions for termination of the contract. The cessation of the right to a long-term lease shall be registered into the public book and produce legal effect from the day of registration",* Art. 34 and *"With the cessation of the right to a long-term lease upon the collapse of the building, there shall be proper application of the provisions on the cessation of the ownership right with the collapse of property from the Law on Ownership and Other Property Rights"* Art. 35, para. 1.

[23] *"The ownership right and right to inheritance shall be guaranteed",* Art. 30, para. 1, Constitution of the Republic of Macedonia, No. 52/92.

donia **for construction purposes** (which is a property right) and the other, with the right of long-term lease on building land in the process of transformation of the right of permanent use (which is an obligatory right).

CONCLUSION: The right of long-term lease acquired by the users of building land in the process of transformation of the right of use applies to the developed building land with an erected building for which there is guaranteed ownership right, and this right is a permanent one, without the option for time limitation. Therefore, the right of long-term lease should be treated as an obligatory right, in contrast to the right of long-term lease on undeveloped building land which was a property subjective right, since the holder gains the ownership right of the building for the duration of lease.

3. Method, Conditions and Procedure for Transformation of the Right of Use into Ownership Right and Right of Long-Term Lease

1. On the basis of former ownership, the users of building land have transformed the right of permanent use exclusively into the ownership right and in that case, transformation was carried out **by decision of the government agency managing the state-owned building land** (Ministry of Transport and Communications) (Art. 50, para. 1). For all other users of building land, who have transformed the right of permanent use into the right of ownership, this right was being established **on the basis of transformation contracts** between the holders of the right of permanent use and the Republic of Macedonia, which are signed by the Minister of Transport and Communications on behalf of the latter.

2. Under the provisions of law, a transformation contract is a strictly formal legal agreement which must be made in writing in order to produce legal effect. The concluded transformation contract, as legal grounds for the acquisition of ownership right, or right of long-term lease on building land, **was entered in the public books for registration of rights to real estate** (Art. 57, para. 2). In the case of existence of certain legal shortcomings rendering the transformation contract null and void, the right to file a lawsuit for determining its nullity is carried by the Public Legal Officer of the Republic of Macedonia, as well as the person with a legal interest in that (Art. 59)

The surface area of buildings and building land to be denationalised, as established on the basis of town plans, had to be included in the transformation contracts (Art. 58, para.**1)**[24]**.** With regard to determination of the surface area of building land, the legislators took the position that the building land not belonging to the appropriate building plot cannot be included. Since it remained untransformed, this building land could be formed into a separate building plot, in accordance with spatial planning documents (Art. 60, para. 1). However, when it was not possible for the untransformed part to be formed as a new building plot, the holder of the right of permanent use was allowed to transform it. The holder had to pay a higher compensation for that part of building land.(Art. 60, para. 2).

3. The compensation the users of building land had to pay in the procedure of transformation into the right of permanent use was set by special methods adopted by the

[24] In the event of a dispute concerning the determined surface area of building land in the transformation contract, the delimitation of building plots is conducted by decision of the Ministry of Transport and Communications. A complaint against such decision may be filed with a second-degree commission of the Government of the Republic of Macedonia. If the parties cannot reach an agreement on the boundaries, they are to be set by a court by extrajudicial procedure. See: Art. 58, para. 2 and 3.

Government of the Republic of Macedonia (Art. 61, para. 1). The compensation was set in foreign currency and it was payable by individuals and legal entities in different ways. Individuals had to pay it in denars or bonds of the Republic of Macedonia issued for the purpose of covering the citizens' claims based on foreign currency deposits or on other grounds determined by law (Art. 62, para. 1). Besides paying compensation in the same way as individuals, legal entities also had the option to pay it in the shares issued by them according to their nominal value or by converting the amount of compensation into the proprietary interest of the Republic (Art. 64, para. 1).

In order to make it easier for the users of building land to pay compensation, the legislators made it possible for it to be paid in **instalments** (up to 40 half-yearly instalments) (Art. 61, para. 2). In the cases in which compensation was payable in instalments, the transformation contract included a **special clause according to which the right of building-land ownership was to be acquired in the transformation procedure once the final instalment has been paid** (Art. 58, para. 4).

The Building Land Law dealt with the method, conditions and procedure for transformation of the right of use into the right of ownership or right of long-term lease, in only a few articles (Art. 57-67). The method of and conditions for transformation of the right of use were dealt with in greater detail by the Decree on the Method of and Conditions for Transformation of the Right to Use the Building Land owned by the Republic of Macedonia into the Ownership Right or Right of Long-term Lease (Official Gazette of the Republic of Macedonia, No. 79/01). Just like the 2001 Building Law, the Decree made it possible for the former owners to transform the right of permanent use into ownership right **on the basis of a decision**, while all beneficiaries of that right could do so on the **basis of contracts**. (See: Art. 3-10). **The transformation of the right of permanent use into the right of long-term lease was carried out on the basis of a contract exclusively** (Art. 11).

Unlike the Law, the Decree also included precise provisions about the evidence the beneficiaries should submit in the procedure for transformation of the right of use into ownership right or right to long-term lease, as well as the contents of the contract for transformation of the right of use into ownership right[25] and the contents of the contract for transformation of the right of use into right of long-term lease[26].

---

[25] *"The contract referred to in Articles 5 and 6 shall be made in writing and include the following: Contracting parties: I. The Republic of Macedonia or the Minister of Transport and Communications. II. The individual or legal entity proposing the transformation of the right of use of building land; subject of contract: Transformation of the right of use into ownership right; documentation referred to in Articles 5 and 6 of this Decree; amount of compensation (when compensation has not been paid); method of paying compensation for building land; requirements for the cancellation of contract: non-performance of the contractual duty to pay compensation (failure to pay two consecutive installments) and other reasons stated in the general provisions of the Law of Obligations; condition: the land or building may not be transferred before the compensation is paid in full; building land area established on the basis of town plan. The contract shall be drawn up in eight (8) identical copies of which two are to be kept by the party allowing the transformation and one by the Public Legal Officer of the Republic of Macedonia"* (Art. 7 of the Decree)

[26] *"The contract referred to in Article 10 of this Decree shall be made in writing and include the following:: Contracting parties: I. The Republic of Macedonia or the Ministry of Transport and Communications. II. The individual or legal entity proposing the transformation of the right of use of building land; subject of contract: right of long-term lease; period of long-term lease; requirements for conclusion of contract; amount of rent and way of paying it; requirements for cancellation of contract: non-performance of the contractual duty to pay rent (failure to pay two consecutive installments); method of paying rent. The contract of transformation of the right of use of building land into the right of long-term lease shall be drawn up in eight (8) identical copies, of which two are to be kept by the party allowing the transformation and one by the Public Legal Officer of the Republic of Macedonia"* (Art. 12 of the Decree)

CONCLUSION: The former owners transformed the right of use into right of ownership on the basis of a decision, while all other categories of persons did so on the basis of contracts. The transformation of the right of use into ownership right was carried out on the basis of contracts exclusively, as strictly formal legal agreement made in writing.

(It should be noted that in addition to transformation of state-owned developed building land to which individuals and legal entities had the right of use, the 2001 Building Land Law also ***regulated the legal regime for the state-owned undeveloped building land****. That was so, as we have already noted, because the trading of building land was free and* ***the Republic of Macedonia was authorised to transfer the undeveloped building land, lease it out (on long-term or short-term basis) or concede it*** *(Art. 13, para. 1). The state-owned undeveloped building land was transferred and leased out in accordance with the* ***Decree on the Method of and Procedure for the Transfer and Leasing out and the Amount of Special Costs of Transfer and Leasing of the Building Land Owned by the Republic of Macedonia*** *(Official Gazette of the Republic of Macedonia, No. 79/01). The leasing of state-owned undeveloped building land was regulated by the 1993 Concession Law (Official Gazette of the Republic of Macedonia, No. 42/93 u 44/99), and subsequently, by the Concessions Law (Official Gazette of the Republic of Macedonia, No. 25/02 and 24/03).*

II. Transformation of the Right to Permanent Use of Developed Building Land into Ownership Right and Right of Long-Term Lease Pursuant to the 2003 Decree on the Method of and Procedure for Transfer of Developed Building Land Owned by the Republic of Macedonia

Since the Building Land Law provided that land is the main property, whereas the erected building on that land is an addition to it (Art. 10), and since the building on that land was to be transferred in the event of privatisation (Art. 67), at the initiative of notaries public in the capacity of members of the Notary Public Chamber of the Republic of Macedonia, a large number of articles of the Building Land Law was rescinded by the Constitutional Court of the Republic of Macedonia[27] because they were contrary to Article 30, paragraph 1 of the Constitution of the Republic of Macedonia, which guarantees the right of ownership. For these reasons (due to the annulment of the provisions for transformation against compensation), the Government of the Republic of Macedonia adopted a by-law dealing only with the transfer of developed building land owned by the Republic of Macedonia. That was the 2003 Decree on the Method of and Procedure for the Transfer of Developed Building Land owned by the Republic of Macedonia (Official Gazette of the Republic of Macedonia, No. 13/03). This Decree regulated the method of and procedure for transformation of the right of permanent use into the ownership right for the users who have not paid compensation for the right

[27] The first ruling of the Constitutional Court of the Republic of Macedonia was U. No. 172/2001 - 0 – 0 of 10 July 2002 abolishing Articles 52, 53, 55 paragraph 1, 66 paragraph 1, 67 and 70 paragraph 1 of the Building Land Law. The second ruling of the Constitutional Court of the Republic of Macedonia was U. No. 208/2001 – 0 – 0 of 25 September 2002 abolishing Article 40, paragraph 5 of the Building Land Law. The third ruling of the Constitutional Court of the Republic of Macedonia was U. No. 225/2001 – 0 – 0 of 15 January 2003 abolishing Article 43, paragraph 7 of the Building Land Law.

to use building land (Art. 1 and Art. 3, para. 1). Since these persons were bound to pay compensation in order to acquire ownership right, **instead of the term "*building-land transformation*", the Decree uses the term "*building-land transfer*"**. The Decree did not apply to transformation of the right of use into ownership right for users who were the former owners, as well as for users who had paid the compensation for the right to use building land. **With regard to** transformation, the provisions of the 2001 Building Land Law (Art. 3, para. **2) remained applicable to these persons.**

Pursuant to the Decree, the subject of transfer was the **developed building land to which domestic individuals and legal entities had the ownership right (mark 831 in the title deed), and as for the building erected upon the building land, they acquired the right of use (mark 814 in the title deed)** (Art. 2). Furthermore, according to the Decree, the building land which is the subject of nationalisation in keeping with the nationalisation regulations could not be the subject of transfer (Art. 4).

According to the Decree, building land could be transferred if the following requirements were fulfilled: 1. That state-owned building land is **developed building land**; 2. That the **right of permanent use** of building land **is existent**; 3. That the building land users are **domestic individuals or legal entities**; and 4. That building land users should have **undisputed actual ownership** of the building land (Art. 2).

According to the Decree, the developed state-owned building land was transferable only **at the request of a building land user who had the obligation to pay compensation** for the right to use the building land, but had not done so (Art. 7).

The Decree provided that developed building land was to be transferred **on the basis of a contract** between the holder of the right to use building land and the Republic of Macedonia (Art. 9). The conclusion of such contracts was in the scope of competences of the Ministry of Finance (Art. 8).

CONCLUSION: The 2003 Decree on the Method of and Procedure for the Transfer of Building Land owned by the Republic of Macedonia regulated the method of transforming the right of ownership of the users who were bound to but did not pay compensation for the right of use of land. In view of that, the expression "*transformation of developed building land*" was not used in the Decree, but the expression "*transfer of state-owned developed building land" instead.*

III. Transformation of the Right of Permanent Use of Developed Building Land into the Ownership Right and Right of Long-Term Lease Pursuant to the 2005 Law on Privatisation and Leasing of State-Owned Building Land

Concerning the transformation of the right of use into ownership right or right of long term lease, the provisions of the 2001Building Land Law[28], as well as the Decree on the Method of and Procedure for the Transfer of Developed Building Land owned by the Republic of Macedonia, ceased to be valid with the adoption of the Law on Privatisation and Leasing of State-owned Building Land in 2005.

[28] Article 87 of the Law on Privatisation and Lease of State-Owned Building Land expressly stipulates: *"On the day this law enters into force, Articles 49, 50, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66 of the Building Land Law (Official Gazette of the Republic of Macedonia, No. 53/2001 and 97/2001) shall cease to be valid"*.

The Law on Privatisation and Leasing of State-Owned Building Land is a special law in the legal system of the Republic of Macedonia dealing with the so called transformation of the right to use state-owned building land. In contrast to the Building Land Law, this law does not use the term "transformation of the right of use", but instead, depending on whether the building land users acquire the right of private ownership or the right of a long-term lease, it makes a differentiation between "***privatisation of state-owned building land***" and "***establishing the right to a long-term lease***". As for privatisation according to this law, it can be *"privatisation with compensation"* and *"privatisation without compensation"*.

– The developed and undeveloped building land with established co-user rights entered in the land cadastre or registered in the real estate cadastre in ideal parts, is privatised **in proportion to the size of the ideal parts of the co-user right** (Art. 13, para. 1).

– According to the amendments to the 2008 Privatisation and Leasing Law (Art. 6-a), **privatisation does not apply to the developed building land underlying apartments, business premises, sheds, garages or other separate parts of residential or business buildings with two or more apartments, or business premises and other separate parts owned by different individuals and legal entities (condominiums).** Instead of facilitating the procedure concerning the privatization of such building, the latest amendments to the 2009 Building Land Privatisation and Leasing Law have dealt very dubiously with privatisation of such building land on which condominiums exist. **Namely, if the ideal parts of the user right are not entered in the land cadastre or registered in the real estate cadastre, the developed building land is to be privatised as jointly owned by individuals and legal entities as co-owners** (Art. 13, para. 2). **The compensation to be paid by each co-owner is determined in proportion to the size of the separate part of the building** according to the overall surface area of the land being privatised, where relations are established between the co-owners **arising from the** legal content of the right to joint ownership of urbanised building land, pursuant to the Building Land Law and the Law on Ownership and Other Property Rights. **It arises from the contents of this provision that the owners of separate building parts buy the land as owners and they become co-owners in law?! In view of the fact** that the superficies solo cedit principle applies to the privatised land underlying buildings, i.e., they have to follow the fate of the jointly-owned land, the question posed is as follows: *How can the owner of a separate part of a building transfer that part (as an addition to the land) if no other co-owner wants to buy it?* This is a rather serious issue and most notaries public (who are responsible for the verification of sales contracts) refuse to verify contracts for the purchase of the separate building parts which are owned jointly and are located on the land with privatised joint ownership, the parties to which are the sellers as joint owners and buyer as third parties.

1. Methods of and conditions for privatisation of state-owned developed building land

The privatisation of state-owned building land for which individuals and legal entities have the right of use means the acquisition of the right of ownership of that land. (Art. 2, para. 1, item 3). **The developed and undeveloped building land to which individuals and legal entities have the permanent right of use may be the subject of privatisation** (Art. 12). The state-owned building land in common use, as well as the state-owned building land which is earmarked in the spatial planning documents for the construction of buildings in common use (Art. 6, para. 1). Since the right to use state-owned building land can be acquired only by persons who had erected permanent buildings on that land, the Law quite rightly provides that the land used by individuals on the basis of lease contracts for the purposes of putting up temporary buildings , cannot be privatised (Art. 7).

The Law on the Privatisation and Leasing of State-Owned Building Land differentiates two types of privatisation: 1. privatisation without compensation and 2. privatisation with compensation.

1. The right to privatisation without compensation can be enjoyed by the following categories of individuals: a) those who are the former owners of state-owned building land; b) those who have acquired the right to use the building land on the basis of compensation[29] and c) those who have acquired the right of use on the basis of acquired ownership of a building from a former owner or user of building land who had paid compensation for the allocated land. The right to Compensation-free privatisation is also applicable to the successors of these persons (Art. 17). As for legal entities, they can privatise building land without any compensation, if they had acquired the right of use by paying compensation[30].

2. The right to privatisation with compensation may be enjoyed by the following categories of individuals: a) individuals who have acquired right to use building land without any compensation; b) individuals who have acquired the right of use on the basis of acquiring the ownership of a building of the former building-land user who had not paid any compensation and c) individuals who have acquired the right to use building land according to building priority right, if that land had not been owned formerly by a holder of priority right acquired for the purpose of expanding the building plot (Art. 18). Privatisation of building land with compensation can also be carried out by the legal entities using the building land which have not paid compensation for the land allotted[31].

The compensation for privatisation of the building land is set in accordance with a special regulation adopted by the Government of the Republic of Macedonia, and the compensation amount depends mainly on the zone and subzone (use according to the town plan) in which the building land to be privatised is located[32]. The compensation for privati-

---

[29] **This is a case of persons who have acquired the right of permanent use on the basis of:** public bidding; direct settlement against compensation; land allocation by a competent authority with compensation; land allocation in exchange for expropriated real estate; land allocation in exchange for the building land seized from its former owner, and priority right to use building land for the surface area of the building which used to be owned by the holder of priority right (Art. 17, para. 1).

[30] **A legal entity is considered to have paid compensation for the building land if the land has been obtained on the basis of:** public bidding; direct settlement with compensation; land allocation by a competent authority with compensation; land allocation in exchange for expropriated real estate; acquisition of the right of ownership of the building of a former owner of land, acquisition of the right of ownership of a building of the former owner of building land who has paid compensation for the right of use; land allocation as compensation for seized building land from a legal entity and founding share of an individual in a private legal entity in which building land represents the former property or the right of use was acquired against compensation (Art. 19).

[31] **A legal entity is considered not to have paid compensation for building land if the right of use was acquired on the basis of:** acquired ownership right of a formerly state/socially owned building on legal grounds; acquired ownership right of a building on legal grounds, where the transfer of ownership right goes together with the transfer of the right to use state/socially owned land and privatization of state/socially owned legal entities (Art. 20)..

[32] The zones according to which the amount of compensation for privatisation is determined, are established in accordance with Article 83 of the Law: *"For the purposes of setting the privatisation compensation, long-term and sort-term lease rent for building land, a regionalization of urban and settlement zones in the Republic of Macedonia shall be carried out. The regionalization shall be conducted according to 1. location and 2. level of communal urbanisation of the building land. The regionalisation referred to in paragraph (1) of this article shall be determined by the Government of the Republic of Macedonia at the recommendation of the Minister of Transport and Communications".*

sation is payable in denars. However, the Law provides that this compensation can also be paid in bonds issued by the Republic of Macedonia for the payment of citizens' foreign currency deposits for which the Republic of Macedonia is the guarantor, or with denationalisation bonds (Art. 25).

The procedure for privatization of the state-owned developed building land to which individuals and legal entities have the right of use, is initiated exclusively at the **request of the building land user**. **Any domestic individual and legal entity using state-owned (developed or undeveloped) building land** has the right to file a privatisation request. Unlike the previous regulations (the Building Land Law and the Decree on the Method of and Procedure for the Transfer of Developed Building Land owned by the Republic of Macedonia), the Law on Privatisation and Leasing of State-Owned Building Land, provides that besides domestic individuals and legal entities, **privatization may be carried out also by foreign individuals and legal entities using the state-owned building land** (Art. 12, para. 2)[33].

The privatisation procedure is conducted by the Property Legal Affairs Office, which renders the **privatisation decisions**. The Law on Privatisation and Leasing of State-Owned Building Land obligates the Property Legal Affairs Office to present its **decisions to the State Legal Office of the Republic of Macedonia** for an opinion, and this opinion should be given within 15 days from the date of presentation (Art. 30). The Law has made it the duty of the Property Legal Affairs Office to present its privatisation decisions to the State Legal Office for the purpose of protecting the state property interests in the privatisation procedure. The privatisation decision may be handed over to the applicant only after the State Legal Office has given a positive opinion or after expiration of the statutory deadline for giving an opinion (Art. 30, para. 4).

The individuals and legal entities who are not satisfied with the privatisation decision can file complaints with a second-degree governmental committee (Art. 31).

For the purpose of ensuring the payment of compensation by the user of building land in the cases of privatisation of state-owned building land with compensation, the Law on Privatisation and Leasing of State-Owned Building Land provides that the privatisation decision may be annulled if the compensation is not paid timely (Art. 32).

2. Method of and conditions for acquisition of the right to a long-term lease on state-owned building land

The building land users who have not privatised building land (both developed and undeveloped) may acquire right to a long-term lease (Art. 34, para. 1).

1. The validity of the right to a long-term lease on state-owned building land may run for at least 10 years and not more than 99 years (Art. 36, para. 1). Furthermore, the Law allows the validity of the right to a long-term lease to be extended until expiration of the set deadline (Art. 36, para. 2). The persons who have acquired the right to a long-term lease **must pay rent**. Rent is payable in denars. However, the Law also allows the rent to be paid in bonds issued by the Republic of Macedonia for the payment of citizens' foreign currency deposits for which the state is the guarantor or in denationalisation bonds (Art. 39).

---

[33] This provision of the Law on Privatisation and Leasing of State-Owned Building Land is in keeping with the provisions of the Law on Ownership and Other Property Rights, which together with amendments to the Law, makes it possible for foreign individuals and legal entities to acquire on certain conditions(whether they are EU and OECD members or not) acquire the right of ownership of building land. See: Art. 245, Law on Ownership and Other Property Rights...

2. Unlike the 2001 Law on Building Land and the new 2008 Law (Official Gazette of the Republic of Macedonia, No. 82/08) regulating the right to long-term leasing of the building land owned by the Republic of Macedonia (or RM), **the Law on Privatisation and Leasing of State-Owned Building Land regulates the long-term leasing of state-owned developed and undeveloped building land to which the right of use has been established. With regard to long-term leasing of developed building land, the Law clearly excludes the superficies solo cedit principle:** *"upon the expiration of the right to a long-term lease on developed building land, the building cannot become an addition to the land and it shall not become state-owned"* (Art. 36, para. 3). This means that after expiration of the right to a long-term lease, the building will not be an addition to the land, but it will still remain the property of the existing building owner whose right of ownership of that building is guaranteed under the Constitution of the Republic of Macedonia.

As for the long-term leasing of undeveloped building land to which the right of use exists, the legislators have not given an answer to the question of legal fate of the building which is yet to be erected on the building land to which right to a long-term lease is being established, pursuant to the Law on Privatisation and Leasing. We find this long-term lease (on undeveloped land owned by the Republic of Macedonia to which the right to build exists) is a property long-term lease, which implies that upon its expiration, the building as an addition to the right to a long-term lease shall be restored to the Republic of Macedonia, as the owner of land, thus re-establishing the superficies solo cedit principle. This nebulousness of the Law leads us to the conclusion that the right to a long term lease on undeveloped building land to which the right of use exists, as regulated by the 2005 Law on Privatisation and Leasing, is identical to the right to a long-term lease of building land owned by the Republic of Macedonia, regulated by the 2001 and 2008 Building Land Law, respectively. **In this context, we believe that the legislators should make a terminological distinction: the long-term lease on undeveloped building land to be named as the *"right to build"* (as property subjective right) and the long-term lease on developed building land should retain the name of *"right to a long-term lease"*, and its contents to relate only to developed building land owned by the Republic of Macedonia to which right of use exists (to regulate more precisely the legal fate of undeveloped building land to which the right of use exists).**

3. As for the legal nature of the right to a long-term lease on building land, as regulated by the Law on Privatisation and Leasing of State-Owned Building Land, the legislators explicitly provide as follows in the provision of Article 2, paragraph 1, item 5: *"A long-term lease is a **property right** established between the Republic of Macedonia as the lessor and the building-land user as the lessee in the way set by this law".* Despite the decisive legal provision, the civilists such as Professor R. Živkovska, believe that the right to a long-term lease on developed building land should be taken as an obligatory subjective right, and the right of long-term lease on undeveloped building to which the right of use exists, the same as the long-term lease on undeveloped building land owned by the Republic of Macedonia to which there is no right of use, as property subjective right.

4. In keeping with the provisions of the Law on Privatisation and Leasing of State-Owned Building Land, the right to a long-term lease is established **at the request of the building-land user or ex officio** by the authority responsible for building land management (Art. 46, para. 1). The competent authority conducts ex officio the procedure for the acquisition of the right to a long-term lease, if the building-land user fails to privatise the building land within the statutory deadline (six years from the effective date of the Law on Privatisation and Leasing of State-owned Building Land) and fails to file a request for acquisition of the right to a long-term lease within that deadline (Art. 46, para. 2).

– When the procedure for acquisition of the right to a long-term lease of building land is initiated on request, **the applicant signs a contract with the competent authority**, which regulates the rights and duties of the contracting parties (Art. 49).
– When the competent authority institutes ex officio the procedure for establishing the right to a long-term lease, **a decision is adopted** on the obligations of the holder of the right to a long-term lease (Art. 51).

5. The right to a long-term lease regulated by the Law on Privatisation and Leasing of Building Land is still not applied in practice in the Republic of Macedonia.

CONCLUSION: The Law on Privatisation and Leasing of State-Owned Building Land regulates the privatisation of developed and undeveloped building land (acquisition of ownership right for the building land to which individuals and legal entities have the right of permanent use), as well as the acquisition of the right to a long-term lease.

With regard to privatization, the legislators make a differentiation between *"privatization with compensation"* and *"privatization without compensation"*. The right to *"privatisation without compensation"* on request is accorded to the individuals who are former owners, the persons who have acquired the right of permanent use on the basis of compensation and the persons who have acquired the right of use on the basis of obtained ownership right of a building from the previous owner or a user who had acquired the right of use by compensation, as well as the successors of these persons. Legal entities can carry out *"privatisation without compensation"* on the basis of a request, provided that they had obtained the right of use on the basis of compensation. All other categories of individuals and legal entities which have acquired the right of use without paying any compensation can carry out privatisation with compensation on request. In both cases (*"privatisation without compensation"* and *"privatisation with compensation"),* the competent authority renders a privatisation decision, as legal grounds for establishing the ownership right to privatised building land.

The persons who have not carried out the privatisation of building land can acquire the right to a long-term lease. The long-term lease is established at the request of the user or ex officio by the competent authority when the user had neither carried out the privatization within the statutory deadline nor filed a request for acquisition of the right to a long-term lease. When the long-term lease is established at the user's request, the competent authority makes a contract with the applicant and when the long-term lease is established ex officio, the competent authority renders a decision for establishing the right to a long-term lease.

Summary

The legislation of the Republic of Macedonia is showing that the transformation of the right of permanent use into ownership right or right to a long-term lease took place in three stages in the legal system of the Republic of Macedonia. The first stage began with adoption of the 2001 Building Land Law which comprehensively regulated the transformation of the right of permanent use into ownership right or right to a long-term lease. The second stage commenced with enactment of the Decree on the Method of and Procedure for the Transfer of Developed Building Land Owned by the Republic of

Macedonia of 7 March 2003, regulating only the transfer of developed building land owned by the Republic of Macedonia, to domestic individuals and legal entities (i.e. transformation of the right of permanent use with compensation). The third stage began with adoption (application) of the 2005 Law on Privatisation and Leasing of State-Owned Building Land (Official Gazette of the Republic of Macedonia, No. 4/05) regulating the privatisation of state-owned developed and undeveloped building land (with or without compensation) to which right of use and long-term lease exist (in case of privatisation), as types of transformation.

I.

1. In dealing with the legal regime for transformation of the right to use building land, the 2001 Building Land Law set four categories of persons holding the right of use and persons having the right to transformation of the building land they had been using.

1. The first category includes the building land users who on the basis of former ownership transformed the right to use the building land exclusively into ownership right without any compensation, on the basis of a decision.
2. The second category includes the users of socially owned building land who had paid the compensation for land when buying a residential or some other building existing on building land, so that they are transforming their right of use into the right of ownership. If they had not paid the compensation, they could transform the right of use into the right of ownership if they pay the compensation or into the right of long-term lease of building land owned by the Republic of Macedonia, if they don't.
3. The third category of users are the persons to whom the building land has been allotted for construction purposes in the following three cases:
   - In the first case, in keeping with the principle of consciousness and honesty, the users of the building land allotted for construction of buildings, who have paid the compensation for allotted building land,, can transform that right into the right of ownership.
   - In the second case, in keeping with the principle of equality of mutual liabilities, the users of the building land allotted to them for permanent use and on which they have erected buildings without paying compensation, can transform their right of use into ownership right, provided that they pay compensation in accordance with denationalisation regulations (being developed, this land cannot be restored to its former owners).
   - In the third case, in keeping with the principle of consciousness and honesty, the state has no right to claim the transformation compensation from the category of persons who had paid compensation for the allotted land on the basis of public bidding or direct settlement.
4. The fourth category includes the owners of apartments or other buildings, who have not acquired the right of use, so that the legislators quite rightly prescribed that they are granted ownership right (co-ownership, joint ownership) or right to a long-term lease (although they had not acquired the right of permanent use when buying the apartment or other building) provided that they pay compensation for the newly formed building plot where the building, i.e. apartment is located.

2. The right to use building land was transformed into right to a long-term lease in the following three cases: 1. for the local self-government units which have acquired on the basis of the separation balance sheet the right of ownership to buildings erected on state-owned building land; 2. for the legal entities which have been managing social capital, which have acquired the right of use on the basis of allocation or on the basis of use of a socially-owned building erected on that land; and 3. for the foreign individuals and legal entities which have acquired the right to use building land on the basis of public bidding or direct settlement.

- The right to a long-term lease on state-owned building land which the building-land users acquired in the right of use transformation procedure applies to state-owned building land on which a building with guaranteed ownership right had been erected. Since the acquired ownership right to a building is a guaranteed permanent right, which cannot be time-limited by a leasing relationship, the right to a long-term lease on state-owned developed building land should be treated as an obligatory right, unlike the right to a long-term lease on undeveloped building land, which was a property subjective right because its holder acquired the ownership right to the building for the duration of lease.
- The former owners have transformed the right of use into the ownership right on the basis of decisions, while all other categories of persons transformed the right of use into the ownership right on the basis of contracts. The transformation of the right of use into the ownership right was carried out exclusively on the basis of contracts as a strictly formal legal settlement put in writing.

II.

1. The 2003 Decree on the Method of and Procedure for the Transfer of Developed Building Land Owned by the Republic of Macedonia regulated the method of transformation of the right of permanent use into the ownership right for the users who were bound to pay compensation for the right to use building land, but did not do so. Hence, the Decree did not use the term *"transformation of developed building land",* but *"transfer of state-owned undeveloped building land"* instead.

III.

The 2005 Law on Privatisation and Leasing of State-Owned Building Land regulates the privatization of building land (acquisition of ownership right to developed and undeveloped building land on which individuals and legal entities have the right of permanent use), as well as the acquisition of the right to a long-term lease.

1. With regard to privatisation, the legislators make a differentiation between *"privatisation without compensation"* and *"privatisation with compensation"*. The right to *"privatisation without compensation"* may be enjoyed on request by individuals having the status of former owners, persons who have acquired the right of permanent use on the basis of compensation and persons who have acquired the right of use on the basis of the former owner's right of ownership to a building or from the user who has acquired this right on the basis of compensation, as well as the successors of these persons. Legal entities can carry out *"privatisation without compensation"* on request, provided that they had obtained the right of use on the basis of compensation. All other categories of individuals and legal entities who have acquired the right of use without any compensation can carry out privatisation with compensation, on request. In both cases (*"privatisation without compensation"* and *"privatisation with compensation"*), the competent authority renders a privatisation decision, as legal grounds for establishing the ownership right to privatised building land.

– The privatisation of developed and undeveloped building land with established co-user rights recorded in the land cadastre or registered in the real estate cadastre in ideal parts, is carried out in proportion to the size of the ideal parts of the co-user right
– The latest Amendments to the 2009 Law on Privatisation and Leasing of Building Land have regulated quite debatably the privatisation of such building land on which condominium buildings already exist. Namely if the ideal parts of user rights are not registered in the land cadastre or entered in the real estate cadastre, the developed building land is privatised as joint property of individuals and legal entities as co-owners The portion of compensation payable by each co-owner is set in proportion to the surface area of the separate part of the building in relation to the total surface area of the land being privatised, thereby establishing the relations between co-owners arising from the legal contents of the co-ownership right.

2. The persons who have not carried out the privatisation of building land can acquire the right of long-term lease. The long-term lease is established on the user's request or ex officio by the competent authority when the user had neither carried out the privatization within the statutory deadline nor filed a request for acquisition of the right to a long-term lease. When the long-term lease is established on user's request, the competent authority makes a contract with the applicant and when the long-term lease is established ex officio, the competent authority renders a decision establishing the right to a long-term lease.

References:

1. Law on Ownership and Other Property Rights (Official Gazette of the Republic of Macedonia, No. 18/01 and 92/08);
2. Building Land Law (Official Gazette of the Republic of Macedonia, No. 52/01);
3. Ruling of the Constitutional Court, U. No. 172/2001 - 0 – 0 of 10 July 2002;
4. Ruling of the Constitutional Court, U. No. 208/2001 – 0 – 0 of 25 September 2002;
5. Ruling of the Constitutional Court, U. No. 225/2001 – 0 – 0 of 15 January 2003;
6. Decree on the Method of and Procedure for Transfer and Leasing and the Amount of Special Costs of the Procedure for the Transfer and Leasing of State-owned Building Land (Official Gazette of the Republic of Macedonia, No. 79/01)
7. Decree on the Method of and Procedure for the Transfer of Developed Building Land Owned by the Republic of Macedonia (Official Gazette of the Republic of Macedonia, No. **13/03;**
8. Law on Privatisation and Leasing of State-Owned Building Land (Official Gazette of the Republic of Macedonia, No. 4/05, 13/07, 165/08 and 146/09);
– Ruling of the Constitutional Court, U. No. 140/2005 – 0 – 1 of 21 June 2006 and
9. Building Land Law (Official Gazette of the Republic of Macedonia, No. 82/08 and 143/08).

Dr. Sc. *Petar Simonetti,**
Full professor of Civil Law
Rijeka, Croatia

ESTABLISHMENT OF THE RIGHT OF OWNERSHIP OF DEVELOPED CONSTRUCTION LAND THAT USED TO BE SOCIALLY-OWNED OR STATE-OWNED IN COUNTRIES OF SOUTHEAST EUROPE

Summary

In all the countries of Southeast Europe, former owners of nationalized construction land, or construction land transferred to the state/social ownership on other grounds, have been given back the right of ownership of the surface area that belongs to the building owned by them (as a rule, a family house), legally separated from the land by the permanent right of use.

REPUBLIC OF ALBANIA

Contemporary law of the Republic of Albania does not recognize legal duality of land and building. The principle s*uperficies solo cedit* has no exceptions and is regulated by the Civil Code of 1994. The legal unity of land and building, built on state-owned land in the socialist legal regime, is established by inversion of the *superficies solo cedit* principle: the owner of the building acquires ownership of land belonging to the building. According to the Law on Privatization of State Owned Buildings of 1992[1], privatization leads to acquisition of the ownership of the building and the land belonging to the building. The owners of separate parts of the building (former tenants of apartments) have acquired the right of co-ownership of the construction lot „yard". These co-ownership relations are regulated by Civil Code of 1994.

Pursuant to the Law on Restitution of Property and Compensation for Former Owners of 1993[2], ownership right is restored to former owners over the land belonging to the building in their ownership.

With the Law on Legalization, Urbanization and Integration of Illegal Constructions of 2006,[3] buildings built without permit were legalized, and the land belonging to the buildings was transferred to the owners of the buildings. The right of ownership of these real estates is entered into the real estate registry pursuant to the rules of the Law on Registration of Real Estate of 1993,[4] in accordance with the provisions of the 1994 Civil Code.

---

* Original text is in local language.

[1] Law 7652 of 23/12/1992.

[2] Law 7698 of 15/4/ 1993.

[3] Law no. 9482 of 3/4/ 2006.

[4] Law no. 7843 of 13/7/1993.

A special Law on Legalization, Urbanization and Integration of Illegal Constructions of 2009[5] regulated the acquisition of the right of ownership of the land owned by the state within the so-called „priority area for tourism development". The Law also stipulates the modalities for concluding the sales contracts between the state and private owners who have built constructions on state-owned land, as well as the procedure for establishing the legal unity of the land and the building, i.e. the creation of a real estate consisting of land and building, over which ownership right is acquired by the prior owners of buildings, either physical or legal persons.

REPUBLIC OF MONTENEGRO

The Republic of Montenegro established the right of ownership of the developed construction land by restitution to the former owner, or by transformation of the permanent right of use into the right of ownership of owners (co-owners) of a building, or a separate part of the building (apartment, L: *condominium*):

According to the Law on Restitution of Property Rights and Compensation[6] (hereinafter: the Law on Restitution) construction land is given back to the previous owner, or his or her legal successors (hereinafter: the former owner) „only if at the time of seizure of ownership there was a structure on such land" (Art. 18, paragraph 1)

Since other provisions of Art. 18 are amended and supplemented by Art. 8 of the Law on Amendments and Supplements to the Law on Restitution of 25 July 2007, we shall refer to these provisions in the text below. Pursuant to these provisions, when legal requirements are met for the return of a structure that has „significantly gained in value due to investment" since its forced transfer into social ownership, the land and the building are returned „only if the former owner pays the amount by which the value of the property increased due to investment". A former owner who refuses to pay that amount „becomes a co-owner to the extent of his or her share in the real estate" (Article 8, paragraph 2 and 4).

A former owner who by law has no right to return (restitution) of the real estate (land and building) when the ownership right over it has been acquired by other physical or legal person „whose founder is not the state" is entitled to a compensation (Article 8, paragraph 2 and 5). In principle, real estate owned by legal persons founded by the state is generally restored to the previous owners. Exceptions are prescribed by law.

Under the Law on Restitution „a current owner of a building", built in accordance with law and applicable zoning plan, who has a permanent right of use of the land may request „establishment of the ownership right" over that land if he pays the „market value of the land in question minus the amount previously paid for the permanent right of use" (Article 19), or for the right of use for purpose of construction, which was transformed, with the construction of the building, into permanent right of use of the owner of the building or of the holder of the right of disposal (former socially-owned legal persons).

This amount is paid to the fund for compensation of former owners (Art. 19, paragraph 2)

By the subsequent Law on Basic Property Relations of 26 February 2009, on the day of its coming into force, the permanent right of use of land transforms into the right of ownership of the owner of the building free of charge (Article 419, paragraph 1). Since the perma-

---

[5] Law no. 10186 of 5/11/2009.

[6] Republic of Montenegro Official Gazette 21/04

nent right of use was enjoyed also by the owners of separate parts of building (owners of apartments), they have acquired ownership rights on the land that belongs to building. Thus, all the owners of the buildings that previously had not acquired the right of ownership of land did so by purchase or on other legal basis and became owners of the land that belongs to their buildings without compensation, unless a special law stipulates otherwise.

It is prescribed otherwise when the market value of the land is not paid in the course of privatization process or bankruptcy proceedings. In this case, the land „remains in the ownership of the state", and „owners of the buildings have the rights of pre-emption" (Art. 419, paragraph 2). The opinion that the market price is paid during the privatization process and during bankruptcy proceedings is given by the body responsible for privatization affairs and the competent commercial court (Art. 419, paragraph 4), respectively. In accordance with the provisions of Art. 420 of the Law on Property Relations, at the request of the owner of the building whose permanent right of use has been registered in the real estate cadastre, the right of ownership of the land shall be registered, as well as of the building as a separate real estate. An owner who acquired ownership of the building in the privatization process or bankruptcy proceedings must enclose, with the request for registration of the ownership right in the real estate cadastre, an opinion of the body in charge of privatization, or of the commercial court, that the market fee for the land was paid.

Since the registration of the holder of rights in the real estate cadastre has a presumptive significance, whoever claims the opposite „is obliged to prove it in court". One who proves in court that the right over real estate belongs to him and not to the person who is registered in the real estate cadastre may request deletion of the holder of the right and inscription of his right of ownership on the basis of an enforceable court decision.

REPUBLIC OF CROATIA AND BOSNIA AND HERZEGOVINA

Ownership right over a developed socially-owned construction land is established by transformation of the permanent right of use into the right of ownership (co-ownership) of owners (co-owners) of the building or separate parts of the building. Rights over undeveloped construction land on which a permanent building is built are also transformed into the right of ownership in accordance with law (legalization of illegal buildings). This conversion occurred by the force of law, outside the land registry, which established the legal unity of the real estate on such surface area over which there was the permanent right of use, and that is the land under the building and around the building, which is required for its regular use in accordance with the appropriate spatial plan. Inscription of a real estate into the land registry is done by exhaustively prescribed rules, regardless whether the land or buildings are registered in the land registry or not. Legal unity of real estate has been established *ex lege* by merging a condominium building with the privately-owned land, as the right of co-ownership now extends to the whole real property, and what stems from that right is the right of ownership of separate parts of the real property.

The right of ownership (co-ownership) of the construction land that belongs to the building is acquired by the owners (co-owners) of buildings and of separate parts of buildings, as a rule, free of charge. Therefore, in the Republic of Croatia the previous owners, or their heirs of the next of kin are entitled to compensation only for the surface area of construction land over which trading companies acquired ownership right in the process of privatization of

enterprises with social capital (socially-owned enterprises). This compensation is „paid" in the shares or stakes of companies that have acquired ownership on the land; and subsidiarily in shares or stakes of companies that are in the portfolio of the Croatian Privatization Fund, in the manner prescribed by the Law on Privatization. These shares are, as a rule, devalued in the market and trading companies that have acquired ownership of land also acquired ever-growing value of construction land without investment or risk. This is one of the focal points of large deformations (and crime) in the process of conversion (privatization) of social ownership.

In Bosnia and Herzegovina (FB&H and RS), the Law on Denationalization has not been passed yet.

REPUBLIC OF MACEDONIA

In the Republic of Macedonia, transformation of the permanent right of use of socially-owned construction land took place in three phases, namely: on the basis of regulations of 2001, 2003, and 2005 (amended in 2009).

According to the Law on Construction Land of 2001[7]:

- Former owners of nationalized construction land have been restored the right of ownership of the surface area of land that belongs to the building in their ownership, or in the ownership of their legal successors;
- The right of ownership of the land belonging to the building is also acquired by the buyers of buildings or other facilities that have paid the fee for the land;
- The buyers of buildings or other facilities that even did not pay the fee for the land subsequently have acquired the right to long-term lease of the land.

The building owners to whom land was allocated for the construction of a building are divided into three groups:

- the right of ownership of land belonging to the building is acquired by those who have paid a fee for the allocated land;
- the right of ownership is also acquired by those who have not paid the fee for land if they pay it subsequently in accordance with the regulations on denationalization;
- the right to long-term lease is acquired by those who have not subsequently paid the fee for the land.

Finally, the right of ownership (co-ownership, joint ownership) is also acquired by buyers of socially-owned apartments who paid the fee for the land - „newly-formed construction lot", either when buying the apartment or subsequently.

The right to long-term lease of the developed state-owned construction land is acquired by:

- the local self-government units that have acquired the right of ownership of buildings and other structures on state-owned construction land on the basis of separation balance sheets;

---

[7] „Zakon za gradežnoto zemjište", Republic of Macedonia Official Gazette, no. 53/01 of December 7, 2001.

– juristic persons who are legal successors of companies with social capital and have been allocated the land for use for the purpose of construction, or those who have built a building on the land over which they had had the right of use, as a rule, even before that land was included in the area of construction land;
– foreign physical and juristic persons who have acquired the right of use of undeveloped land through public tender or direct negotiations.

Unlike the permanent right of use that separated the building and socially-owned land and was a real right by its legal nature, the right to long-term lease is an obligatory right.

Regulation on the manner and procedure for determining developed construction land owned by the Republic of Macedonia of 2003[8] regulated the way of transformation of the permanent right of use (According to the Regulation: alienation of developed state-owned construction land) for those who were obliged to pay the fee for the land, and did not pay it.

The Law on Privatization and Lease of State-Owned Construction Land of 2005[9] regulated the privatization of construction land, acquisition of the right of ownership of construction land over which physical and juristic persons had the permanent right of use and acquisition of long-term lease.

The decision on privatization determines that the ownership of land belonging to the building is acquired by previous land owners who have a building in their ownership on that land, physical and juristic persons who have acquired the right of use for a fee, as well as those who have not acquired the right of use for a fee if they filed such a request during the privatization process in accordance with the law. In both cases, the decision on privatization is the legal ground for the acquisition of ownership right by registration in the public registry, into which the rights over real estates are generally inscribed.

Co-ownership rights inscribed into the land cadastre, or real estate cadastre, are privatized proportionally to the size of ideal portions of co-users' rights.

Based on the amendments and supplements to the Law on Privatization... of 2009[10], on the unrecorded, i.e. unregistered ideal portions of land, the owners of separate parts of buildings (apartments) acquire joint ownership right. With the payment of a portion of the fee proportional to the surface area of separate parts of the building, an equivalent right of co-ownership of that land is established. For persons who failed to submit an application for the privatization of construction land in due time, a long-term lease of land is established, at their request, by conclusion of a lease agreement, or *ex officio* on the basis of a decision of a competent body (if such request has not been submitted).

REPUBLIC OF SERBIA

The Republic of Serbia established the right of ownership (co-ownership) of the developed construction land in social/state ownership by transformation (conversion) of the permanent right of use into the right of ownership of owners (co-owners) of buildings and of separate parts of buildings.

---

[8] „*Uredbata na načinot i postopkata za otuģovanje na gradežno izgrađeno zemljište sopstvenost na Republika Makedonija*, Republic of Macedonia Official Gazette, no. 13/03 of 4/3/2003.

[9] Zakon za privatizacija i zakup na gradežno zemjište vo državna sopstvenost, Republic of Macedonia Official Gazette, no. 4/05, of 17/1/2005.

[10] "Zakon za izmenuvanje i dopulnovanje na zakonot za privatizacija i zakup za gradežno zemjište vo državna sopstvenost", Republic of Macedonia Official Gazette, no.146/09 of 7/12/2009.

Under the Law on Planning and Construction[11] (hereinafter: the LPC), persons who are registered in the public registry of real estates and rights over them (hereinafter: public registry) as holders of the right of use of the developed construction land in state ownership „shall have their right of use terminated..." and converted into the „right of ownership". Therefore, the permanent right of use is transformed (converted) into ownership of the owner of the structure[12] without compensation (Art 101, paragraph 1). Under the same presumptions, the right of use of the owners of separate parts of the building „transforms to the right of ownership, proportionally to the surface area of separate physical parts" (Art. 101, paragraph 2), that is, to the right of co-ownership.

Owners of structures and owners of separate physical parts of buildings, constructed on the basis of a lease agreement for the purpose of construction for the term of over 50 years, acquire the right of ownership or the right of co-ownership of land, also free of charge (Art. 101, paragraph 3). But „persons" who, based on a contract on lease of state-owned construction land, erected buildings and then sold „separate physical parts" to third parties „remain obliged to pay the rent according to the valid lease agreement" (Art. 101, paragraph 4). It can be concluded from this provision that the buyers of separate parts of buildings have acquired ownership of such parts, while the land remained in the possession of the state, but the rent for the land is not paid by the owners of separate parts of the building, but by the lessee – the investor who sold such parts of the property and transferred them to third parties based on a sales agreement.

In this way, the owners of separate parts of buildings who have acquired this right, based on a sales agreement, from the land lessee who had built the building for the market, albeit exempted from fees for the use of land that the lessee pays instead of them, have not become owners of the land, as have those persons who built buildings for themselves on a state-owned land based on a lease agreement. If this provision (Art. 101, paragraph 4 of the LPC) is interpreted so that the buyers of separate parts of buildings have become co-owners of the land, proportionally to the surface area (or value) of their apartments, then there is a very unusual solution by which those who pay for the lease are those who are not the owners of the real estate (land and buildings), while the lessor to whom the lease is paid is not the owner of the land either. In both cases, the land lease agreement, under which a rent is paid, is separated from the original main *causa*.

These solutions are very impractical because the lessor will not be able to ensure his periodic claims, which last until the expiry of the agreed term of the lease (in practice, up to 99 years), by mortgaging the building, i.e. separate parts of the building, which are now owned by third parties who owe nothing to the lessor in that legal relationship.

Presumptions of the registration of the right of ownership (co-ownership) in the public registry are prescribed in paragraph 5 and 6 of Article 101 of the LPC.

Assuming that the owner of the building, as well as the owner of a separate part of the building, „is not registered as the holder of the right of use of construction land on which the building is built, but that the registered holder of such right is rather a unit of local self-government, autonomous region, or the Republic of Serbia", then the land is determined „for regular use of the building pursuant to the provisions of Art. 70 of this Law"[13], over which

---

[11] Official Gazette of the Republic of Serbia, 72/09 and 81/09.

[12] Under the LPC, "structure" is a wider notion than "building" (Art. 2, item 22.)

[13] Art. 70 of the LPC states: The land for a regular use of the building is land underneath the building and land around the building in an area that is designated as the minimum for formation of new parcels for that zone, according to the relevant planning document for that building.

the owner of the building, as well as the owners of separate parts of the building acquire ownership (co-ownership) „without compensation" (Art. 102, paragraph 1 and 2 of the LPC).

But if it is determined that the land for regular use of the building „is smaller than the cadastral lot on which the building is built," the owner of land may, if the remaining land cannot form a separate construction lot, „lease that part of land to the owner of the building in accordance with Art. 96, paragraph 9 of this Law, or sell it to the owner at the market price, by direct deal" (Article 102, paragraph 3). In this case, it is meaningless to call an open tender (public sale) because the only person who has an interest in purchasing the remaining portion of land is the owner of the building and the land belonging to the building that shares the boundary with the remaining part of land.

Based on an enforceable decision on establishing ownership rights over land belonging to the building, the right of ownership, or lease, is registered in the public registry (Art. 102, paragraph 5).

On the socially-owned or state-owned construction land, over which the ownership rights are or were held by „business organizations and other juristic persons, to which the provisions of the laws governing privatization, bankruptcy and enforcement proceedings were applied, as well as their legal successors", the right of use can be converted into the right of ownership, against the compensation of the market value of building land at the moment of conversion reduced by the costs of the right of use of construction land" (Article 103, paragraph 1 of the LPC).

Holders of the right to use construction land – the persons whose position is determined by the law that regulates sports, as well as associations of citizens, retain this right if it has not been terminated by the special provisions of the LPC.

At the request of the owner of the building, the local self-government's body in charge of property and legal affairs passes a decision on the determination of land for the regular use of the building and on the formation of a construction lot.

Decision on the determination of land for the regular use of building and the formation of construction lot shall be passed if:

1) the existing cadastral lot, on which the building is built, represents only the land under the building;

2) it is a building for which a legalization request has been filed and for which a competent body has determined that it can be legalized, i.e. issued a decision on legalization in accordance with the previously applicable law;

3) in the process of conversion of the right of use it is necessary to determine the land for the regular use of the existing building, when the owner of the building is a physical or juristic person, and the holder of the right of use of construction land on which the building is built is local government, autonomous province, or the Republic of Serbia, or another legal person that is founded by local government, autonomous province, or the Republic of Serbia.

With the request for issuance of the decision on determination of the land for regular use of the existing building and formation of the construction lot, a proof of ownership of the building shall be enclosed by the building owner, or a proof that the request for legalization has been accepted by the competent body that has decided that legalization is possible, i.e. the decision on legalization and a copy of the parcel plan.

The decision referred to in paragraph 2 of this Article contains all the necessary elements for formation of the construction lot, in accordance with applicable planning documents, which shall be acquired by the competent body *ex officio*.

The decision referred to in paragraph 2 of this Article may be appealed within 15 days from the date of delivery of the decision to the Ministry in charge of finance.

The enforceable decision referred to in paragraph 3 of this Article is the ground for implementation of changes in the cadastral plan of the body in charge of the state survey and cadastre.

Privatized juristic persons acquire the right of ownership by conversion of the right of use pursuant to the provisions of the LPC „based on the confirmation by the Privatization Agency... on the payment of the purchase price after privatization" (Art. 105).

Cash funds gained on the basis of conversion of the right of use into the right of ownership under this law shall be paid in amount of 50% into a special restitution fund (to be established as a budgetary fund) and the remaining 50% shall be paid to the budget of the local self-government unit and earmarked pursuant to Art. 92, paragraph 3 of this Law, while the funds paid into the fund for restitution can not be used until a law governing the restitution is adopted (Art. 107).

* * *

Only the reports on the Republic of Croatia and Bosnia and Herzegovina contain a critique of the establishment of the right of ownership of socially-owned or state-owned construction land in favour of the owner (co-owner) of buildings and the separate parts of buildings who were not owners of the land before the forced transfer into social/state ownership because there was an alternative legal solution: the conversion of permanent right to use into the equivalent right to build that would last as long as the building, which is the same time period for which the permanent right of use lasted. In this case, the owner (co-owner) of a building or separate parts of a building, as the holder of the right to build, would pay a periodic fee to the owner of the land. This fee would be reduced in proportion to the amount paid for the acquisition of the right of use for the purpose of construction of a building on a construction land in social/state ownership because that amount is paid to the former owner in the process of dispossession of nationalized undeveloped construction land, as well as in the case of voluntary surrender of nationalized land.

Local self-government units would have the right of ownership of the land that is, by law, not returned to the previous owner or his successors (persons entitled to the right of denationalization) because their legal predecessors – socialist municipalities, had the right of management and disposition of that land.

Reports on the Republic of Croatia and Bosnia and Herzegovina advocate for the Law to exclude the possibility of alienation of construction land owned by the state (and the entities in Bosnia and Herzegovina), regions (Croatia), and cantons (FBH), as well as the units of local self-government, because there are four legal institutions in the Croatian law and the Bosnian law that facilitate construction and possession of one's own building and other structures, devices and equipment on someone else's land, with the obligation of payment of periodic fees that would, in that case, end in an appropriate fund for public utility equipping of the land, and these institutions are: a) the right to build (German: *Baurecht*), which separates the building from the land, taking the role of land so that the building is its accessory as if it were land; b) lease of land on which there are temporary buildings that are legally separated from the land by the force of law itself, c) concession on general and public good, which legally separates the building from the land but does not assume the role of land, as does the right to build, and finally; d) real easements that separate land from permanent devices and equipment that are appurtenances to master (principal) real estate. Exercise of the right to build reduces the costs of construction by the price of land and provides a permanent source of income for the land owners.

In Rijeka, 29 April 2010 *Petar Simonetti*

III
NOVINE U RAZVOJU U OBLASTI SVOJINE NA ZEMLJIŠTU I GRAĐEVINSKOG ZEMLJIŠTA

Dr *Ilija Babić**,
redovni profesor i dekan Fakulteta
za evropske pravno – političke studije Sremska Kamenica,
Univerzitet „Singidunum“, Beograd

PRAVO SVOJINE NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU

Autor u radu nastoji da istorijskom, komparativnom i sistematskom analizom osvetli dejstvo rimskog načela superficies solo cedit na građevinskom zemljištu u pravu Srbije. Detaljnije ispituje rešenja Zakona o planiranju i izgradnji iz 2009. o pretvaranju prava korišćenja u pravo svojine na građevinskom zemljištu bez naknade i pretvaranju prava korišćenja u pravo svojine uz naknadu.

Ključne reči: *superficies solo cedit; pravo trajnog korišćenja, pretvaranje prava korišćenja; pravo službenosti građenja; pravo građenja; superficijarno pravo*

I. Pojava prvih naselja i gradova i potreba planiranja

Svi ljudi na Zemlji su nekada bili lovci – sakupljači. Čak i pri kraju starijeg kamenog doba (paleolita) čovek je živeo nestalnim životom lovca – sakupljača. Da bi obezbedio hranu i tako preživeo morao je loviti životinje ili trgati za samoniklim plodovima. Paleolitska revolucija odigrala se kada je čovek počeo da pripitomljava životinje i proizvodi zrnastu hranu.[1]

Prve tragove stalnih naseobina nađeni su na prostoru od Indije do Baltika, a potiču pre petnaest hiljada godina.[2] U sredozemnim predelima jugozapadne Azije, poznatim kao Plodni polumesec (obuhvatao je delove današnjeg Jordana, Sirije, Turske, Iraka i Irana), oko 8500. g. p. n. e. , a tek 3000. g. docnije, u sredozemnim delovima jugozapadne Evrope, ljudi su počeli da se bave zemljoradnjom – postajali su proizvođači hrane. Od tih vremena čovek gradi skloništa i trajno se nastanjuje.[3]

Na teritoriji današnjeg Irana pronađene su opeke starije od 6000 g. p. n. e. koje su oblikovane rukom. Oko 6000 p. n. e. opeke se već oblikuju kalupima. Pojedini primerci opeka, izrađenih kalupima, oko 5000 p. n. e. pronađene su u Jerihonu.[4]

---

* Originalni tekst je na lokalnom jeziku.

[1] Janson H. W., *Istorija umetnosti,* Izdavački zavod Jugoslavije, Beograd, 1970, strana 22.

[2] Mumford Lewis, *Grad u historiji*, Naprijed, Zagreb, 1988, strana 14.

[3] Vidi potpunije: Dajmond, Džared, *Mikrobi, puške i čelik,* Dosije i Službeni list SCG, Beograd, 2004, str. 82 – 116.

[4] De Bono, Edward, *Heureka – Ilustrovana istorija pronalazaka*, Mladost, Zagreb, 1978.

Pre više od 5000 godina razvili su se u Mesopotamiji (na teritoriji današnjeg Iraka) neki od prvih gradova (npr.: Ur, Uruk i Nipur).[5]

Dok su se gradovi u Mesopotamiji gradili bez određenog rasporeda „oni u dolini Inda bili su građeni po tačno utvrđenom planu".[6] Pretpostavlja se da je mesopotamijski grad Vavilon, uništen i obnovljen „dostigao veličinu gradova u dolini Inda kada je dobio viseće vrtove".[7] Herodot (grčki istoričar – oko 484 – oko 425. p. n. e.) piše da Vavilon: „Leži u jednoj prostranoj ravnici i ima oblik četvorougla čija je svaka strana duga sto dvadeset stadija... On je, koliko je meni poznato, i jedan od najlepših gradova na svetu".[8]

U Egiptu, grad Memfis osnovan je kao prestonica kralja Menesa oko 3100. g. p. n. e., a na Kritu je pre 3000. g. p. n. e. osnovan Knosos. Na teritoriji antičke Grčke nastalo je nekoliko stotina politički autonomnih gradova – država (polis – a), koji su imali i zaleđe.[9]

Čuveni arhitekta Hipodam od Mileta (475 – 400. g. p. n. e.) je, prema Aristotelu[10], prvi izradio plan grada sa sistemom pravougaonih ulica. Posle 466. g. p. n. e. na Periklov zahtev, je ovaj sistem nametnuo Pireju. Kasnije je sa atinskim kolonistima otplovio u Turi, u južnu Italiju i taj sistem nametnuo i grčkim kolonijama u Italiji. Hipodamov sistem prihvataju Rimljani.[11] Kada su Rimljani ovladali tehnikama postavljanja luka i građenja svoda betonom preobrazili su brzo izglede gradova. Bio je otvoren put za stvaranje remek dela poput rimskog Panteona ili Aja Sofije u Konstantinopolju.[12]

Posle propasti Rimskog carstva moć gradova je postepeno opadala. Najveći sunovrat gradskog života dogodio se u devetom veku zbog čestih pljačkaških pohoda i pustošenja od strane vikinga, muslimana i Mađara.[13] [14] Izgradnja i jačanje gradova započinje sa oživljava-

---

[5] Grupa autora, *Ilustrovana istorija sveta – Velika porodična enciklopedija*, Reader s Digest i Mladinska knjiga, Beograd, 2007, strana 202.

[6] *Ibidem*.

[7] *Ibidem*.

[8] *Herodotova istorija*, tom I, Matica srpska, Novi Sad, 1988, strana 91.

[9] Najveći polis u „zlatno doba" antičke Grčke bla je Atina, koja je imala oko 250.000 stanovnika. U to vreme Korint je imao manje od 100.000 stanovnika, a Teba, Argos, Korkira i Arkagas, verovatno su brojali oko 50.000 stanovnika – vidi potpunije: Borstin Danijel, Dž., *Svet stvaranja*, Geopoetika, Beograd, 2002, strana 89.

[10] Aristotel u svom delu *Politika*, raspravlja o Hipodamovom idealnom gradu – državi (Vidi: Aristotel, *Politika,* BIGZ, Beograd, 1984, str. 38 – 42), ali i planiranju grada: „Što se tiče rasporeda građanskih kuća, misli se da je lepši i pogodniji za obavljanje poslova ako su ulice skroz prosečene po novijem i po Hipodamovom sistemu. Naprotiv, za bezbednost u ratu bolji je raspored kao što je bio u staro doba. U takvom gradu stranci ne mogu lako da nađu izlaz i neprijatelji teško mogu da se snađu" – Aristotel, *op. cit.,* strana 187.

[11] „Iako je Rim ostao grad krivudavih ulica, on nije oklevao da grčki uzor pravilne izgradnje gradova nametne svojim kolonijama", tako da „od prvog veka nadalje je gotovo svaka novovoosnovana kolonija osnivana po pravougaonom sistemu" Kanlif Bari, *Rimsko carstvo – narodi i civilizacija*, Vuk Karadžić i Jugoslovenska revija, Beograd, 1980, strana 101. Vidi potpunije: Mumford Lewis, *op. cit.,* st.145, 173, 197. i 303.

[12] Kanlif Bari, *op. cit.,* strana 101.

[13] Džajs Fransis i Džozef, *Život u srednjovekovnom gradu*, Utopija, Beograd, 2004, strana 11.

[14] Počevši od biblijskih gradova Sodome i Gomore, grad je pod optužbom da je izvor izopačenosti i dekadencije. Neki nomadi, ne samo u antičkom periodu nego i u srednjem veku, nisu zapažali prednosti gradova. Navodi se tako: „Mongoli su zauzeli grad (Peking), masakrirali njegove stanovnike, opljačkali kuće, zatim ga spalili. Razaranje je trajalo mjesec dana… Nomadi nisu shvaćali šta bi mogli učiniti od jednog grada, nisu vidjeli načina da ga upotrijebe za učvršćenje i širenje svoje vlasti, jer se središte vlasti za njih nalazilo pod pokretnim šatorom" – Supek Rudi, *Grad po mjeri čovjeka*, Naprijed, Zagreb, 1987, str. 110. i 111.

njem trgovine u 11. i 12. veku širom Evrope.[15] „Gradovi zapadne Evrope, sa svim svojim budućim sadržajima, nastali su u srednjem veku. Do 1250. godine, gradovi su već bili živa i napredna staništa ljudi, i to ne samo na obali Sredozemlja već i na severozapadu Evrope".[16] Za vreme renesanse (od 1450. do 1550) ponovo oživljava urbanizam i gradnja gradova u obliku rešetke (po tom sistemu su, docnije, u XVII veku, gradili gradove u Americi).[17] Najbrojnije stanovništvo imali su gradovi u Italiji: u Firenci je u 14 veku živelo više od 90.000 stanovnika.[18] London će tek u petnaestom veku imati 40.000 stanovnika. Krajem 17 veka Nirnberg je imao oko 20.000 stanovnika, Brisel i Luven imali su između 25.000 i 40.000 stanovnika, a Bazel oko 8.000 stanovnika.[19]

Od početka srednjeg veka zapaža se planiranje gradova: „Sklad je tako potpun da čovjek, gledajući stotine planova srednjovjekovnih gradova jedan za drugim, osjeća kao da je morala postojati svjesna teorija po kojoj se vršilo cjelokupno urbanističko planiranje".[20] Planiranje izgradnje gradova se, docnije, nažalost, sve više napušta. Grad prestaje biti zajednički poduhvat za zajedničko dobro. Posle velikog požara u Londonu od 1666. godine počinje špekulantska gradnja stanova velikih razmera. Tako se navodi da je dr Barbone isparcelisao svoju zemlju u uličice i male kućice, prodajući je po stopi „ulične fronte". Zemljišna renta je porasla zbog hipoteka „drugi su pošli njegovim koracima i još više usavršili tu metodu, tako da su se oko Londona kuće počele gomilati". Uz rub grada taj proces je bio još brži. Kada su seoska imanja podeljena na građevinske parcele, grad kao organska celina je razbijen.[21]

Zamiru stari gradovi i nisu više presedan za nove gradove u devetnaestom veku. Po prvi put u istoriji pojavio se masovni saobraćaj (jeftine poštanske kočije, železnica i najzad tramvaj). Uvođenje javnog saobraćaja odigravalo se po isti način kao i razvoj ostalih delova grada – špekulacijom. Stambeni prostor u gradovima žrtvovan je u korist ulica i bulevara.[22] Urbanističko planiranje zapostavilo je javni saobraćaj. Na taj način saobraćajni inženjeri i urbanisti pomogli su u „razaranju živog tkiva grada" jer su planirali i izgradili autoputeve izvan grada, a garaže i parkirališta u gradu (da bi se omogućila lakša upotreba automobila).[23]

U 20 veku i početkom 21 veka izgrađuju se brojni gradovi (koji ne samo da se šire, nego rastu i u visinu[24]) i naglo povećava broj gradskog stanovništva. Godine 1800. u zapadnom svetu nijedan grad nije imao milion stanovnika (najveći je bio London sa 953.310 stanovnika), a već 1900. godine jedanaest velegradova ima više od milion stanovnika.[25] Samo pede-

---

[15] Grupa autora, *Ilustrovana istorija sveta, ibidem.,* strana 203.

[16] Džajs Fransis i Džozef, *op. cit.,* strana 5.

[17] Grupa autora, *Istorija* (glavni urednik Anhelos Gavira Gerero), Mladinska knjiga, Beograd, 2009, strana 25. i 322.

[18] Grupa autora, *Ilustrovana istorija sveta, ibidem.,* strana 203.

[19] Mumford Lewis, *op. cit.,* strana 317.

[20] *Ibidem*, strana 306.

[21] *Ibidem,* strana 423.

[22] *Ibidem,* strana 435.

[23] *Ibidem,* strana 518.

[24] Izgradnju visokih objekata Konstantinos Doksijadis, u knjizi *Čovek i grad,* Nolit, Beograd, 1982, strana 153. i dalje, smatra prvim i najvećim zločinom u arhitekturi – takve zgrade su protivprirodne, remete razmere okoline, deluju protiv čoveka i društva itd...

[25] To su gradovi: Berlin, Čikago, Nju Jork, Filadelfija, Moskva, Petrograd, Beč, Tokio i Kalkuta – vidi: Mumford Lewis, *op. cit*., strana 537.

set godina kasnije (1950) bilo je 75 gradova na svetu sa brojem stanovnika između 1 i 5 miliona stanovnika, da bi do 1990. broj takvih gradova bio 249. Godine 1990. bilo je 12 gradova sa deset i više miliona stanovnika.[26] Nastaju megalopolisi. Oni se prepoznaju po „bezličnosti i besciljnoj ekspanziji" i „u samom gradu smanjuju raspoloživi prostor za bilo koju svrhu osim za saobraćaj".[27] Ipak, pitanje opstanka gradova u budućnosti nije izvesno.[28]

Danas gradovi doživljavaju stalnu ekspanziju, a vekovima su sedišta ekonomske i državne vlasti. Zbog ograničene površine gradskog građevinskog zemljišta, još u Rimskom carstvu, rimsko pravo je predvidelo mogućnost građenja na tuđem zemljištu. U početku je građenje na tuđem zemljištu vršeno na osnovu obligacionog ugovora (zakupa). Docnije, u ovom ugovoru preovlađuju stvarnopravni elementi i on menja pravnu prirodu.

II. Dugoročni zakupi zemljišta u rimskom pravu

Ugovori o dugoročnom zakupu zemljišta ovlašćivali su zakupca da zemljište ima u državini, da ga trajno iskorišćava i da ga pravnim poslovima *inter vivos* i *mortis causa* prenosi na sukcesore, pod uslovom da za to plaća zakupninu.[29] U Justinijanovom pravu takav zakup ima stvarnopravno dejstvo. Dugoročni zakup zemljišta mogao je imati za predmet poljoprivredno zemljište (emfiteuza) ili građevinske parcele (superficies).

U Justinijanovom pravu dugoročni i prenosivi zakup poljoprivrednog zemljišta regulisan je i označen kao emfiteuza. U vreme principata u zapadnom delu Carstva pojavilo se trajno pravo iskorišćavanja tuđeg poljoprivrednog zemljišta (*agro vectigali* ili *ius perpetuum*), a u postklasičnom pravu u istočnom delu Carstva, poljoprivredno zemljište je davano u dugoročni zakup na osnovu emfiteuze (*emphyteusis*).[30] U doba ranog carstva, *ager vectigalis* je bila zemlja u svojini države ili grada koja je u zakup davana dugoročno (najčešće na 100 godina) ili trajno, „zauvek" (*in perpetuum*), uz plaćanje zakupnine (*vectigal*). U drugom veku naše ere ovaj institut proizvodi stvarnopravna dejstva. Davanje zemlje u trajan zakup (emfiteuza) vršio je imperator u četvrtom veku naše ere, da bi u petom veku bilo omogućeno i privatnim vlasnicima zemljišta da putem emfiteuze daju u dugoročan zakup svoju zemlju. Zenonovom konstitucijom ovo je bio poseban pravni posao koji nije bio ni kupoprodaja ni zakup. Prema Digestama ovo je jedan institut nazvan *ager vectigalis id est emphyteuticarius*.[31] Emfiteuta je mogao ovo zemljište prenositi na druga lica *inter vivos* i *mortis causa*, ali je vlasnik zemljišta imao pravo preče kupovine. Prava emfiteute su prestajala kada tri uzastopne godine nije platio zakupninu ili nije ispunio poreske obaveze.[32]

Superficijes[33] je ugovor o dugoročnom zakupu građevinskih parcela, u rimskom pravu, koji je ovlašćivao neko lice na korišćenje i upotrebu zgrade koja će se tek izgraditi ili je već

---

[26] Grupa autora, *Ilustrovana istorija sveta, ibidem.,* strana 203.

[27] Mumford Lewis, strana 553.

[28] Grupa autora, *op. cit.,* strana 203.

[29] Puhan Ivo, *Rimsko pravo*, Naučna knjiga, Beograd, 1970

[30] Horvat Marijan, Rimsko pravo,, Školska knjiga, Zagreb, 1974, strana 165.

[31] Paund Rosko, *Jurisprudencija*, Službeni list SRJ, Beograd i CID, Podgorica, 2000, strana 95.

[32] Puhan Ivo, op. cit., strana 247.

[33] Lat. *superficies, ei, f.* (*super – facies*) – površina; „zgrada povrh zemlje", Divković Mirko, *Latinsko – hrvatski rječnik,* Zagreb, 1980 (reprint izdanja iz 1900), strana 1035.

izgrađena na tuđem zemljištu[34]. Nastao je u klasičnom periodu, kada je pravo svojine na zemljištu bilo potpuno ustanovljeno, a većina zemljišnih površina bila je u svojini malog broja vlasnika. Potrebe nezemljoradnika za kućama i poslovnim prostorijama bile su velike. Dugoročni zakup građevinskih parcela je u klasičnom periodu bio obligacioni. Graditelj zgrade imao je samo obligacioni zahtev protiv zakupodavca (*actio conductio*).

Putem *superficies* – a omogućeno je da pravo svojine i dalje imaju dotadašnji vlasnici, a da se upotreba, prvenstveno građevinskih parcela, prenese na druga lica. Na taj način je korisnik zemljišta u stvari sticao pravo građenja.[35] Ovaj ugovor, u početku javno-pravne prirode, usvojen je i u privatnom pravu i dobio ime *superficies*[36]. Ugovorom je država ili opština (grad) davala u zakup zemljište - *loca publica* ovlašćenom licu (*superficiarius*) sa ciljem da na njemu sagradi zgradu, osim ako zgrada već postoji na tom zemljištu[37], da sagrađenu ili postojeću zgradu upotrebljava i za to plaća zakupninu (*solarium, pensio*) „ili besplatno za neku nominalnu kiriju u znak priznanja"[38]. Formalnopravno vlasnik zemljišta je i vlasnik zgrade u skladu sa načelom *superficies solo cedit* [39]– sve što se trajno spoji sa površinom zemljišta sastavni je deo zemljišta, odnosno pripada vlasniku zemljišta.[40] Nastankom prava *superficies* – a (stvarnog prava na tuđoj stvari) ovo načelo je donekle korigovano.[41] Superficijar stiče pravo da se tom zgradom, prema ugovoru, koristi trajno ili određeno duže vreme (najčešće 99 godina) i na njoj vrši ona prava koja može vršiti i vlasnik[42]. Pravo superficijara nastaje pod opštim pretpostavkama za nastanak stvarnih prava na nepokretnostima. Superficijar može zgradu dati u zakup ili na poslugu, opteretiti je hipotekom ili službenošću, prodati je, razmeniti ili pokloniti. Ovo pravo superficijara je i nasledivo. Iako je od nastanka superficijesa postojala tendencija da se odvoji zemljište od zgrade, ovaj institut, ni u „svome zenitu nije uspio pravno odvojiti zemljište i zgradu kao dvije samostalne nekretnine"[43]

U početku je pretor superficijara štitio posebnim kvaziposesornim interdiktom koji je delovao *erga omnes* – imao je stvarnopravno dejstvo. Docnije je, radi zaštite svog stvarnog prava (deluje *erga omnes*) superficijar mogao podizati iste tužbe kao i vlasnik zemljišta (ove tužbe su se nazivale *utiles*) – *rei vindicatio utilis*, *actio negatoria utilis*, *actio Publiciana utilis*. Ističe se da je tek Justinijan odredio da je superficijes poseban stvarnopravni odnos i uvrstio ga u *iura in re aliena*.[44]

---

[34] Pojedini pravni pisci smatraju da superficijes nastaje i na pojedinim delovima zgrade (npr.: na spratovima) - Salkovski Karl, *Institucije s istorijom rimskog privatnog prava*, Državna štamparija Kraljevine Srbije, Beograd, 1894, strana 307; Arnts, L. Riter od Arnesberga, *Pandekte*, *Knjiga druga – Stvarno pravo*, Kraljevska srpska državna štamparija, Beograd, 1892, strana 489.

[35] Puhan Ivo, *op. cit.,* strana 247.

[36] Horvat Marijan, Rimsko pravo,, Školska knjiga, Zagreb, 1974, strana 167; Aranđelović Dragoljub, *Predavanja iz rimskog prava*, Geca Kon, Beograd, 1938, strana 201.

[37] Paund Rosko, *ibidem*; Salkovski Karl, *ibidem.*

[38] *Ibidem*.

[39] Pravilo *superficies solo cedit* proističe iz načela *accessorium cedit principale*: zemljište je uvek glavna stvar – *res principale,* a ono što se sa zemljištem trajno spoji njegov priraštaj - Simonetti Petar, Pravno jedinstvo nekretnine, *Pravni život,* broj 11/2007, strana 432.

[40] Stanojević Obrad, *Rimsko pravo,* Službeni list SCG, Beograd, 2004, strana 286

[41] Horvat Marijan, *op. cit*., strana 166.

[42] Aranđelović Dragoljub, *op. cit.,* strana307.

[43] Simonetti Petar, *op. cit.,* strana 429.

[44] Stojčević, Dragomir, *Rimsko privatno pravo*, Savremena administracija, Beograd, 1985, strana 180.

Za zaštitu državine, osim kvaziposesornih interdikata, superficijar je mogao podneti *interdictum de superficiebus* koji je sličan *interdict-* u *possidetis*.[45]

III. Rimsko pravilo *Superficies solo cedit* i uticaj na savremeno pravo

Pravilo *superficies solo cedit* potiče iz rimskog prava, a označava da trajni objekat deli pravnu sudbinu zemljišta. Važilo je kogentno pravilo da je zemljište *ex iure* glavna stvar. Ono je proisteklo iz šireg načela – *accessorium cedit principale:* ko je vlasnik glavne stvari (zemljišta) vlasnik je svega onoga što je trajno spojeno sa zemljištem (objekata, drveća i biljaka). Sve stvari koje su trajno spojene sa zemljištem kao glavnom stvari, gube pravnu samostalnost. Pravo svojine na zemljištu i stvarima koje su sa njim spojene proteže se, shodno tome, u rimskom pravu i do kraja srednjeg veka (kada su tehničke mogućnosti korišćenja zemljišne površine, zemljišta iznad i ispod površine, bile svedene na tanak sloj), neograničeno u visinu i dubinu – od neba do pakla *cuius est solum eius est usque ad coelum et ad inferos*.[46] Savremeno doba tehnički omogućava da se zemljište koristi skoro do svemira i duboko ispod površine, ali je pravo svojine pravno ograničeno tako da se može koristiti opet samo tanak sloj površine zemljišta i vazdušnog stuba.

Pravilo *superficies solu cedit* usvojeno je u građanskim zakonicima koji su važili u prvoj Jugoslaviji i savremenom kontinentalnom evropskom pravu.

Paragraf 293. Opšteg austrijskog građanskog zakonika (OAGZ) definiše pokretne i nepokretne stvari. Kao pravno nepokretne stvari smatra i pokretne stvari koje se po odredbi vlasnika ili po zakonu „čine pripadak kakve nepokretne stvari".[47]

Paragraf 185. Srpskog građanskog zakonika iz 1844. godine (SGZ) određuje da su nepokretne one stvari „koje se ne mogu s jednoga mesta na drugo krenuti, ili premestiti, a da se u svojim sastavnim delovima ne naruše". Istu pravnu sudbinu kao i nepokretnosti imaju i nepokretnosti po nameni (po prirodi pokretne stvari, ali se smatraju kao priraštaj nepokretnosti – „pridodatak")[48]

Opšti imovinski zakonik za Knjaževinu Crnu Goru iz 1888. godine, pravilo *superficies solo cedit* izražava kroz pravnu izreku u članu 1017: „Čija zemlja toga i dvori, čija njiva toga i usjev".

Pravna pravila iz navedenih zakonika su se primenjivala u drugoj Jugoslaviji[49] tj. i pravilo *superficies solo cedit*, s manjim izuzetkom kod građenja na tuđem zemljištu".[50]

---

[45] Arnts L. Riter od Arnesberga, *op. cit.,* strana 490.

[46] Simonetti, Petar, Pravno jedinstvo nekretnine, *Pravni život,* br. 11/2007, strana 433.

[47] Kao pripadak OAGZ smatra „što se sa nekom stvari stavi u trajnu vezu". Takvo svojstvo ima prvenstveno priraštaj stvari, „dok se od nje ne odvoji, već i uzgredne stvari, bez kojih se glavna stvar ne može upotrebiti..." (paragraf 294. OAGZ). Dejstvo pravila *superficies solu cedit* detaljno je regulisano u par. 417 – 420. OAGZ – prilikom građenja i priraštaja (sejanjem i sađenjem).

[48] Vidi paragraf 186. SGZ. Iz paragrafa 189. SGZ proističe da je prvenstveno zemljište glavna stvar, ali i svaka stvar „koja je sa glavnom stvari skopčana tako da se bez narušenja glavne stvari od nje odvojiti ne bi mogla; tako su sve kuće i ostale zgrade i zdanja, tako i sve što je u zemlji ukopano ili uzidano, ili prilepljeno ili prikovano, kao: kazani, uzidani rafovi, i sve, za običnu upotrebu celoga opredeljeno, kao: đeram, kabao, uže, lanac na bunaru itd." (paragraf 189. SGZ).

[49] Vidi član 4. Zakona o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije („Službeni list FNRJ", broj 86/1946)

[50] Simonetti Petar, *Prava na nekretninama,* Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2009, str. 49. i 50.

Francuski građanski zakonik iz 1804 (FGZ) preuzeo je pravilo *superficies solo cedit* i regulisao ga članovima 552 – 555. Prema odredbama FGZ svojina na zemljištu proteže se na površinu i ispod površine. Vlasnik može na površini sve saditi i graditi, osim ako sudija tim povodom ustanovi izuzetno službenosti ili zemljišne službenosti. On može i ispod površine graditi sve građevine, osim ako sudija donese suprotnu odluku (vidi član 552. FGZ). Pretpostavlja se da je sve građevine, sadnice i tvorevine na zemljištu ili u zemljištu načinio vlasnik sa svim pripacima, ako se suprotno ne dokaže i bez odobrenja vlasnika se ne mogu ukloniti (vidi član 553. FGZ).[51]

Nemački građanski zakonik iz 1896 (NGZ) reguliše nasledni zakup (sličan emfitevzi) i nasledno pravo građenja (odgovara superficies- u). Nasledno pravo građenja regulisano je u članu 1012: „Zemljišna parcela se može opteretiti tako što njen korisnik po tom osnovu stiče neotuđivo i nasledno pravo da podigne zgradu na površini ili ispod površine zemljišta". Pravo građenja može biti trajno ali se, po pravilu, određuje rok do koga ovo pravo traje i visina godišnje zakupnine (kao i u rimskom pravu ovo pravo se može ustanoviti bez plaćanja zakupnine). Pravo građenja ne prestaje uništenjem zgrade.[52]

Italijanski građanski zakonik iz 1942 (IGZ) reguliše superficijarno pravo koje razdvaja zemljište i zgradu (zgrada je samostalna nepokretnost) i omogućava da jedno lice bude vlasnik zgrade, a drugo zemljišta.[53]

Pravo građenja poznato je i u pravu SAD. Ono se može steći plaćanjem zakupnine vlasniku zemljišta u državama Pensilvanija, Njujork, Džordžija, Merilend itd.[54]

Holandski građanski zakonik iz 1994 (HGZ) reguliše pravo građenja (čl. 101 – 105). U članu 101. HGZ propisano je da pravo građenja predstavlja stvarno pravo imati ili steći u svojinu zgradu izgrađenu i zasađenu na ili ispod nepokretnosti drugog lica. Pravo građenja može biti samostalno ili zavisno od drugog stvarnog prava, kao i od prava dugoročnog zakupa nepokretnosti. Ugovorom može biti obavezan titular prava građenja da vlasniku zemljišta isplati u redovno ili neredovno vreme novčanu naknadu. Na pravo građenja primenjuju se odgovarajuće odredbe kojima je regulisan dugoročni zakup zemljišta (v. čl. 85 – 100. HGZ).

Građanski zakonik Ruske Federacije iz 1994 (GZRF)[55] detaljno reguliše pravo svojine. Vlasnik zemljišne parcele ima pravo koristiti po svom nahođenju sve što se nalazi na i ispod površine te parcele, ako drugačije nije predviđeno zakonom o prirodnim bogatstvima, o korišćenju vazdušnog prostora i drugim zakonom i ne vređa prava drugih lica (član 261. stav 3. GZRF). Zemljišnu parcelu i nepokretnosti koje se na njoj nalaze vlasnik može staviti na raspolaganje drugim licima stalno ili do određenog roka u zakup (član 264. stav 1. GZRF).

GZRF reguliše „pravo doživotnog i naslednog korišćenja" zemljišne parcele. Član 266. stav 2. GZRF je propisao da: „Ako iz uslova korišćenja zemljišne parcele, predviđenih zakonom, ne proističe što drugo, titular zemljišne parcele ima pravo na njoj podići građevinu i sazidati druge nepokretne stvari i na njima steći pravo svojine".

---

[51] Vidi potpunije: Lucas Andre i Catala Pierre, Litec, *Code civil,* Paris, 2001, str. 332 – 335.

[52] Paund Rosko, *Jurisprudencija, knjiga III,* JP Službeni list SRJ, Beograd i CID, Podgorica, 2000, strana 96.

[53] Vidi: Simonetti Petar, *Prava na nekretninama*, Pravni fakultet Sveučilišta u Rijeci, Rijeka 2009, str. 50. i 51; Pravno jedinstvo nekretnine, *Pravni život,* broj 11/2007, str. 435. i 436.

[54] *Ibidem*, str., 96. i 97.

[55] GZRF je stupio na snagu 1. januara 1995. na osnovu tačke 1. Zakona Federacije stupanju na snagu prvog dela Zakonika.

Pravo građenja regulisano je i u zakonima država nastalih raspadom SFRJ.[56]

Istaknuta osnovna rešenja instituta prava građenja uporednih pravnih sistema proistekla su, prema tome, iz rimskog prava.

IV. Prava na izgrađenom građevinskom zemljištu u Srbiji

1. Napuštanje principa superficies solo cedit u drugoj Jugoslaviji i Srbiji Izuzeci

U Jugoslaviji, za vreme Narodnooslobodilačkog rata i posle okončanja Drugog svetskog rata, zemljište, zgrade i druge stvari i prava su prinudno prenošene iz privatne u društvenu (državnu) imovinu, radi „eksproprijacije eksproprijatora" tj. ukidanja kapitalističkih odnosa.[57] Zemljište (poljoprivredno i građevinsko) je od fizičkih i pravnih lica oduzimano po više osnova i zakona kao što su: Zakon o konfiskaciji imovine i izvršenju konfiskacije[58], Zakon o prelazu u državnu svojinu neprijateljske imovine i sekvestraciji nad imovinom odsutnih lica FNRJ[59], Zakon o postupanju sa imovinom koju su sopstvenici morali napustiti u toku okupacije i imovinom koja im je oduzeta od strane okupatora i njegovih pomagača[60], Zakon o oduzimanju državljanstva oficirima i podoficirima bivše jugoslovenske vojske, koji neće da se vrate u otadžbinu, pripadnicima vojnih formacija koji su služili okupatoru i odbegli u inostranstvo, kao i licima odbeglim posle oslobođenja[61], Osnovni zakon o eksproprijaciji[62], Zakon o agrarnoj reformi i kolonizaciji[63] itd.

Princip *superficies solo cedit* u drugoj Jugoslaviji i Srbiji, u gradovima i naseljima gradskog karaktera, napušten je donošenjem Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta[64]. Na osnovu ovog zakona prešle su prinudno u državnu (društvenu svojinu), pored najamnih stambenih zgrada i najamnih poslovnih zgrada, i građevinska zemljišta u gradovima i naseljima gradskog karaktera (član 1. Zakona).

Ukoliko se na nacionalizovanoj građevinskoj parceli nalazi zgrada koja nije nacionalizovana tj. zgrada je u privatnoj svojini vlasnik te zgrade ima pravo besplatnog korišćenja zemljišta koje pokriva zgradu i zemljišta koje služi za redovnu upotrebu te zgrade, sve dok na tom zemljištu postoji zgrada (član 37. Zakona). Na taj način je pravno razdvojeno pravo svojine na zemljištu (koje je u društvenoj svojini) od prava svojine na porodičnoj stambenoj

---

[56] Tako je pravo građenja u Hrvatskoj regulisano čl. 280 – 296. Zakona o vlasništvu i drugim stvarnim pravima („Službene novine, br. 91/96, 68/98, 137/99, 22/00, 129/00 i 114/01), a Republika Srpska je ovo pravo uredila odredbama čl. 286 – 302. Zakonom o stvarnim pravima („Službeni glasnik RS", br. 124/08).

[57] Vidi: Simonetti Petar, *Denacionalizacija*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2004, str. 39. i 40.

[58] „Službeni list DFJ", br. 40/45 i 70/45. Taj zakon je potvrđen Zakonom o potvrdi i izmenama i dopunama Zakona o konfiskaciji imovine i o izvršenju konfiskacije od 9. juna 1945. godine („Službeni list FNRJ", broj 61/46).

[59] „Službeni list DFJ", broj 63/46

[60] „Službeni list FNRJ", broj 64/46

[61] „Službeni list FNRJ", broj 86/46

[62] „Službeni list FNRJ", broj 28/47

[63] „Službeni list DFJ", broj 64/45 sa docnijim izmenama i dopunama.

[64] „Službeni list FNRJ", broj 52/58. Stupio je na snagu 28. decembra 1958. godine

zgradi koja je na njemu podignuta ili će biti podignuta.[65] Razdvajanje prava svojine na zemljištu u društvenoj svojini od prava svojine na zgradi u privatnoj svojini nastajala je po sili zakona, na osnovu imperativne norme.

Član 32. Zakona o građevinskom zemljištu[66] je odredio da se građevinskim zemljištem u građevinskom području smatra zemljište za koje skupština opštine odlukom utvrdi da se u opštem interesu namenjuje za izgradnju ili za uređenje i očuvanje određenog prostora. Takvo rešenje je, u osnovi, preuzeto i u docnijim zakonima o građevinskom zemljištu[67]. Zakon o građevinskom zemljištu iz 1995.[68] odredio je da građevinsko zemljište može biti: gradsko građevinsko zemljište; građevinsko zemljište u građevinskom području i građevinsko zemljište izvan građevinskog područja (član 3.).

Vlasnik zgrade u privatnoj svojini sticao je, izgradnjom zgrade na građevinskom zemljištu u društvenoj svojini, trajno pravo korišćenja na zemljištu pod zgradom i koje služi za redovnu upotrebu zgrade.[69]

Prinudne norme o pravnom razdvajanju zgrade od zemljišta u društvenoj svojini, nisu, međutim, važile za zemljište i zgrade u privatnoj svojini. Pozitivni propisi druge Jugoslavije i Srbije priznavali su načelo pravnog jedinstva zemljišta i zgrade u privatnoj svojini. Pretpostavke za primenu ovog načela nisu bile propisane pozitivnim pravom[70] zbog čega su se na te odnose supsidijarno primenjivala pravna pravila iz paragrafa 189. SGZ.[71] Shodno tim pravilima, ako se otuđuje zemljište u privatnoj svojini otuđuje se i trajna zgrada kao pripadak zemljišta. Strane su mogle ugovorom pravno razdvojiti zemljište i zgradu. Tako su strane mogle da ugovore: 1. da jedna strana otuđuje zemljište a zadržava pravo svojine na zgradi, 2. da jedna strana otuđuje zgradu, a zadržava pravo svojine na zemljištu i 3. da pravo svojine ne zemljištu otuđi jednom licu a drugom pravo svojine na zgradi.[72]

---

[65] Na zahtev ranijeg sopstvenika nacionalizovanog građevinskog neizgrađenog zemljišta opštinski narodni odbor daće mu to zemljište na korišćenje radi podizanja porodične stambene zgrade, ako se prema urbanističkom planu ili odluci narodnog odbora koja taj plan zamenjuje, može na tom zemljištu podići takva zgrada (član 40. stav 1. Zakona). Zakonom o određivanju građevinskog zemljišta u gradovima i naseljima gradskog karaktera"Službeni list SFRJ", br. 5/68 i 20/69 propisano je da se odredbama člana 2. tog zakona, građevinska zemljišta u gradovima i naseljima gradskog karaktera određuju republičkim zakonom (član 2. Zakona). Sticanje gradskog građevinskog zemljišta omogućeno je Zakonom o uređivanju i korišćenju gradskog zemljišta „Službeni list SRS", broj 12/64.

[66] „Službeni glasnik SRS", broj 32/75

[67] „Službeni glasnik, SRS", broj 27/86 ; „Službeni glasnik SRS", broj 23/90 i Službeni glasnik RS br. 44/95 i 16/97.

[68] Službeni glasnik RS br. 44/95 i 16/97.

[69] Vidi: Simonetti Petar, Ustanove pravnog razdvajanja zemljišta i zgrade i pravo služnosti (službenosti) građenja prema Nacrtu Zakonika o svojini i drugim stvarnim pravima Republike Srbije, *Pravni život*, broj 11/2008, strana 122. i Anđelković Žarko, Zemljište pod zgradom i zemljište za redovnu upotrebu zgrade, *Pravni život*, broj 11/2008, strana 259.

[70] Vidi član 9. Zakona o osnovama svojinskopravnih odnosa „Službeni list SFRJ, br. 6/80 i 36/90, „Službeni list SRJ", br. 29/96 i „Službeni glasnik RS", broj 115/2005 – drugi zakon.

[71] Vidi za Hrvatsku: Simonetti Petar, *Prava na nekretninama,* Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2009, strana 70.

[72] Simonetti Petar, Ustanove pravnog razdvajanja zemljišta i zgrade i pravo služnosti (službenosti) građenja prema Nacrtu Zakonika o svojini i drugim stvarnim pravima Republike Srbije, *Pravni život*, broj 11/2008, strana 124.

Ako je zgrada u etažnoj svojini[73] izgrađena na zemljištu u privatnoj svojini, vlasnici posebnih delova zgrade imali su zajedničku nedeljivu svojinu na zajedničkim delovima zgrade i susvojinski deo na zemljištu pod zgradom i koje služi za redovnu upotrebu zgrade[74], srazmerno vrednosti svog posebnog dela zgrade, prema ukupnoj vrednosti zgrade. Ukoliko je zgrada u društvenoj (državnoj) svojini izgrađena na zemljištu u društvenoj (državnoj) svojini na građevinskoj parceli na kojoj je zgrada podignuta vlasnici posebnih delova zgrade imaju trajno pravo korišćenja zemljišta samo dok zgrada na njemu postoji.[75]

2. Zakon o planiranju i izgradnji iz 2003.

2.1. Pravilo o pravnom razdvajanju zemljišta i zgrade

Zakon o planiranju i izgradnji iz 2003. godine (ZPI iz 2003)[76] zadržao je pravilo o razdvajanju zemljišta i zgrade. U određenim slučajevima omogućeno je pretvaranje prava korišćenja u pravo svojine.

ZPI iz 2003. propisao je da građevinsko zemljište može biti: javno građevinskog zemljište i ostalo građevinsko zemljište (član 68.) Javno građevinsko zemljište je ono na kojem su, do dana stupanja na snagu tog zakona (tj. do 13. 05. 2003), izgrađeni javni objekti od opšteg interesa i javne površine i koje su u državnoj svojini. Izgrađeno ili neizgrađeno javno građevinsko zemljište ne može se otuđiti iz državne svojine (član 70. stav 7. ZPI). Ostalo građevinsko zemljište moglo je biti u svim oblicima svojine i u prometu je. Ovo zemljište koje je do dana stupanja na snagu tog zakona, određeno kao gradsko građevinsko zemljište u državnoj svojini, ostalo je u državnoj svojini, ako posebnim zakonom nije drukčije određeno (član 79. st. 1, 2. i 3. Zakona).

ZPI iz 2003. propisao je da vlasnici čiji su objekti, da dana stupanja na snagu tog zakona (tj. do 13. 05. 2003) „izgrađeni u skladu sa zakonom na izgrađenom ostalom građevinskom zemljištu u državnoj svojini, imaju pravo korišćenja postojeće građevinske parcele dok taj objekat postoji“ (član 83. ZPI iz 2003).

Pored prava svojine i prava korišćenja kao pretpostavke za sticanje odobrenja za građenje, a posle izgradnje zgrade i prava svojine na zgradi, ZPI iz 2003. odredio je još jedan osnov – zakup. Putem zakupa je, takođe, pravno razdvojeno pravo svojine na zemljištu od prava svojine na zgradi. Opština je mogla davati u zakup neizgrađeno javno građevinsko zemljište, na određeno vreme do privođenja planiranoj nameni, radi izgradnje privremenih objekata. [77] Ovi rokovi u opštim aktima opština nisu bili dugi.[78]. Ostalo neizgrađeno građevinsko zemljište u državnoj svojini moglo se davati u zakup na osnovu ugovora između

---

[73] Pravo svojine na posebnom delu zgrade može postojati na stanu, poslovnoj prostoriji ili garaži, odnosno garažnom mestu. Na zajedničkim delovima zgrade i uređajima u zgradi vlasnici posebnih delova zgrade imaju pravo zajedničke nedeljive svojine - član 19. Zakona o osnovama svojinskopravnih odnosa.

[74] Vidi: Planojević Nina, *Etažna svojina*, Pravni fakultet, Kragujevac, Kragujevac, 1997, strana 136; Subić Milan, Pravo svojine na zgradama, *Pravni život*, broj 10/2000, strana 323.

[75] *Ibidem*, str. 148 – 151.

[76] Službeni glasnik RS broj 47/2003 i 34/06.

[77] Vidi član 76. ZPI iz 2003.

[78] Tako je član 14. st. 2. i 3. Odluke o građevinskom zemljištu Grada Beograda („Službeni list Grada Beograda“, br. 16/2003 i 2/2004 i „Službeni glasnik RS“, broj 41/2005 - odluka Ustavnog suda Republike Srbije) odredio da se neizgrađeno javno građevinsko zemljište daje u zakup do privođenja planiranoj nameni, najduže pet godina. Samo izuzetno se taj rok mogao produžiti. Isto rešenje sadržano je i u članu 36. stav 1, a u vezi sa članom 38. stav 2. Odluke o davanju u zakup građevinskog zemljišta Grada Novog Sada („Službeni list Grada Novog Sada“, br. 11/2003, 9/2004 i 10/2005).

opštine, odnosno odnosno preduzeća kome je ove poslove poverila i lica kome se zemljište daje u zakup (v. član 81. stav 1, a u vezi sa članom 72. stav 3. ZPI iz 2003), a u skladu sa opštim aktom opštine (vidi član 81. stav 4. ZPI iz 2003). Odluke opština, odnosno gradova predvidele su, u stvari dugoročni zakup građevinskog zemljišta.[79]

2.2. Pretvaranje prava korišćenja u pravo svojine pojedinačnim upravnim aktom

Pretvaranje prava korišćenja u pravo svojine omogućio je ZPI iz 2003. godine samo po zahtevu ranijeg sopstvenika i sledom toga akta organa uprave kojim se taj zahtev usvaja, a ne po sili zakona. Na taj način je omogućeno i uspostavljanje pravnog jedinstva nepokretnosti, koje je, ipak, regulisano kao izuzetak od pravila o razdvajanju nepokretnosti. ZPI iz 2003. je regulisao dve pravne situacije – jedna koja ima u vidu opšti akt jedinice lokalne samouprave i druga koja ima u vidu pojedinačni upravni akt.

U prvoj pravnoj situaciji, za pretvaranje prava korišćenja u pravo svojine potrebno je da se steknu sledeće pretpostavke: 1. da je svojstvo gradskog građevinskog zemljište u državnoj svojini određeno odlukom skupštine opštine, odnosno grada, odnosno Grada Beograda, 2. da ovo, ostalo građevinsko zemljište, nije privedeno nameni u celini ili većim delom do dana stupanja ZPI iz 2003. na snagu (tj. 13. 05. 2003), 3. da ne čini urbanističku i funkcionalnu celinu sa javnim građevinskim zemljištem, 4. da je raniji vlasnik, odnosno njegov zakonski naslednik, podneo zahtev opštinskoj upravi najkasnije u roku od dve godine od dana donošenja odluke o određivanju građevinskog zemljišta za javno građevinsko zemljište i 5. da je zahtev ranijeg sopstvenika, odnosno njegovog zakonskog naslednika usvojen (vidi član 79. st. 4 – 6. ZPI iz 2003).

U drugoj pravnoj situaciji, za pretvaranje prava korišćenja u pravo svojine, potrebno je da se steknu sledeće pretpostavke: 1. da je organ uprave doneo pojedinačni upravni akt o izuzimanju gradskog građevinskog zemljišta od ranijeg sopstvenika, 2. da korisnik gradskog građevinskog zemljišta nije to zemljište priveo nameni za koju je zemljište izuzeto, u roku od godine dana od dana stupanja na snagu ZPI iz 2003, 3. ako je raniji sopstvenik, odnosno njegov zakonski naslednik podneo organu uprave zahtev za poništenje rešenja o izuzimanju zemljišta i 4. da je organ uprave usvojio zahtev za poništenje izuzetog zemljišta.

3. Pretvaranje prava korišćenja u pravo svojine po Zakonu o planiranju i izgradnji iz 2009 (ZPI iz 2009)

1. Uopšte

Pravno jedinstvo zemljišta i zgrade Zakon o planiranju i izgradnji (ZPI)[80] koji je stupio na snagu 11. 09. 2009. godine, uspostavio je: 1) po sili zakona ili je 2) omogućio njeno uspostavljanje.

---

[79] Član 16. Odluke o građevinskom zemljištu Grada Beograda propisao je da se ostalo neizgrađeno građevinsko zemljište u državnoj svojini može dati u zakup radi izgradnje „na određeno vreme, a najduže 99 godina“ i da se rok trajanja zakupa utvrđuje zavisno od namene, površine, vremena amortizacije objekta i dr. Član 2. Odluke o davanju u zakup građevinskog zemljišta Novog Sada određuje da Novi Sad ostalo građevinsko zemljište u državnoj svojini daje u zakup radi izgradnje objekata i privođenja nameni, u skladu sa odgovarajućim urbanističkim planom, planskim dokumentom, odnosno prostornim planom. Trajanje zakupa zavisi od namene ostalog građevinskog zemljišta, odnosno objekta i prirode amortizacije objekta, i to za objekte: 1) sa namenom za stanovanje rok trajanja zakupa je 99 godina, i 2) za druge namene rok trajanja zakupa je 15 do 80 godina. Pre nego što istekne rok zakup se može produžiti, u skladu sa zakonom.

[80] „Službeni glasnik RS“, br. 72/09 i 82/09 - ispravka

1) ZPI je pretvorio pravo korišćenja u pravo javne svojine na građevinskom zemljištu, bez naknade u korist Republike Srbije, autonomne pokrajine, odnosno jedinice lokalne samouprave (član100). Zakonom nije određeno da prestaje trajno pravo korišćenja, nego je, kao pravilo, propisano pretvaranje (konverzija) prava korišćenja u pravo javne svojine ili pravo (privatne) svojine.[81] Pravo trajnog korišćenja na izgrađenom građevinskom zemljištu fizičkih lica pretvoreno je, bez naknade u pravo svojine (član 101. ZPI). Na taj način je uspostavljeno načelo da na zemljištu u državnoj svojini ne može stajati zgrada u privatnoj svojini.[82] Na zemljištu koje ne može biti predmet prava svojine ne može se ni pretvaranjem prava korišćenja ono steći u svojinu.[83] Zakon o planiranju i izgradnji je, po sili zakona, pravo trajnog korišćenja građevinskog zemljišta etažnih vlasnika pretvorio u pravo susvojine na tom zemljištu, bez naknade.

2) Pretvaranje prava korišćenja u pravo svojine na građevinskom zemljištu predviđeno je kao mogućnost, za privredna društva i druga pravna lica na koja su se primenjivale odredbe zakona kojima se uređuje privatizacija, stečajni i izvršni postupak, kao i njihovi pravni sledbenici, uz naknadu tržišne vrednosti.

2. Pretvaranje prava korišćenja u pravo svojine na građevinskom zemljištu bez naknade

2.1. Pretvaranje prava korišćenja u pravo javne svojine

Titulari prava korišćenja, upisani u zemljišnom registru, i to: Republika Srbija, autonomna pokrajina, odnosno jedinica lokalne samouprave, na izgrađenom i neizgrađenom građevinskom zemljištu u državnoj svojini[84], po sili zakona (član 100. ZPI iz 2009) postaju titulari javne svojine danom stupanja na snagu ZPI (tj. 11. 09. 2009), bez naknade.

Pravo korišćenja, upisano u zemljišnom registru na pravna lica, koje je osnovala Republika Srbija, autonomna pokrajina, odnosno jedinica lokalne samouprave, na izgrađenom i neizgrađenom građevinskom zemljištu u državnoj svojini, prelazi u pravo javne svojine osnivača, bez naknade, danom stupanja na snagu ZPI iz 2009 (vidi član 100. stav 2. ZPI). Zakon ima u vidu pravna lica koju je osnovala Republika Srbija, autonomna pokrajina ili jedinica lokalne samouprave i koje deluju u opštem interesu. Pravna lica mogu biti ustanove, kao što su: zdravstvene ustanove[85], obrazovne ustanove, ustanove koje obavljaju naučno istraživačku delatnost[86] ili privredni subjekti kao što su javna preduzeća (može da ih osnuje Republika Srbija, autonomna pokrajina ili jedinica lokalne samouprave)[87] itd.

---

[81] Simonetti Petar, *Prava na građevinskom zemljištu,* Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2008, strana 419.

[82] *Ibidem.*

[83] Simonetti Petar, *op. cit.,* strana 400. Vidi i član 360. stav 1. Zakona o vlasništvu i drugim stvarnim pravima Republike Hrvatske.

[84] Građevinsko zemljište, prema još uvek važećim odredbama člana 2. Zakona o sredstvima u svojini Republike Srbije („Službeni glasnik RS“, br. 53/1995, 3/1996, 54/1996, 32/1997 i 101/2005 – drugi zakon), ne može biti u svojini opštine, grada ili autonomne pokrajine.

[85] Prema odredbama člana 46. Zakona o zdravstvenoj zaštiti („Službeni glasnik RS“, broj. 107/2005 i 72/2009 – drugi zakon) zdravstvene ustanove se mogu osnovati kao: dom zdravlja, apoteka, bolnica (opšta i specijalna), zavod, zavod za javno zdravlje, klinika, institut, kliničko – bolnički centar, klinički centar.

[86] Vidi, na primer, čl. 54 – 59. Zakona o naučno istraživačkoj delatnosti („Službeni glasnik RS“, br. 110/2005 i 50/2006 – ispravka).

[87] Vid član 4. Zakona o javnim preduzećima i obavljanju delatnosti od opšteg interesa („Službeni glasnik RS“ broj 25/2000, 25/2002, 107/2005, 108/2005 – ispr.).

Javna svojina, međutim, nije regulisana zakonom kako je to propisano Ustavom RS[88]. Ustav Republike Srbije jemči privatnu, zadružnu i javnu svojinu te garantuje njihovu jednaku pravnu zaštitu. Javna svojina je: 1) državna svojina, 2) svojina autonomne pokrajine i 3) svojina jedinice lokalne samouprave (član 86. st. 1. i. 2. Ustava).

Nacrt Zakona o javnoj svojini, svojini i drugim imovinskim pravima Republike Srbije, autonomne pokrajine i jedinice lokalne samouprave[89] uredio je pravo javne svojine, pravo svojine i druga stvarna prava Republike Srbije, autonomne pokrajine i jedinica lokalne samouprave. Titulari javne svojine su Republika Srbija, autonomna pokrajina i jedinica lokalne samouprave (član 3. Stav 1. Nacrta).

Zbog toga što nije donesen zakon koji reguliše javnu svojinu ZPI je odredio rok od godinu dana od dana stupanja na snagu ZPI iz 2009. u kome će nadležni javni pravobranilac, odnosno drugo lice koje zastupa Republiku Srbiju, autonomnu pokrajinu, odnosno jedinicu lokalne samouprave zahtevati upis prava javne svojine u zemljišni registar. Izuzetno, zahtev za upis prava za građevinsko zemljište koje koristi ministarstvo nadležno za poslove odbrane može se podneti u roku od dve godine od stupanja na snagu ZPI iz 2009. Iako su odredbe o upisu prava javne svojine imperativne, shodno formulaciji u članu 100. st. 3, 4. i 5. ZPI, Zakon reguliše i situacije kada zahtev za upis javne svojine ne bude podnet u navedenim rokovima. U tom slučaju, prema odredbama člana 100. stav 6. ZPI iz 2009. „nadležni organ izvršiće po službenoj dužnosti upis prava javne svojine na nepokretnostima na kojima je na dan stupanja na snagu ovog zakona upisano pravo korišćenja na izgrađenom ili neizgrađenom građevinskom zemljištu u korist Republike Srbije, autonomne pokrajine, odnosno jedinice lokalne samouprave".

Navedene odredbe imaju u vidu okolnost da na svim delovima Republike Srbije nije završen postupak izrade ili obrazovanja katastra nepokretnosti, da bi se mogao osnovati katastar nepokretnosti u skladu sa odredbama člana 90, a u vezi sa članom 187. Zakona o državnom premeru i katastru[90]

2.2. Pretvaranje prava korišćenja u pravo svojine

U vreme stupanja na snagu Zakona o planiranju i izgradnji iz 2009. građevinsko zemljište je moglo biti javno građevinsko zemljište i ostalo građevinsko zemljište (član 68. ZPI iz 2003). Javno građevinsko zemljište postalo je građevinsko zemljište na kojem su, do dana stupanja na snagu ZPI iz 2003. (tj. 13. maja 2003), izgrađeni objekti od opšteg interesa i javne površine i koje su u državnoj svojini. Takvo svojstvo ima i zemljište koje je planom donetim u skladu sa tim zakonom, namenjeno za izgradnju javnih objekata od opšteg interesa i za javne površine i koje je u državnoj svojini (v. član 69. ZPI iz 2003). Javno građevinsko zemljište nije se moglo otuđiti iz državne svojine (član 70. stav 7. ZPI iz 2003). Ostalo građevinsko zemljište jeste izgrađeno zemljište, kao i zemljište namenjeno za izgradnju objekata, u skladu sa zakonom, a koje nije određeno kao javno građevinsko zemljište. Ovo zemljište moglo je biti u svim oblicima svojine i bilo je u prometu (član 79. st. 1. i 2. ZPI iz 2003).

---

[88] „Službeni glasnik RS" broj 98/2006. Ustav nije regulisao sticanje javne svojine - u članu 86. stav 4. propisao je: „Sredstva iz javne svojine otuđuju se na način i pod uslovima utvrđenim zakonom". Prvenstveno sticanje ali i prenošenje javne svojine mora se, međutim, regulisati zakonom, što je trebalo i navesti u Ustavu.

[89] Nacrt je pripremilo Ministarstvo finansija Republike Srbije u oktobru 2008. godine.

[90] „Službeni glasnik RS", broj 72/2009.

Prema odredbama člana 83. Zakona o planiranju i izgradnji iz 2003. vlasnici čiji su objekti, do dana stupanja na snagu tog zakona, izgrađeni u skladu sa zakonom na izgrađenom ostalom građevinskom zemljištu u državnoj svojini, imala su pravo korišćenja postojeće građevinske parcele dok taj objekat postoji (član 83. ZPI iz 2003).

Licima koja su upisana kao imaoci prava trajnog korišćenja na izgrađenom građevinskom zemljištu u državnoj svojini u zemljišnom registru, stupanjem na snagu ZPI od 2009. pravo korišćenja se pretvara u pravo svojine bez naknade (vidi član 101. stav 1. ZPI). Zakon koristi izraz „lica" te ima u vidu fizička i pravna lica, izuzev privrednih društva i drugih pravnih lica „na koja su se primenjivale odredbe zakona kojima se uređuje privatizacija, stečaj i izvršni postupak" (pretvaranje prava korišćenja u pravo svojine regulisano je članom 103. ZPI iz 2009). Javna knjiga „o evidenciji nepokretnosti i pravima na njima" obuhvata zemljišnu knjigu koju vode osnovni sudovi i Republički geodetski zavod (ovaj organ uprave vodi katastar nepokretnosti, a preuzeo je i pravnu evidenciju stvarnih prava na nepokretnostima)[91].

Pravo trajnog korišćenja sticao je vlasnik zgrade izgradnjom zgrade. Ovo pravo se pretvorilo, po sili zakona, u pravo svojine, tako da je vlasnik zgrade postao istovremeno i vlasnik zemljišta pod zgradom i za redovnu upotrebu zgrade (na kojoj je imao trajno pravo korišćenja). Pravnim poslom se ova imperativna norma ne može menjati.[92]

2.3. Pretvaranje prava trajnog korišćenja na zemljištu u pravo susvojine etažnog vlasnika

Od dana stupanja na snagu Zakona o stanovanju - ZOS[93](stupio je na snagu 02. 08. 1992) na stanu se nije moglo steći stanarsko pravo (član 30. stav 1. ZOS). Članom 31. ZOS propisano je da je rok za otkup (privatizaciju) stanova 31. 12. 1995. ako nosilac stanarskog prava u tom roku ne zaključi ugovor o otkupu stana, nastavlja da koristi stan kao zakupac na neodređeno vreme, sa pravom da ga otkupi. Otkupom stanova sticano je pravo svojine na stanu kao posebnom delu zgrade i nedeljiva svojina na zajedničkim delovima zgrade (etažna svojina). Na taj način je etažna svojina prvenstveno na stanovima u gradovima i naseljima gradskog karaktera postala najvažniji oblik svojine. Najčešće se etažna svojina uspostavlja na stanu,[94] poslovnoj prostoriji, garaži, ali i garažnom mestu[95], delovima podruma, tavana itd.[96] Zgrade su prestale biti u društvenoj svojini, a njeno održavanje i korišće-

---

[91] Nadležni sudovi dužni su da na zahtev Republičkog geodetskog zavoda (Zavod) predaju zemljišnu knjigu, knjigu tapija i intabulacionu knjigu, odnosno njihove delove, najkasnije do dana početka osnivanja katastra nepokretnosti. Od dana početka osnivanja katastra nepokretnosti (odluku o tome donosi Zavod) neće se provoditi promene u katastru zemljišta, zemljišnoj knjizi, knjizi tapija, intabulacionoj knjizi i izdavati tapije i provoditi promene u knjizi prodatih društvenih stanova sa hipotekom, a nerešeni i novi zahtevi za upis promena dostavljaju se Zavodu i rešavaju se u postupku osnivanja katastra nepokretnosti – vidi član 92, a u vezi sa članom 91. stav 2. Zakona o državnom premeru i katastru („Službeni glasnik RS", broj 72/2009).

[92] Simonetti Petar, *op. cit*., strana 421.

[93] „Službeni glasnik RS", br. 50/92 do 26/2001 i 101/2005 – drugi zakon.

[94] Stan je jedna ili više prostorija namenjenih i podobnih za stanovanje koje, po pravilu, čine jednu građevinsku celinu i imaju zaseban ulaz (član 3. Zakona o stanovanju).

[95] Član 253. st. 1. i 2. Nacrta Zakonika, primera radi navodi da je poseban deo zgrade (koji može činiti etažnu svojinu) stan, poslovna prostorija, garaža, garažno mesto koje je jasno obeleženo ili podrum koji čini građevinsku celinu.

[96] Planojević Nina, *Etažna svojina,* Pravni fakultet, Kragujevac, 1997, str. 87 -89; Spasić,I., Etažna svojina u Zborniku *Promene stvarnog prava u Srbiji,* str.107 – 111.

nje prešlo je na skupštinu stambene zgrade koja ima status pravnog lica i koju čine svi vlasnici stanova i drugih posebnih delova zgrade.[97] Zemljište pod zgradom je, međutim, i dalje bilo u državnoj svojini sve do stupanja na snagu Zakona o planiranju i izgradnji iz 2009. godine.

Stupanjem na snagu Zakona o planiranju i izgradnji 11. 09. 2009. godine, po sili zakona, pravo trajnog korišćenja etažnih vlasnika – vlasnika posebnih fizičkih delova stambene zgrade sa više stanova, poslovne zgrade i poslovno – stambene zgrade pretvara se u pravo susvojine na tom zemljištu, bez naknade. Pravo susvojine na zemljištu, na kome se nalazi zgrada i koje služi za redovnu upotrebu zgrade, nastalo je inverzijom načela s*uperficies solo cedit*. Naime, vlasnik posebnog dela zgrade stiče na zemljištu pod zgradom i za redovnu upotrebu zgrade „pravo svojine, srazmerno površini posebnih fizičkih delova čiji su vlasnici". Suvlasnički delovi na zemljištu na kome se nalazi zgrada i koje služi za redovnu upotrebu zgrade određuju se srazmerno površini posebnih fizičkih delova čiji su oni vlasnici. Na taj način je ostvareno pravno jedinstvo suvlasništva na zemljištu pod zgradom i za redovnu upotrebu zgrade sa svojinom na posebnom delu zgrade.[98] Ova pravila se ne primenjuju na lica koja mogu ostvariti pravo na pretvaranje prava korišćenja u pravo svojine uz naknadu (v. član 101. st. 2. u vezi sa stavom 4. ZPI iz 2009).

ZPI iz 2009. nije regulisao svojinu na zajedničkom delu zgrade. Nacrt Zakonika određuje da su zajednički delovi zgrade: delovi koji služe zgradi kao celini ili nekim posebnim delovima zgrade; da se smatraju jednom stvari koja se ne može pretvoriti u isključivu svojinu ili susvojinu etažnih vlasnika, osim ako je to Zakonikom drukčije određeno (v. čl. 256. st. 1. i 2. i član 258. stav 1. Nacrta Zakonika).

2.4. Određivanje zemljišta za redovnu upotrebu objekta u slučajevima pretvaranja prava korišćenja građevinskog zemljišta u pravo svojine, bez naknade

Zemljište za redovnu upotrebu jeste zemljište ispod objekta i zemljište oko objekta u površini koja je određena kao minimalna za formiranje novih parcela za tu zonu, po važećem planskom dokumentu, za taj objekat (član 70. stav 1. ZPI iz 1979).[99] Rešenje o utvrđivanju zemljišta za redovnu upotrebu objekta i formiranju građevinske parcele donosi nadležni organ uprave, po zahtevu vlasnika objekta. Površina zemljišta za redovnu upotrebu utvrđuje se u slučajevima pretvaranja prava korišćenja građevinskog zemljišta u pravo svojine, bez naknade ako vlasnik objekta, odnosno posebnog fizičkog dela objekta, nije upisan kao imalac prava korišćenja na građevinskom zemljištu na kome je objekat izgrađen, već je kao imalac prava korišćenja upisana jedinica lokalne samouprave, autonomna pokrajina, Republika Srbija ili neko pravno lice čiji je osnivač jedinica lokalne samouprave, autonomna pokrajina, Republika Srbija (vidi član 102, a u vezi sa članom 101. st. 1. i 2. ZPI iz 2009).

Ako se u postupku utvrđivanja zemljišta za redovnu upotrebu objekta utvrdi da površina katastarske parcele istovremeno predstavlja i zemljište za redovnu upotrebu objekta u

---

[97] Vidi čl. 11. i 12. Zakona o održavanju stambenih zgrada, „Službeni glasnik RS", br. 44/95, 46/98, 1/2001 – odluka Ustavnog suda Srbije i 101/2005 – dr. zakon.

[98] Simonetti Petar, Pravno jedinstvo nekretnine, *Pravni život,* broj 11/2007, strana 445.

[99] Član 67. ZPI iz 2003 je zemljište za redovnu upotrebu objekta određivao kao zemljište na kojem su izgrađeni objekti i zemljište koje služi redovnoj upotrebi tih objekata. Vidi i: Anđelković Žarko, Zemljište pod zgradom i zemljište za redovnu upotrebu zgrade, *Pravni život*, boj 11/2008, str. 255 – 259; Jovanović Ljiljana, Utvrđivanje prava korišćenja na neizgrađenom građevinskom zemljištu, *Pravni život,* broj 11/2008, str. 244 -246.

skladu sa ZPI iz 2009, vlasnik postojećeg objekta stiče pravo svojine na tom građevinskom zemljištu, bez naknade. Ukoliko se utvrdi da je zemljište za redovnu upotrebu objekta manje od katastarske parcele na kojoj je objekat sagrađen, vlasnik zemljišta može, ako se od preostalog zemljišta ne može formirati posebna građevinska parcela, taj preostali deo zemljišta dati u zakup vlasniku objekta ili otuđiti vlasniku objekta po tržišnoj ceni neposrednom pogodbom (v. član 102. st. 2. i 3, a u vezi sa članom 96. stav 9. tačka 4. ZPI iz 2009). U slučaju da se utvrdi da je zemljište za redovnu upotrebu objekta manje od katastarske parcele na kojoj je objekat sagrađen, a od preostalog zemljišta se može formirati posebna građevinska parcela, vlasnik preostalog dela zemljišta raspolaže tim zemljištem u skladu sa ZPI iz 2009.

Vlasnik objekta, odnosno posebnog dela objekta stiče pravo da se u zemljišnom registru upiše kao vlasnik na građevinskom zemljištu, na osnovu pravnosnažnog rešenja nadležnog organa uprave kojim je utvrđeno zemljište za redovnu upotrebu tog objekta, u navedenim situacijama (vidi član 102. stav 5, a u vezi sa članom 70. st. 4 – 7. ZPI iz 2009).

2.5. Pretvaranje prava dugoročnog zakupa u pravo svojine

Član 101. stav 3. ZPI iz 2009. određuje i pretvaranje prava dugoročnog zakupa građevinskog zemljišta u pravo svojine (susvojine). Prema tim odredbama vlasniku objekta ili vlasnicima posebnih fizičkih delova objekta koji je izgrađen na građevinskom zemljištu za koje je zaključen ugovor o zakupu radi izgradnje na rok od preko 50 godina, utvrđuje se pravo svojine na građevinskom zemljištu, odnosno pravo svojine na građevinskom zemljištu srazmerno površini posebnih fizičkih delova čiji su vlasnici, bez naknade (član 101. stav 3. ZPI iz 2009). Iako ZPI iz 2009. govori o „građevinskom zemljištu za koje je zaključen ugovor o zakupu radi izgradnje na rok preko 50 godina"(član 101. stav 3) sistematskim tumačenjem se može zaključiti da je Zakon imao u vidu ostalo neizgrađeno zemljište u državnoj svojini. U (dugoročni) zakup se moglo davati ostalo neizgrađeno građevinsko zemljišta u državnoj svojini, a postupak, uslove, način, kao i program davanja u zakup tog zemljišta uređivala je opština (član 81. stav 1. i stav 4. ZPI iz 2003).

Ostalo neizgrađeno građevinsko zemljište u privatnoj svojini vlasnici su mogli zakupcima izdavati u zakup vođeni autonomijom volje (vidi član 10. Zakona o obligacionim odnosima[100]. Ukoliko bi se odredbe člana 101. stav 3. ZPI iz 2009. tumačile tako da se odnose i na pretvaranje građevinskog zemljišta u privatnoj svojini na kome su izgrađeni objekti u svojinu vlasnika objekta ili susvojinu vlasnika posebnog dela zgrade, bez naknade, time bi se, u stvari, izvršila nacionalizacija, što je suprotno Ustavu Srbije.[101] Stoga navedene odredbe imaju u vidu ostalo izgrađeno građevinsko zemljište u državnoj svojini.

Ukoliko su pravna ili fizička lica zaključila ugovor o zakupu građevinskog zemljišta u državnoj svojini, u skladu sa odredbama ZPI iz 2003 (vidi član 81. tog zakona), a po završetku izgradnje objekat prodali trećim licima posebne fizičke delove objekta, ostaju obveznici plaćanja zakupnine po važećem ugovoru o zakupu (vidi član 100. stav 4. ZPI iz 2009).

Dugoročni zakup ostalog građevinskog neizgrađenog zemljišta u državnoj svojini, predviđen članom 81. ZPI iz 2003, predstavlja, u stvari, superficijarno pravo kojim se pravno raz-

---

[100] „Službeni list SFRJ", br. 29/78, 39/85, 45/89 i 57/89 i „Službeni list SRJ", broj 31/93.

[101] „Pravo svojine može biti oduzeto ili ograničeno samo u javnom interesu utvrđenom na osnovu zakona, uz naknadu koja ne može biti niža od tržišne" (član 58. stav 2. Ustava Republike Srbije, „Službeni glasnik RS", broj98/2006).

dvaja zemljište i postojeća zgrada na osnovu ugovora o zakupu. Na osnovu ugovora o zakupu graditelj je ovlašćen da izgradi objekat na zemljištu koje je predmet zakupa, da ga održava u ispravnom stanju, koristi ga kao plodouživalac i da plaća zakupninu dok ugovor traje. Superficijarno pravo (usvojeno, na primer, u italijanskom, francuskom, španskom, belgijskom, švajcarskom pravu) razlikuje se od prava građenja (prihvaćeno, na primer, u Austriji, Nemačkoj, Hrvatskoj, Bosni i Hercegovini).[102] U pravu građenja objekat koji je sagrađen ili već postoji smatra se u pravnom smislu kao veštačka nepokretnost, a kod superficijarnog prava objekat nije pripadak prava, nego je odvojen od superficijarnog prava i zemljišta i smatra se kao posebna stvar.[103] Kada je zakupac, na osnovu dugoročnog zakupa (superficijarnog prava) na neizgrađenom građevinskom zemljištu, sagradio objekat, a zatim, trećim licima prodao posebne delove objekta, on, i posle stupanja na snagu ZPI iz 2009. ostaje zakupac sve dok taj ugovor traje.

3. Pretvaranje prava korišćenja u pravo svojine na građevinskom zemljištu uz naknadu

Pravo korišćenja izgrađenog i neizgrađenog građevinskog zemljišta u državnoj odnosno javnoj svojini na kome su imaoci prava korišćenja bila ili jesu privredna društva i druga pravna lica na koja su se primenjivale odredbe zakona kojima se uređuje privatizacija, stečajni i izvršni postupak, kao i njihovi pravni sledbenici, ne pretvara se po sili zakona u pravo svojine tih pravnih lica ili njihovih pravnih sledbenika. Pravni sledbenici privrednih društava i drugih pravnih lica mogu biti i fizička i pravna lica. Pretvaranje ovog prava korišćenja u pravo svojine navedenih lica može se izvršiti samo uz naknadu tržišne vrednosti tog građevinskog zemljišta u momentu pretvaranja prava, umanjenu za troškove pribavljanja prava korišćenja na tom građevinskom zemljištu (vidi član 103. stav 1. ZPI iz 2009).

Pretvaranje prava korišćenja u navedenim slučajevima ostvaruje se samo po zahtevu sadašnjeg imaoca prava korišćenja. Na osnovu zahteva rešenje donosi nadležni organ uprave, na čijoj se teritoriji nalazi predmetno građevinsko zemljište (član 103. st. 2. i 3. ZPI iz 2009).

Promena vlasništva državnog odnosno društvenog kapitala društvenog preduzeća ili drugih pravnih lica vršena je u skladu sa Zakonom o privatizaciji.[104] Predmet privatizacije bila su društvena preduzeća ili druga pravna lica u društvenoj svojini. Na izgrađenom ili neizgrađenom građevinskom zemljištu u državnoj odnosno javnoj svojini kupac kapitala je mogao steći trajno pravo korišćenja (na zemljištu pod objektom i za redovnu upotrebu objekta) ili pravo korišćenja. Kupovinom društvenog preduzeća ili drugog pravnog lica u društvenoj svojini kupac nije sticao pravo svojine na zemljištu na kome se nalaze objekti ili je to zemljište neizgrađeno.

ZPI iz 2009. regulisao je mogućnost pretvaranja prava korišćenja neizgrađenog građevinskog zemljišta u državnoj svojini, koje je stečeno radi gradnje, u skladu sa ranije važećim zakonima kojima je bilo uređeno građevinsko zemljište do 13. maja 2003. godine (dan stupanja na snagu ZPI iz 2003) u pravo svojine. Pretvaranje prava korišćenja u pravo svojine

---

[102] Simonetti Petar, Ustanove pravnog razdvajanja zemljišta i zgrade i pravo služnosti (službenosti) građenja prema Nacrtu Zakonika o svojini i drugim stvarnim pravima Republike Srbije, *Pravni život,* broj 11/2008, str. 129 – 136.

[103] Ristov Angel, Pravo dugotrajnog zakupa građevinskog zemljišta, *Pravni život*, broj 11/2007, str. 573. i 574.

[104] Službeni glasnik RS, br. 38/2001, 18/2003, 45/2005, 123/2007 i 123/2007 – drugi zakon.

vrši se po zahtevu imaoca prava korišćenja i uz naknadu tržišne vrednosti tog zemljišta u momentu konverzije prava, umanjene za iznos stvarnih troškova pribavljanja prava korišćenja, sa obračunatom revalorizacijom do momenta uplate po ovom osnovu (član 104. st. 1. i 2). Ako se u roku od jedne godine od dana stupanja na snagu ZPI iz 2009 (11. 09. 2009) ne pretvori pravo korišćenja u pravo svojine, nadležni organ po službenoj dužnosti utvrđuje prestanak prava korišćenja i utvrđuje pravo svojine u korist lokalne samouprave na čijoj teritoriji se nalazi predmetno zemljište (član 104. stav 4).

Društvena preduzeća, lica čiji je položaj uređen zakonom kojim se uređuje sport, kao i udruženja građana, kao imaoci prava korišćenja na građevinskom zemljištu, ostaju imaoci prava korišćenja, osim ako se na njih mogu primeniti odredbe ZPI iz 2009. koje se odnose na prestanak prava korišćenja ili poništaj rešenja o izuzimanju zemljišta, do okončanja postupka privatizacije. Pretvaranje prava korišćenja u pravo svojine subjekta privatizacije na tom zemljištu moguće je nakon privatizacije i uplate prodajne cene (čl. 105. i 106. ZPI iz 2009).

V. Službenost građenja u nacrtu Zakonika o svojini i drugim stvarnim pravima

Načelo rimskog prava *superficies solo cedit* dosledno je usvojeno u Nacrtu Zakonika: „Stvar trajno spojena sa zemljištem svojina je vlasnika zemljišta, i prenosi se, zalaže, nasleđuje, podleže drugom raspolaganju i zapleni po istim odredbama kao i zemljište, ako nije drukčije određeno ili ugovoreno“ (član 25).

Odstupanje od ovog načela, prema tome, može biti propisano ili ugovoreno. Nacrt predviđa uvođenje novog instituta u pravo Srbije – službenosti građenja (čl. 347 – 357) i na taj način omogućava pravno odvajanje postojeće zgrade i zemljišta na kome se zgrada nalazi.[105]

Pravo službenosti građenja je pravo svagdašnjeg vlasnika nepokretnosti stvari (povlasnog dobra) da, za potrebe tog dobra (stvarna službenost građenja), odnosno pravo lica da za svoje potrebe (stvarno - lična službenost građenja), na tuđoj nepokretnoj stvari (poslužnom dobru) ima u svojinu zgradu ili njen deo, kao i da upotrebljava i koristi delove poslužnog dobra potrebne za vršenje svojine na zgradi odnosno njenom delu (član 347. stav 1. Nacrta). Prema tome, službenost građenja ovlašćuje svog imaoca da na zemljištu izgradi trajnu samostalnu zgradu na kojoj stiče pravo svojine i koja je pravno odvojena od zemljišta do prestanka prava službenosti građenja.[106] Imalac prava službenosti građenja i vlasnik poslužnog dobra ugovorom mogu predvideti obavezu imaoca prava službenosti građenja da vlasniku poslužnog dobra plaća naknadu, ali se ova službenost može steći i bez naknade (v. čl. 349. i 350. Nacrta).

Imalac službenosti građenja može biti ovlašćen da izgradi zgradu na poslužnom dobru i ima je u svojini, ili da ima u svojini zgradu već izgrađenu na poslužnom dobru, nadzida je, dozida, da dovrši njenu izradu, obnovi je, ili poruši i izgradi drugu (član 347. stav 2. Nacrta). Pravo službenosti građenja stiče se na način na koji se stiču i stvarne službenosti – tj. upisom

---

[105] Simonetti Petar, Ustanove pravnog razdvajanja zemljišta i zgrade i pravo služnosti (službenosti) građenja prema Nacrtu Zakonika o svojini i drugim stvarnim pravima Republike Srbije, *Pravni život*, strana 138.

[106] *Ibidem,* strana 139.

u javni registar na osnovu pisanog ugovora, sudske odluke na osnovu testamenta, druge sudske odluke ili odluke drugog nadležnog organa, kao i pisane jednostrane izjave volje vlasnika poslužnog dobra (vidi čl. 356, a u vezi sa članom 324. Nacrta).

Za razliku od osnovnog oblika stvarne službenosti isto lice može biti imalac službenosti građenja i imalac poslužnog dobra (svojinska službenost građenja – član 348).

Objekat prava službenosti građenja je građevinsko zemljište na kome se može izgraditi trajna zgrada i ono zemljište koje služi za vršenje prava svojine na zgradi.

Službenost građenja traje najduže 50 godina, s mogućnošću obnavljanja uz saglasnost vlasnika poslužnog dobra, i u tom roku prenosiva je, založiva i nasleđiva. Istekom ovog roka zgrada postaje svojina vlasnika nepokretnosti. Pravo službenosti građenja prestaje istekom roka od 50 godina, odricanjem i u drugim slučajevima određenim zakonom (uz odgovarajuću primenu odredaba kojima je regulisana stvarna službenost), njenim brisanjem iz registra nepokretnosti (na osnovu odgovarajućih isprava) – v. član 354. Nacrta.

Pravo službenosti građenja, predviđeno u Nacrtu Zakonika, podudara se sa superficijarnim pravom, koje već postoji u jednom broju evropskih pravnih sistema. Oba instituta, naime pravno odvajaju zgradu od zemljišta i ne mogu postojati bez građenja. Suprotno tome, pravo građenja zgradu privlači k sebi i ona je njegov pripadak, kao da je pravo građenja zemljište tako da pravo građenja i zgrada čine neraskidivo pravno jedinstvo.[107]

Zaključci

Zbog ograničene površine gradskog građevinskog zemljišta, još u Rimskom carstvu, rimsko pravo je predvidelo mogućnost građenja na tuđem zemljištu. U početku se građenje na tuđem zemljištu zasnivalo na dugoročnom ugovoru o zakupu. Docnije, u Justinijanovom pravu u ovom ugovoru preovlađuju stvarnopravni elementi i on menja pravnu prirodu. Dugoročni zakup zemljišta mogao je imati za predmet poljoprivredno zemljište (*emfiteuza*) ili građevinske parcele (*superficies*). Rešenja rimskog prava uticala su na evropska zakonodavstva koja su, prihvatajući princip *superficies solo cedit* uglavnom regulisala pravo građenja ili superficijarno pravo.

Sve do stupanja na snagu Zakona o planiranju i izgradnji (11. 09. 2009), u gradovima i naseljima gradskog karaktera, najveće površine gradskog građevinskog zemljišta bile su u državnoj svojini. Ako se na građevinskoj parceli nalazi zgrada u privatnoj svojini vlasnik te zgrade imao je pravo trajnog korišćenja zemljišta koje pokriva zgradu i zemljišta koje služi za redovnu upotrebu te zgrade, sve dok na tom zemljištu postoji zgrada. Prinudne norme o pravnom razdvajanju zgrade od zemljišta u društvenoj (državnoj) svojini, nisu, međutim, važile za zemljište i zgrade u privatnoj svojini. Pozitivni propisi druge Jugoslavije i Srbije priznavali su načelo pravnog jedinstva zemljišta i zgrade u privatnoj svojini.

Zakon o planiranju i izgradnji je pretvorio pravo korišćenja u pravo javne svojine na građevinskom zemljištu, bez naknade u korist Republike Srbije, autonomne pokrajine, odnosno jedinice lokalne samouprave.

Pravo trajnog korišćenja na izgrađenom građevinskom zemljištu fizičkih lica pretvoreno je, bez naknade, u pravo svojine. Vlasnik objekta koji je izgrađen na građevinskom zemljištu za koje je zaključen ugovor o zakupu radi izgradnje na rok od preko 50 godina, stekao je pravo svojine na građevinskom zemljištu bez naknade. Takođe, po sili zakona, pra-

[107] *Ibidem*, str. 145. i 154.

vo trajnog korišćenja građevinskog zemljišta etažnih vlasnika pretvoreno je u pravo susvojine na tom zemljištu, bez naknade. Na taj način je uspostavljeno pravno jedinstvo zemljišta i zgrade.

Pretvaranje prava korišćenja u pravo svojine na građevinskom zemljištu predviđeno je kao mogućnost, za privredna društva i druga pravna lica na koja su se primenjivale odredbe zakona kojima se uređuje privatizacija, stečajni i izvršni postupak, kao i njihovi pravni sledbenici, uz naknadu tržišne vrednosti tog zemljišta.

Pretvaranje prava trajnog korišćenja u pravo svojine i još neke stvarnopravne odnose regulisao je Zakon o planiranju i izgradnji iz 2009. godine iako to nije njegova matična materija zbog toga što nije donesen zakon koji reguliše pravo svojine i druga stvarna prava.

Nacrt Zakona o svojini i drugim stvarnim pravima predviđa uvođenje novog instituta u pravo Srbije – službenosti građenja (čl. 347 – 357) i tako omogućava pravno odvajanje postojeće zgrade i zemljišta na kome se zgrada nalazi. Pravo službenosti građenja podudara se sa superficijarnim pravom, koje već postoji u jednom broju evropskih pravnih sistema.

Dr. *Nada Dollani**
Pravni fakultet Univerziteta u Tirani,
Predavač Građanskog prava

REGULISANJE SVOJINE NAD ZEMLJIŠTEM PREMA ALBANSKOM ZAKONODAVSTVU

I. Pregled svojinskih odnosa

Prema građanskom zakoniku iz 1981. godine[1], pravo svojine je podrazumevalo garanciju prava pojedincu na državinu, uživanje i raspolaganje imovinom u granicama utvrđenim zakonom. Zakon je dozvoljavao dve vrste svojine: socijalističku svojinu i ličnu svojinu. U Narodnoj Republici Albaniji, svojinu nad imovinom imala je država, poljoprivredne zadruge i pojedinci. Socijalističku imovinu činila je državne imovina i zadružna imovina poljoprivrednih zadruga.

Državna imovina priznata je kao najviši oblik socijalističke imovine, i pripadala je celom narodu. Država je bila jedini vlasnik sve državne imovine. Državna imovina obuhvatala je i bilo koju drugu imovinu koja je stvorena u privredi u državnom vlasništvu, ili koju je država stekla u skladu sa zakonom.

Na osnovu odluka nadležnih državnih organa, zemljište je dodeljivano državnim preduzećima i ustanovama, poljoprivrednim zadrugama i društvenim organizacijama na kolektivno korišćenje, kao i građanima za ličnu upotrebu. Zemljište je davano na korišćenje bez naknade.

Zadružna imovina, s druge strane, bila je definisana kao imovina koja pripada grupi seoskih radnika koji su udruženi u zemljoradničke zadruge na dobrovoljnoj osnovi. Objekti, mašine, oprema, sredstva transporta, alati i sredstva za rad, radne i proizvodne životinje, voćnjaci, kao i poljoprivredni usevi bili su u svojini zemljoradničke zadruge, zajedno sa ostalim sredstvima potrebnim za njihov rad.

Lična imovina je, za razliku od državne, bila veoma ograničena i uključivala je prihode od rada i drugih legitimnih izvora, porodične kuće i druge objekte gde se živi, ono što je služilo da zadovolji lične materijalne i kulturne potrebe, i potrebe domaćinstva.

Moderno i sveobuhvatno regulisanje svojine tek je uspostavljeno Građanskim zakonikom iz 1994.[2] Zakonik precizira da svojina podrazumeva garanciju prava pojedinca na slobodno uživanje i posedovanje objekata, u granicama utvrđenim zakonom.[3] Državna imovina više nije izričito propisana, a privatna svojina i državne svojina su izjednačene po značaju. Objekti mogu pripadati fizičkim licima, pravnim licima i državi. Prema Građanskom

---

* Originalni tekst je na lokalnom jeziku.

[1] Usvojen Zakonom br. 6340 od 26. juna 1981.

[2] Usvojeno Zakonom br. 7850 iz 1994.

[3] Član 149. Građanskog zakonika iz 1994.

zakoniku, ovo pravo na svojinu, odnosno pravo vlasništva jednako je regulisano za sve tri vrste titulara. Prema njemu, više ne postoji hijerarhijska lestvica, a državna imovina više ne uživa višu poziciju, kao što su zakoni pre pada komunizma propisivali.

II. Regulisanje svojine nad zemljom prema Građanskom zakoniku
Sticanje svojine kroz spajanje i mešanje objekata

Pravo vlasnika na upotrebu površine, prostora unutar i podzemnih prostorija je zagarantovano Građanskim zakonikom. Član 173. ovog Zakonika precizira da sve što je sagrađeno ispod i na zemljištu pripada vlasniku zemljišta, osim ako drugačije nije određeno zakonom. Ovo predstavlja pravnu pretpostavka u korist vlasnika zemljišta, koji se, prema ovom principu, takođe smatra vlasnikom onoga što je izgrađeno iznad tla i pod zemljom, osim ako je:

a) drugačije određeno odredbama Građanskog zakonika ili drugih zakona, u onim slu čajevima kada ono što je sagrađeno na zemljištu i pod njim pripada ne vlasniku zemljišta, već drugim licima; i,

b) kada druga lica uspeju da dokažu suprotno od pretpostavke, odnosno onda kada uspeju da dokažu da su ona vlasnici onoga što je sagrađeno na zemljištu ili pod njim, a ne vlasnik zemljišta.

Izuzetak utvrđen u zakonu prema kojem vlasnik zemljišta koji nije vlasnik onoga što je podignuto iznad tla i pod njim, pod uslovom da su ispunjeni zakonom predviđeni zahtevi, upravo se odnosi na slučajeve koji uključuju spajanje stvari različitih vlasnika u jednu svojinu. Ovo spajanje objekata različitih vlasnika u jednu svojinu vlasništvo može predstavljati spajanje nepokretnih stvari, spajanje pokretne i nepokretne stvari, kao i mešanja pokretnih stvari. Pod ovim uslovima, sticanje vlasništva putem spajanja i mešanja objekata nastaje na tri načina:

A. Sticanje svojine kroz spajanje i mešanje nepokretnosti sa pokretnim stvarima;

B. Sticanje svojine kroz spajanje i mešanje pokretnosti;

C. Sticanje svojine kroz spajanje i mešanje nepokretnosti.

Odredbe Građanskog zakonika posebno određuju uslove za svaki od ovih načina za sticanje svojine. Ovaj rad će se usredsrediti na sticanje svojine kroz spajanje i mešanje nepokretnih objekata, uglavnom na prava koja se izvode iz objekata koji se nalaze na površini zemljišta.

A. Sticanje svojine kroz spajanje i mešanje nepokretnosti sa pokretnostima

Ovaj način sticanja svojine regulisan je članovima 174 i 175 Građanskog zakonika. Ove odredbe propisuju naredna dva načina sticanja vlasništva kroz spajanje i mešanje nepokretnosti sa pokretnim stvarima:

a) Upotreba tuđih pokretnih stvari od strane vlasnika zemljišta za gradnju na svojoj zemlji regulisana je članom 174. Građanskog zakonika;

b) Upotreba sopstvenih pokretnih stvari od strane vlasnika zemljišta za gradnju na svojoj zemlji regulisana je članom 175. Građanskog zakonika.

a) Kako bi vlasnik koji gradi na sopstvenom zemljištu upotrebljavajući tuđe stvari stekao svojinu nad zgradom, potrebno je uzeti u obzir tri kriterijuma na osnovu kojih se uspostavlja svojina na novim objekata, u skladu sa zakonom:

Prvo: Ako se pokretne stvari mogu razdvojiti sa novonastalog objekta, bez činjenja ozbiljnog oštećenja;

Drugo: Pravo na izbor ostaje vlasniku pokretnih stvari, ukoliko pokretne stvari mogu da se odvoje od novoizgrađenog objekta bez ozbiljnog oštećenja, i

Treće: Ako je vlasnik zemljišta postupao u savesno ili nesavesno. [4]

Tamo gde je pokretne stvari spojene sa zemljom moguće odvojiti od izgrađenog objekta bez ozbiljnog oštećenja, vlasnik pokretne stvari ima pravo da, u skladu sa zakonom, bira između povraćaja pokretnih stvari i isplate njihove vrednosti. Značajnija šteta na objektu u moraju se tumačiti u smislu da se pokretne stvari koje pripadaju drugim vlasnik ne mogu odvojiti od nepokretnosti bez rušenja i uništenja iste. Ovu okolnost sud proverava od slučaja do slučaja tokom pretresa. Otuda, na primer, ako je vlasnik zemljišta uzeo jedan broj balvana iz dvorišta svoga suseda bez dozvole vlasnika, i iskoristio ih za izgradnju krova svoje kuće, u ovom slučaju pokretni objekti (drveni balvani) ne mogu da budu vraćeni njihovom vlasniku, jer bi novonastali objekat bio značajno oštećen. Međutim, ako je vlasnik zemljišta uzeo jedan broj sadnica iz dvorišta svog suseda bez njegove dozvole i zasadio ih na svojoj zemlji, vlasnik sadnica ima pravo da zahteva da mu se sadnice vrate, jer se njihovim vraćanjem ne izaziva nikakva značajna šteta za vlasnika zemljišta.

Onda kada vlasnik pokretnih stvari odabere da pokretne stvari spojene sa nepokretnim objektom koje se ne mogu odvojiti bez značajne štete na novonastalom objektu ostanu u svojini vlasnika zemljišta, ili onda kada pokretne stvari ne mogu biti odvojene od novonastale nepokretne stvari bez značajnijeg oštećenja, vlasnik pokretnih stvari ima pravo da traži od vlasnika zemljišta vrednost njegove pokretne stvari. U slučaju da vlasnik pokretnih stvari izabere da oduzme svoju imovinu (naravno, gde je tako nešto moguće, ukoliko novonastali objekat ne bude značajno oštećen), vlasnik zemljišta je obavezan da te stvari preda njihovom vlasniku, pod uslovom da vlasnikov povraćaj ne dovodi do ozbiljnih oštećenja novonastale nepokretne stvari.

Ova pravila se primenjuju kada je vlasnik zemljišta postupao savesno u stvaranju novih stvari kroz spajanje tuđih pokretnosti sa zemljom koja je u njegovoj svojini. Kada je vlasnik zemljišta postupao nesavesno, on je dužan da vrati pokretne stvari njihovom vlasniku, ako vlasnik pokretnih stvari od nega to zatraži, a tamo gde ovo ne dovodi do ozbiljnih oštećenja novonastalog objekta, i da nadoknadi nastalu štetu, ako se ne dokaže da je svojim postupkom izazvao materijalnu štetu vlasniku pokretnih stvari. Ukoliko se ispostavi da je vraćanje pokretnih objekata od strane vlasnika zemljišta, koje je postupao nesavesno, nije moguće jer bi povraćaj doveo do ozbiljnih oštećenja novonastalog objekta, vlasnik zemljišta je obavezan da plati vlasniku pokretnih stvari vrednost takvih pokretnih stvari, kao i da mu nadoknadi pretrpljenu štetu, ako se dokaže da je njegov postupak izazvao materijalnu štetu vlasniku pokretnih stvari.

---

[4] Član 174. Građanskog zakonika propisuje da „*vlasnik zemljišta, koji je gradio, sadio ili vršio druge poslove upotrebom tuđeg materijala, obavezan je da plati njihovu vrednost, ukoliko odvajanje I vraćanje takvih materijala nije zatraženo, a kada je to moguće uraditi bez ozbiljnog oštećenja na objektima ili sadnicama" ."Kada je odvajanje materijala moguće, a vlasnik zemljišta je postupao savesno, vlasnik zemljišta mora da obešteti vlasnika materijala za načinjenu štetu."*

Prema tome, ako je postupio nesavesno, vlasnik zemljišta je u svakom slučaju dužan ili da vrati pokretnost vlasniku, kada god je to moguće, odnosno kada nema ozbiljnijeg oštećenja novonastalog objekata u slučaju vraćanja, kao i da nadoknadi nastalu štetu, onda kada je njegovo postupanje dovelo do ozbiljne štete vlasniku pokretne stvari, odnosno da plati vrednost pokretnih stvari, onda kada je vraćanje pokretnina nemoguće, kao i da nadoknadi vlasniku pokretne stvari pretrpljenu štetu, ako se dokaže da je spajanjem stvari vlasniku pokretnosti naneta materijalna šteta. Za vlasnika zemljišta će se smatrati da je postupao nesavesno ako je znao, ili je pod svetlom čitavog niza konkretnih okolnosti, morao znati da je gradio koristeći tuđe stvari.

b) Kako bi se svojina stekla za vlasnika pokretnosti koji gradi a tuđoj zemlji, sledeći kriterijumi moraju biti ispunjene u skladu sa zakonom:

Prvi: Vlasnik zemlje ima pravo na izbor.

Drugi: Znanje ili nedostatak znanja vlasnika zemlje o postojanje izgrađene zgrade.

Treći: Istek roka od šest meseci oda dana kada vlasnik zemljišta dobije obaveštenje o objektu.

Četvrti: Savesnost ili nesavesnost trećeg lica koje gradi na tuđoj zemlji.

Peti: Vrednost zgrade i vrednost zemljišta.[5]

Svojina na novim objektima uspostavlja se na osnovu ovih kriterijuma. Prema zakonu, u skladu sa konkretnim slučajevima, istovremeno moraju postojati bilo svi ovi kriterijumi, ili više njih, ili barem jedan od njih. Tamo gde vlasnik pokretnih stari gradi ili sadi biljke tuđem zemljištu, vlasnik zemljišta ima pravo da zadrži novonastale stvari, ili da zahteva da vlasnik pokretnih stvari, koje su izgrađene ili zasađene na tuđem zemljištu, ukloni te stvari o svom trošku, a onda kada se dokaže da je vlasnik pokretnih stvari postupao nesavesno, vlasnik zemljišta ima i pravo da zahteva naknadu štete, ako je u stanju da dokaže da je zgrada na njegovom zemljištu izazvala materijalnu štetu. Ukoliko je on saglasan da nove stvari ostanu u njegovom posedu, vlasnik zemljišta obavezan je da plati vlasniku pokretnih stvari njihovu vrednost, kao i vrednost rada potrebnog za gradnju i druge radove, odnosno vrednost koja je gradnjom dodata na objekat.

U svakom slučaju, vlasnik zemljišta nema pravo da traži uklanjanje objekata i sadnica koji su izgrađeni ili zasađeni na njegovoj zemlji od strane nekog drugog. Treći stav člana 175. Građanskog zakonika predviđa da vlasnik zemljišta ne može da zahteva uklanjanje objekata izgrađenih tuđim materijalom od strane nekog drugog na njegovom zemljištu, ukoliko su istovremeno ispunjeni sledeći uslovi:

---

[5] Član 175. Građanskog zakonika određuje da *„kada je treće lice gradilo, sadilo ili vršilo druge poslove upotrebom svog materijala na tuđoj zemlji, vlasnik zemljišta ima pravo da zadrži pokretnosti, ili da zatraži da druga strana, koja je izvršila radove, da preuzme obavezu da ukloni pokretnosti o svom trošku, a ako je neophodno da izvrši naknadu štete.*

„Onda kada vlasnik pristane da ih zadrži, vlasnik zemljišta je dužan da plati vrednost materijala i radne snage, ili vrednost dodatu na zemljište.

„Vlasnik zemljišta ne može da zahteva uklanjanje objekata i sadnje ako su sagrađeni ili zasađeni uz njegovo znanje, ili savesno od strane trećeg lica, i ako je prošlo šest meseci od dana kada je vlasnik dobio obaveštenje o postojanju takvih objekata i sadnji.

"Ukoliko je objekat podignut savesno na tuđoj zemlji, a njegova vrednost je veća od vrednosti zemljišta, lice koje je podiglo objekat može se priznati za vlasnika zemljišta na osnovu odluke nadležnog suda."

a) kada su takvi objekti izgrađeni sa njegovim znanjem (znanjem vlasnika zemljišta);

b) Kada prođe šest meseci od dana kada je vlasnik zemljišta primio obaveštenje o postojanju objekta;

c) Kada je lice koje je podignulo zgradu postupalo savesno, odnosno nije znalo, ili s obzirom na sve okolnosti, nije moglo da zna da gradi na tuđem zemljištu.

Ukoliko sva tri navedena uslova postoje istovremeno, vlasnik zemljišta je obavezan da zadrži novi objekat u svojoj svojini, i mora da plati vlasniku objekata vrednost utrošenog materijala za izgradnju objekta, kao i vrednost koju je novoizgrađeni objekat dodao na vrednosti njegovog zemljišta. U pogledu prvog uslova datog u tački „**a)**", izraz „kada su takvi objekti izgrađeni sa njegovim znanjem" mora se pravilno tumačiti, i potrebno je istaći kako se ovaj uslov razlikuje od onog navedenog tački „**b)**". U ovom slučaju, bez obzira na činjenicu da je u samoj pravnoj normi upotrebljen pojam „sa znanjem vlasnika". mi smo mišljenja da se ovakva formulacija odnosi na zgradu podignutu uz odobrenje vlasnika, odnosno, uz izričito ili prećutno odobrenje. Pod uslovom da se prvi uslov tumači na taj način, moguće je napraviti razliku između ovog uslova i uslova navedenog u tački „**b)**" koji zahteva da prođe šest meseci od dana kada je vlasnik dobio obaveštenje u vezi sa zgradom podignutom na njegovom zemljištu. U ovom drugom slučaju, vlasnik ne dozvoljava, bilo eksplicitno ili implicitno, da se objekat gradi na njegovoj zemlji, a objekat je ipak izgrađen bez njegovog znanja i vlasnik zemljišta samo dobija obaveštenje da na njegovoj zemlji postoji novoizgrađeni objekat. Nakon šest meseci od prijema obaveštenja o tome da je treće lice podiglo objekat na njegovoj zemlji, vlasnik zemljišta gubi pravo da zahteva uklanjanje takvog objekta.

Postoji potreba da se treći uslov naveden u tački c) razjasni i pravilno shvati, zato što je moguće da u praksi nastanu nesporazumi oko njegove primene. Prema ovom uslovu, potrebno je da je lice koje je podiglo objekat postupalo savesno u trenutku kada je gradilo objekat ili sadilo materijal, odnosno da nije znalo, ili s obzirom na sve okolnosti, nije moglo da zna da je gradilo ili sadilo na tuđem zemljištu. Smatramo da neko lice savesno gradi na tuđem zemljištu samo u slučajevima kada gradi sa dozvolom nadležnih državnih organa, odnosno na osnovu građevinske dozvole koju izdaje nadležni organ. U svim ostalim slučajevima, kada neko gradi sa svojim materijalom na tuđem zemljištu, bez dozvole nadležnog organa, za njega će se smatrati da je postupao nesavesno, jer, bez obzira na činjenicu da on možda nije znao da gradi na tuđem zemljištu, u skladu sa okolnostima morao je znati da gradi na tuđem zemljištu. Prema tome, kada god se je slučaj o zgradi podignutoj od strane trećeg lica na tuđem zemljištu bez dozvole nadležnog organa, za takvo treće lice ne može se smatrati da je postupalo savesno, a samim tim i vlasnik zemljišta ima pravo da zahteva uklanjanje građevine sa svog zemljišta na trošak lica koje je podignulo građevinu, čak iako su prva dva uslova ispunjenja, jer obaveza vlasnika zemljišta da se uzdrži od uklanjanja objekta podignutog na njegovoj zemlji postoji samo sako su sva tri navedena uslova ispunjena istovremeno.

Stav 4 člana 175. Građanskog zakonika propisuje mogućnost da lice koje gradi sa svojim materijalom postane vlasnik kako novonastalog objekta, tako i zemljišta na kojem je objekat izgrađen. Da bi vlasnik pokretnih stvari izgrađenih na tuđem zemljištu mogao da postane vlasnik i tuđe zemlje na kojoj je gradio, potrebno je da se istovremeno budu ispunjeni sledeći uslovi:

a) Kod gradnje objekta, potrebno je da je takvo lice postupalo savesno;

b) Vrednost objekta mora biti veća od vrednosti zemljišta;

c) Takvo lice mora da pokrene parnični postupak pred sudom kako bi postalo vlasnik objekta i zemljišta na kome je objekat podignut.

Prvi uslov koji zahteva da je lice gradnju ili sadnju trebalo da vrši savesno pojašnjen je ranije i samo će se lice koje je dobilo građevinsku dozvolu za gradnju od nadležnog organa smatrati za savesno lice. U svim drugim slučajevima, bez obzira na okolnosti, i bez obzira na činjenicu da je vrednost objekta može biti čak sto puta veća od vrednosti zemljišta, lice koje je podiglo objekat ne može postati vlasnik bilo zgrade, bilo zemljišta. Umesto toga, na zahtev vlasnika zemljišta, dužan je da oslobodi zemljište na kojem je objekat izgrađen o svom trošku, i tako vrati zemljište njegovom vlasniku, bez opterećenja, u stanju u kome je bilo pre izgradnje objekta.

Drugi uslov proveravaju nadležni sudski veštaci, koji, na osnovu podataka tržišta i realne vrednosti zemljišta i objekta, utvrđuju vrednost i jednog i drugog. Treći uslov se odnosi na postupak. Pod ovim uslovom, gde je vrednost objekta veća od vrednosti zemljišta, lice koje je, postupajući savesno, gradilo objekat na zemljištu, mora da podnese tužbu pred sudom, sa zahtevom da ga sud proglasi vlasnikom i zgrade i zemljišta na kojem je zgrada podignuta. Nakon što je razmotri predmet i tačno utvrdi da su oba uslova istovremeno ispunjena, odnosno da je graditelj je postupao savesno i da je vrednost objekta veća od vrednosti zemljišta, sud odlučuje bilo da prihvati ili odbaci tužbu.

Ako utvrdi da su oba ova uslova ispunjena, sud je obavezan da prizna vlasniku pokretne stvari, koja je izgrađena njegovim materijalom na tuđem zemljištu, kako svojinu na zgradi, tako i na tuđem zemljištu na kome je gradio, pod uslovom da vlasnik pokretnosti mora da plati vlasniku zemljišta vrednost zemljišta, iako ovaj poslednji zahtev nije izričito naveden u zakonu. S druge strane, ako sud utvrdi da lice koje je gradilo na tuđem zemljištu ne ispunjava oba uslova: da je postupalo savesno onda kada je gradilo objekat i da vrednost objekta nije veća od vrednosti zemljišta na kojem se objekat počiva, ili ako samo jedan od ovih uslova nije ispunjen, bilo da nije bilo savesnosti graditelja, bilo da vrednost objekta nije viša od vrednosti zemljišta, sud će odlučiti da odbaci tužbu koju je podneo vlasnik pokretnih stvari, koji je gradio na tuđem zemljištu.

III. Zakonodavstvo koje reguliše svojinu na zemljištu tokom perioda tranzicije

S obzirom da u socijalizmu najviši oblik svojine u Albaniji bila državna svojina a privatna svojina skoro nije ni postojala, regulisanje ove druge svojine bilo je hitno potrebno. Odmah nakon pada komunizma 1991. godine, u cilju uspostavljanja novog ekonomskog poretka i obezbeđivanja transformacije iz centralno uređenog privrednog sistema pod kontrolom države u ekonomski sistem zasnovan na principima slobodnog tržišta, pluralistički Parlament Albanije usvojio je Zakon kojim su dozvoljeni i zaštićeni: privatna svojina, slobodna inicijativa, nezavisne privatne aktivnosti, poslovanje, strane investicije, pravo na davanje i uzimanje zajmova, pravo na zapošljavanje radnika na i zasnivanje radnog odnosa, privatizacija državne imovine, čime je regulisan ceo proces transformacije privrede u Republici Albaniji iz planske privrede pod kontrolom države u privredu zasnovanu na slobodnom tržištu. [6]

[6] *Zakon br. 7512 od 10. avgusta l991. „o dozvoljavanju i zaštiti privatne svojine, slobodne inicijative, nezavisnih privatnih aktivnosti i privatizaciji“.*

U tom smislu, usvojen je i Zakon Br. 7652 od 23. decembra 1992, „o privatizaciji objekata u državnom vlasništvu", kojim se takođe reguliše i svojina nad zemljištem na kojoj se zgrade nalaze. Cilj ovog zakona je da se obezbedi privatizacija državnih objekata i uspostavljanje slobodnog tržišta nekretnina u privatnom vlasništvu, i pomogne korišćenje, održavanje i upravljanje nad zgradama, priznavajući pravo stanarima državnih zgrada da postanu njihovi vlasnici. Prema ovom zakonu, vlasnici imaju pravo da otuđe, iznajmljuju i registruju svoje objekte. Zakon je zemljište na kojem se objekti nalaze smatrao za odvojenu stvar, a vlasništvo nad njim je dodeljeno stanarima objekata. Nakon privatizacije, zajednička dvorišta dvorišnih zgrada koja su uvek koristili i održavali stanari tih zgrada data su u suvlasništvo stanarima. Suvlasnički odnosi između suvlasnika su kasnije regulisani Građanskim zakonikom iz 1994, a uspostavljeno je i suvlasništvo nad stanovima i regulisano kao jedan od oblika obavezujućeg suvlasništvu.

Zakon „o privatizaciji objekata u državnoj svojini" precizirao je da će zemljište koje je nekad bilo u privatnoj svojini biti regulisano posebnim zakonom, a kasnije je to regulisano zakonom Br. 7698 od 15. aprila 1993 „o povraćaju imovine i naknadama bivšim vlasnicima".

Još jedan društveni problem, koji je ostao nerešen dugo vremena, odnosi se na povećanje demografskih migracija koje država nije mogla da kontroliše, a samim tim i na nelegalne objekte koji su bili građeni, posebno u neformalnim naseljima, na državnom zemljištu. ili na zemljištu bivših vlasnika. Pitanje legalizacije nelegalnih objekata je regulisano Zakonom Br 9482 od 3. aprila 2006, „o legalizaciji, urbanizaciji i integraciji nelegalnih objekata". Ovaj Zakon dozvolio je legalizaciju objekata podignutih bez dozvole u „formalnim naseljima", „neformalnim naseljima", i „drugim teritorijama", kao i „dograđivanje takvih objekata bez naknadne dozvole za objekte za koje je izdata građevinska dozvola". Ovo je takođe omogućilo prenos svojine na građevinskim parcelama na kojima su izgrađeni nelegalni objekti, zatim urbanizaciju neformalnih naselja, parcela, i objekata, kao i njihovu integraciju u sistem teritorijalnog i infrastrukturnog razvoja države, sa ciljem poboljšanja uslova života, kao i procedura za legalizaciju neformalnih naselja/objekata i uspostavljanje i funkcionisanje struktura odgovornih za realizaciju ovih procesa.

Imovina legalizovana po ovom zakonu upisuje se u registre nepokretnosti u skladu sa Zakonom Br. 7843 od 13. jula 1994, „o registraciji nepokretnosti". Nakon registracije legalizacije dozvole za građevinsku parcelu, koja se u registru nepokretnosti upisuje na ime privatnih lica, ova lica pravo na novčanu nadoknadu u naturi, ili u novcu. U slučajevima kada je zemljište u državnom vlasništvu, prenos vlasništva na građevinskoj parceli ili zemljištu sa države na pojedinca koji se prijavio za taj postupak je regulisano odredbama Građanskog zakonika.

Na osnovu Zakona „o legalizaciji, urbanizaciji i integraciji nelegalnih objekata", usvojen je Zakon br. 10 186 od 5. novembra 2009. „o regulisanju svojine nad državnim zemljištem u područjima sa prioritetom za razvoj turizma". Cilj ovog zakona je da reguliše svojinske odnose na zemljištu i objektima izgrađenim u područjima koja uživaju prioritet kao područja sa prioritetom za razvoj turizma, koja su određena za stimulisane aktivnosti. Ovaj Zakon se primenjuje na prenos prava svojine na izgrađenim objektima i zemljištu koji se nalaze u stimulisanim područjima na zainteresovana lica ili stimulisana lica.

Zakon „o regulisanju svojine nad državnim zemljištem u područjima sa prioritetom za razvoj turizma" propisuje sve modalitete za zaključenje prodajnih ugovora između države i privatnih subjekata, koji su gradili ili uživaju stvarna prava na državnom zemljištu, a propisuje i sve prethodne postupke i postupke za registraciju nepokretne imovine kupljene od strane privatnih subjekata kod Kancelarije za registraciju nepokretnosti.

Kao zaključak, možemo reći da je uložen trud da se obezbedi da albanski propisi regulišu sve situacije u kojima su vlasnik objekta i vlasnik zemljišta dve različite osobe, pri čemu se daje prioritet vlasniku zgrade u slučajevima gde je Država bila vlasnik zemljišta. Dakle, postoji pravno jedinstvo između zgrade i zemljišta, čime se izbeglo preklapanje kod novoizgrađenih objekata kroz spajanje i mešanje stvari.

Bibliografija:

Andrea Natanaili, *Predavanja o stvarnom pravu (Lectures on Property Law*), Tirana 1975.

Avni Shehu, *Svojina* (*Ownership),* Tirana 2000. *Albin* Publishing House.

Ardian Nuni i Luan Hazneziri, (Predavanja o svojini i naslednom pravu) *Lectures on Ownership and Inheritance*, Tirana 2008.

Građanski zakonik Narodne Republike Albanije iz 1981.

Građanski zakonik Republike Albanije iz 1994.

Zakon br. 7512 od 10. avgusta l991. „o dozvoljavanju i zaštiti privatne svojine, slobodne inicijative, nezavisnih privatnih aktivnosti i privatizaciji".

Zakon br. 7652 od 23. decembra 1992. „o privatizaciji objekata u državnom vlasništvu."

Zakon br. 7698 od 15. aprila 1993. „o povraćaju imovine i naknadi bivšim vlasnicima."

Zakon br. 9482 od 3. aprila 2006. „o legalizaciji, ubranizaciji i integraciji nelegalnih objekata".

Zakon br. 10 186 od 5. novembra 2009. „o regulaciji svojine na državnom zemljištu u područjima s prioritetom za razvoj turizma"

*Borislav P. Rašović**,
advokat, Podgorica

PRAVNI REŽIM IZGRAĐENOG GRAĐEVINSKOG ZEMLJIŠTA U CRNOJ GORI

Danom stupanja na snagu Zakona o uređenju prostora i izgradnji objekata[1] prestao je da važi Zakon o građevinskom zemljištu[2], osim poglavlja V – naknada za korišćenje građevinskog zemljišta koje se primjenjivalo do 1. januara 2009. godine.

Zakon o uređenju prostora i izgradnji objekata sadrži samo opšti pojam građevinskog zemljišta definisan u značenju izraza u članu 9 st 1 alineja 12 kao zemljište koje je određeno planskim dokumentom za građenje objekata .

Zakon o uređenju prostora i izgradnji objekata konkretizuje ovu normu preko propisanih pravila o planskim dokumentima i izgradnji objekata.

Ovaj zakon ne sadrži pojam izgrađenog i neizgrađenog građevinskog zemljišta, ali iz ovako definisanog značenja građevinskog zemljišta i drugih normi u zakonu, možemo izvesti zaključak, da je izgrađeno građevinsko zemljište ono, na kome je izgrađen objekat prema uslovima iz planskog dokumenta, dok bi neizgrađeno građevinsko zemljište bilo ono, čija je namjena određena u planskom dokumentu za izgradnju objekata. „Zakon o građevinskom zemljištu SRH izričito je propisivao da se neizgrađenim građevinskim zemljištem smatra i ono zemljište na kome je izgrađen sporedni objekt koji ne služi za redovnu upotrebu postojeće stambene ili poslovne zgrade i za čiju izgradnju nije potrebna građevinska dozvola".[3]

Po ovom zakonskom rješenju režim građevinskog zemljišta uslovljen je namjenom površina u planskom dokumentu sa planiranom svrhom uređenja prostora isključivo radi građenja objekata.

1. Izgradnja objekata na području detaljnog urbanističkog plana

Detaljni urbanistički plan, kao i sve druge vrste planskih dokumenata – državnih i lokalnih, imaju karakter javnog dokumenta i izgradnja objekata zasniva se na načelo zaštite javnog interesa.

Detaljnim urbanističkim planom određuju se uslovi za izgradnju objekata na način koji obezbjeđuje sprovođenje tog plana. Ovaj plan sadrži i plan parcelacije. Organ uprave nadležan za poslove katastra dužan je da plan parcelacije utvrđen planskim dokumentom prenese na katastarske parcele . Na osnovu plana parcelacije ili uslova i smjernica koje se utvrđuju u

---

* Originalni tekst je na lokalnom jeziku.

[1] Sl.list Crne Gore, br. 51/2008.

[2] Sl.list Crne Gore, br. 55/2000.

[3] Petar Simonetti, Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, Zbornik radova, Mostar 2006, str. 21.

planskom dokumentu formira se urbanistička parcela , kao dio prostora , a koja obuhvata jednu ili više katastarskih (vlasničkih) parcela ili njihovih djelova i koji zadovoljava uslove izgradnje propisane planskim dokumentom. Zato je u Zakonu o uređenju prostora i izgradnji objekata propisana kao dužnost vlasnika katastarske parcele da trpi promjene granica urbanističke parcele, prema planu parcelacije.

Dakle, kada se u planu parcelacije, urbanistička parcela „preklapa" sa katastarskom parcelom, a građevinsko zemljište nije izgrađeno, onda je isti subjekat prava svojine katastarske i urbanističke parcele. Kada se urbanistička parcela formira kao dio prostora više katastarskih parcela ili njihovih djelova više vlasnika, nastaje susvojina na urbanističkoj parceli. U ovom slučaju građenju objekta na urbanističkoj parceli može se pristupiti, kao prethodnom uslovu, uz zajedničku saglasnost svih vlasnika, jer je dokaz o pravu svojine, odnosno drugom pravu na građevinskom zemljištu, jedan od uslova za izdavanje građevinske dozvole.

Drugi slučaj je kada jedan od vlasnika „ dokupi" vlasnički dio urbanističke parcele radi kompletiranja. Urbanistička parcela kada obuhvata više katastarskih parcela u privatnoj i državnoj svojini, formira se dokompletiranjem urbanističke parcele prema planu parcelacije i to prenosom prava. Kada je u pitanju državna svojina po Zakonu o državnoj imovini,[4] prodaja se može vršiti i neposrednom pogodbom.

Izgradnja objekata u zahvatu detaljnog urbanističkog plana može se obavljati samo u skladu sa zakonom i drugim propisima, tehničkim normativima i normama kvaliteta.

Izgrađeni objekat podliježe ocjeni podobnosti za upotrebu koja se utvrđuje tehničkim pregledom.

Objekat je podoban za upotrebu prema čl. 121 st 2 Zakona o uređenju prostora i izgradnji objekata:

1. ako je izgrađen u skladu sa građevinskom dozvolom i revidovanim glavnim projektom;
2. ako je obezbijeđen dokaz o kvalitetu izvedenih radova , odnosno ugrađenog materijala, instalacija i opreme, izdat od strane ovlašćene organizacije,
3. ako su radovi izvedeni u skladu sa propisima , standardima, tehničkim normativima i normama kvaliteta koje važe za pojedine vrste radova, odnosno materijala, opreme i instalacija.

Izgradnja objekta mimo navedenih uslova na prostoru detaljnog urbanističkog plana ne dovodi do originarnog sticanja prava svojine na objektu za graditelja , niti u katastar nepokretnosti tako izgrađeni objekat može biti upisan (deklarativno dejstvo upisa ovdje bi izostalo). To pravilo sadržano je i u Zakonu o svojinsko-pravnim odnosima, koji u čl. 46 propisuje da vlasnik zemljišta građenjem stiče pravo svojine na objektu koji je izgradio u skladu sa zakonom.

2. Građevinski objekat izgrađen bez odobrenja za građenje – pravni status objekta i građevinskog zemljišta

U situaciji kada vlasnik građevinskog zemljišta ili neko drugo lice – investitor, izgradi objekat bez odobrenja nadležnog organa, tretira se kao privremeni objekat i ne može biti predmet svojine koji se upisuje u javnu knjigu. Privremeni objekat je samo prividno nepokretna stvar, jer njegova privremenost ukazuje se i kroz odredbu člana 167 Zakona o

[4] Sl.list Crne Gore , br. 55/2000.

uređenju prostora i izgradnji objekata da će se ukloniti ako se ne uklopi u planski dokument.

Odredbe od člana 41 do člana 44 Zakona o svojinsko-pravnim odnosima, o građenju na tuđem zemljištu, ne mogu se primjeniti na slučaj izgradnje objekta bez odobrenja na građevinskom zemljištu.

Za sticanje prava svojine građenjem objekta na svom ili tuđem građevinskom zemljištu uslov je odobrenje nadležnog organa. Građevinsku dozvolu po članu 91 stav 1 Zakona o uređenju prostora i izgradnji objekata, za objekat koji se gradi po državnom planskom dokumentu izdaje organ uprave, a po stavu 2 istog člana za objekat koji se gradi po lokalnom planskom dokumentu izdaje organ lokalne uprave.

Građevinsko zemljište na kome je izgrađen objekat bez odobrenja ostaje u režimu neizgrađenog građevinskog zemljišta, jer se građenje objekta može započeti na osnovu upravnog akta – građevinske dozvole.

Upravna mjera i radnja koju građevinski inspektor po čl. 153 stav 1 tačka 3 Zakona o uređenju prostora i izgradnji objekata je i naredba o rušenju, odnosno uklanjanju objekta i vraćanje zemljišta u prvobitno stanje.

3. Zajednička nedjeljiva svojina na urbanističkoj parceli

Izgradnja objekta na urbanističkoj parceli u skladu sa zakonom uslovljava ne samo sticanje prava svojine na objektu za graditelja kao vlasnika zemljišta, nego je taj uslov relevantan i za vlasnike posebnih djelova u stambenoj zgradi za sticanje zajedničke nedjeljive svojine na urbanističkoj parceli. Prema čl. 171 Zakona o svojinsko-pravnim odnosima propisano je da na urbanističkoj parceli, na kojoj je stambena zgrada izgrađena, vlasnici posebnih djelova imaju zajedničku nedjeljivu svojinu.

Član 53 st 2 tačka 3 Zakona o državnom premjeru i katastru nepokretnosti[5] propisuje da list nepokretnosti kao osnovni dokument o nepokretnostima i pravima na njima sadrži i podatke o objektima i posebnim djelovima objekata i imaocima prava na njima (V list)

Dakle, vlasnik posebnog dijela u izgrađenoj stambenoj zgradi , ex lege, stiče, sa ostalim vlasnicima posebnih djelova zajedničku nedjeljivu svojinu na izgrađenom građevinskom zemljištu u okviru urbanističke parcele. Ovo je slučaj uspostavljanja režima zajedničke nedjeljive svojine za sve vlasnike posebnih djelova u stambenoj zgradi, umjesto režima prava isključive svojine, susvojine ili zajedničke svojine koji je postojao na neizgrađenoj urbanističkoj parceli i u toku izgradnje stambene zgrade. Izgradnjom stambene zgrade prema uslovima iz planskog dokumenta i u skladu sa zakonom, prevodi se režim neizgrađenog građevinskog zemljišta u izgrađeno i uspostavlja režim zajedničke nedjeljive svojine na urbanističkoj parceli svih vlasnika posebnih djelova.

4. Zajednička nedjeljiva svojina na urbanističkoj parceli za slučaj propasti stambene zgrade

Zakon o svojinsko-pravnim odnosima u članu 172. st. 3 uredio je režim zajedničke nedjeljive svojine na urbanističkoj parceli za slučaj potpune propasti stmbene zgrade. U slučaju rušenja stambene zgrade, prema ovom zakonskom rješenju, svakom vlasniku posebnog dijela stambene zgrade pripada udio, na zemljištu na kojem je zgrada izgrađena, srazmjerno vrijednosti njegovog posebnog dijela prema ukupnoj vrijednosti cijele zgrade, ako vlasnici posebnih djelova ugovorom nijesu drukčije odredili.

---

[5] Sl.list Crne Gore , br. 29/2007.

Zakonodavac je u ovom slučaju uspostavio zavisnost udjela na sada već neizgrađenom građevinskom zemljištu zbog rušenja zgrade, prema srazmjeri vrijednosti svakog posebnog dijela u odnosu na ukupnu vrijednost cijele zgrade. Zakon dozvoljava mogućnost da ovo pravilo vlasnici posebnih djelova na drugačiji način međusobno urede ugovorom.

5. Pristup izgrađenom građevinskom zemljištu – urbanistička i katastarska parcela

Donošenje planskog dokumenta ima za cilj njegovu realizaciju izgradnjom građevinskog zemljišta. U praksi se često kategorije urbanističke i katastarske parcele poistovjećuju, tako što se za ocjenu izgrađenosti građevinskog zemljišta uzima izgrađenost katastarske parcele. Takav pristup je pravno pogrešan.

Katastarska parcela je kategorija katastarskog plana. U članu 31 stav 1 Zakona o državnom premjeru i katastru nepokretnosti, katastarska parcela je određena kao dio zemljišta u katastarskoj opštini definisana granicama i označena brojem, čiji je imalac prava, odnosno korisnik jedno ili više lica.

Katastarska parcela je vlasnička jednog ili više lica.

Urbanistička parcela je kategorija urbanističkog plana i po članu 58 stav 1 Zakona o uređenju prostora i izgradnji objekata njene karakteristike su:

a) da je dio prostora,
b) da se formira na osnovu plana parcelacije ili uslova iz smjernica koje se utvrđuju planskim dokumentom,
c) da obuhvata jednu ili više katastarskih parcela ili njihovih djelova,
e) da zadovoljava uslove izgradnje propisane planskim dokumentom.

Izgradnja građevinskog zemljišta uvijek se vrši izgradnjom urbanističke parcele, njenim privođenjem namjeni koji je utvrđen u planskom aktu.

U članu 60 Zakona o uređenju prostora i izgradnji objekata određeno je da je lokacija mjesto na kome se izvode radovi kojima se prostor privodi namjeni u skladu sa planskim dokumentom, te da lokacija može biti jedna ili više urbanističkih parcela ili dio jedne urbanističke parcele.

Ovo razlikovanje je naročito važno za pravilnu primjenu pravila o deeksproprijaciji iz člana 39 stav 2 i 3 Zakona o eksproprijaciji.[6]

Prema tom pravilu, na zahtjev ranijeg vlasnika eksproprisane nepokretnosti, pravosnažno rješenje o eksproprijaciji poništiće se ili izmijeniti, ako korisnik eksproprijacije u roku od tri godine, ali ne po isteku 6 godina od pravosnažnosti rješenja o eksproprijaciji nije izvršio najmanje trećinu vrijednosti od ukupne vrijednosti predviđenih radova. Predviđeni radovi se utvrđuju u planskom dokumentu za svaki dio prostora koji zadovoljava uslove izgradnje i to isključivo na urbanističkoj parceli. Trećina vrijednosti izvedenih radova u odnosu na ukupnu vrijednost predviđenih radova je činjenično pitanje koje se utvrđuje vještačenjem kao dokaznim sredstvom i to u zavisnosti da li je lokacija jedna, više ili dio jedne urbanističke parcele.

Pitanje izgrađenosti katastarske parcele može biti od značaja van granica područja planskog akta. U zahvatu urbanističkog plana katastarska parcela nije lokacija, ne privodi se

[6] Sl list Crne Gore, br. 55/2000, 28/2006, 21/2008.

namjeni i u ocjeni izgrađenosti građevinskog zemljišta pogrešan je pravni pristup utvrđivati izgrađenost katastarske parcele.

6. Prava stranih lica, stranih država i organizacija na građevinskom zemljištu

Zakon o svojinsko-pravnim odnosima u glavi XII propisuje posebna pravila o primjeni odredbi zakona na strana lica, strane države i organizacije.

„U Zakonu o svojinsko-pravnim odnosima propisana je mogućnost sticanja prava svojine stranih lica na isti način kao i domaćih državljana osim ako zakonom (ovim ili nekim drugim) ili međunarodnim ugovorom (primat međunarodnog prava) nije drukčije određeno."[7]

Donošenjem ovog zakona, ograničenja za sticanje prava svojine za strana lica, koja su bila po Zakonu o osnovama svojinsko-pravnih odnosa su izmijenjena. Po sadašnjim rješenjima iz Zakona o svojinsko-pravnim odnosima strano fizičko lice može na teritoriji Crne Gore sticati pravo svojine na nepokretnostima nasleđivanjem kao i državljanin Crne Gore. Zakon propisuje ograničenja za strana lica u pogledu sticanja prava svojine na dobrima u opštoj upotrebi i prirodnim bogatstvima.

Zakon o državnoj imovini i Zakon o svojinsko-pravnim odnosima definišu građevinsko zemljište dobrom od opšteg interesa. „Nijedna generacija nema ovlaštenja lišiti potonju generaciju prava na to zajedničko dobro".[8]

U Crnoj Gori strano lice može sticati pravo svojine na građevinskom zemljištu bez ograničenja.

Strane države za potrebe njihovih diplomatskih i konzularnih predstavništava, kao i organizacije i specijalizovane agencije Organizacije UN, uz prethodnu saglasnost Ministarstva inostranih poslova, mogu sticati pravnim poslom – prodajom pravo svojine na građevinskom zemljištu u svrhu izgradnje zgrada, stanova za službene potrebe.

Za razliku od sticanja stranih lica, zakonodavac u ovom slučaju traži da se ostvare određeni uslovi:

a) da je kupac strana država, odnosno organizacija i specijalizovana agencija Organizacije UN,
b) da je namjena građevinskog zemljišta u planskom dokumentu za izgradnju zgrada za potrebe diplomatskih konzularnih predstavništava stranih država, kao i organizacija i specijalizovanih agencija UN i stanova za službene potrebe,
c) da je obezbijeđena prethodna saglasnost Ministarstva inostranih poslova.

7. Pretvaranje prava korišćenja u pravo svojine

Zakon o nacionalizaciji najamnih zgrada i građevinskog zemljišta[9] i drugi propisi uspostavili su režim društvene svojine na građevinskom zemljištu u užim građevinskim rejonima gradova i naseljima gradskog karaktera i dotadašnji vlasnik ex lege postao je korisnik.

Ovaj relikt društvene svojine ne može da istrpi provjeru bilo kakve zakonske opravdanosti, osim što je za čitav period stvorio enormnu ekonomsku i pravnu moć opštinama, napušten je donošenjem Zakona o svojinsko-pravnim odnosima.

---

[7] Zoran P. Rašović, Stvarno pravo, st. 132, izdavač Pravni fakultet Podgorica, 2010. g.

[8] Petar Simonetti, isto.

[9] Sl. list FNRJ, br. 55/1958, stupio na snagu 28.12.1958. g.

„Iz odredaba Zakona o nacionalizaciji proizilazilo je da je svrha nacionalizacije građevinskog zemljišta bila spriječiti individualno prisvajanje gradske rente; gradsku rentu usmjeriti u fondove komunalne zajednice; omogućiti plansku i jeftiniju stambenu izgradnju i pružiti mogućnost komunalnoj zajednici da ona upravlja građevinskim zemljištem, u tom okviru pripremati zemljište za plansku izgradnju odgovarajuće komunalne infrastrukture, te po zakonom utvrđenim kriterijima vršiti dodjelu građevinskog zemljišta radi izgradnje stambenih i poslovnih zgrada fizičkih i pravnih osoba."[10]

Prema rješenju iz člana 419 st. 1 Zakona o svojinsko-pravnim odnosima, pravo upravljanja, korišćenja, odnosno trajnog korišćenja i raspolaganja na zemljištu u društvenoj sada državnoj svojini, postaje stupanjem na snagu ovog zakona, pravo svojine dotadašnjeg imaoca prava upravljanja, korišćenja, odnosno trajnog korišćenja, ako posebnim zakonom nije drukčije određeno ili zainteresovano lice dokaže da je prije stupanja na snagu ovog zakona steklo pravo svojine na određenom zemljištu. Ova prava iz društvene svojine pretvaraju se u pravo svojine po sili zakona, tako da se uspostavlja režim svojine u korist dosadašnjeg imaoca ovih prava.

„Odredbe ovog člana najčešće će se primjeniti kod građe- vinskog zemljišta"[11]

Zakon o državnoj imovini propisuje u članu 64 st. 1 da se pravo korišćenja, odnosno trajnog korišćenja na zemljištu u državnoj svojini koje je u okviru generalnog urbanističkog plana, detaljnog urbanističkog plana, urbanističkog projekta i lokalne studije lokacije upisano na Crnu Goru, opštinu, javnu službu čije je osnivač Crna Gora, odnosno opština, danom stupanja na snagu ovog zakona postaje državna svojina Crne Gore, odnosno imovina opštine, odnosno javne službe, čime se ne dira u prava fizičkih lica i privrednih društava u procesu pretvaranja prava iz društvene svojine u smislu Zakona o svojinsko-pravnim odnosima.

Ovim zakonskim rješenjem izvršeno je pretvaranje prava korišćenja upisano na Crnu Goru, opštinu, javnu službu, čiji je osnivač Crna Gora, u pravo državne svojine Crne Gore.

Uspostavljanje prava svojine na građevinskom zemljištu u državnoj svojini u korist imaoca trajnog prava korišćenja je mogućnost i iz Zakona o povraćaju oduzetih imovinskih prava i obeštećenju.[12] Prema rješenju iz ovog zakona, pravo prevođenja trajnog prava korišćenja u pravo svojine može zahtijevati vlasnik objekta, izgrađenog na građevinskom zemljištu u državnoj svojini u skladu sa zakonom i važećim urbanističkim planom.

8. Uslovi i postupak vraćanja bivšim vlasnicima neizgrađenog i izgrađenog građevinskog zemljišta po Zakonu o povraćaju oduzetih imovinskih prava i obeštećenju

Vraćanje neizgrađenog i izgrađenog građevinskog zemljišta oduzetog u korist opštenarodne, državne, društvene i zadružne svojine bivšim vlasnicima uređeno je Zakonom o povraćaju oduzetih imovinskih prava i obeštećenju.

Neizgrađeno građevinsko zemljište, po pravilu iz člana 17 st. 1 i 2 ovog zakona, koje je prešlo u društvenu, odnosno državnu svojinu vraća se bivšem vlasniku, ako ovim zakonom nije drukčije određeno. Podržavljenja neizgrađena građevinska zemljišta koja su jedinici

---

[10] Petar Simonetti, Denacionalizacija, Pravni fakultet u Rijeci, st. 96., 2004. g.

[11] Zoran P. Rašović, Komentar Zakona o svojinsko-pravnim odnosima, st. 2153., Pravni fakultet Podgorica, 2009. g.

[12] Sl. list Crne Gore, br. 21/2004, 49/2007.

lokalne samouprave ili nekom drugom, u skladu sa zakonom, predati radi privođenja namjeni u skladu sa planskim aktom, vraćaju se bivšem vlasniku, na način i po postupku predviđenim Zakonom o eksproprijaciji, osim ako u vrijeme podnošenja zahtjeva za povraćaj vrijednost izvedenih radova prelazi najmanje trećinu vrijednosti od ukupne vrijednosti predviđenih radova.

Član 2 st. 1 alineja 6 Zakona o povraćaju oduzetih imovinskih prava i obeštećenju definiše značenje neizgrađenog građevinskog zemljišta kao urbanističku parcelu koja nije privedena trajnoj namjeni predviđenoj urbanističkim planom.

Izgrađeno građevinsko zemljište u čl. 2 st. 1 alineja 7 Zakona o povraćaju oduzetih imovinskih prava i obeštećenju definiše se kao urbanističke parcele ili djelovi tih parcela na kojima su izgrađeni objekti u skladu sa planom. Prema članu 18 st. 1 tog zakona podržavljeno izgrađeno zemljište neće biti predmet povraćaja, osim u slučaju kada je na njemu postojao objekat koji se vraća bivšem vlasniku u skladu sa ovim zakonom. Podržavljeno izgrađeno građevinsko zemljište prema čl. 18 st. 2 tog zakona, na kojem se nalazi objekat koji je postojao u vrijeme kada je zemljište oduzeto, ali je od tada značajno dobilo na vrijednosti usljed ulaganja u objekat, predmet je povraćaja samo ako bivši vlasnik plati iznos za koji je vrijednost imovine porasla usljed ulaganja i ukoliko taj objekat nije u svojini fizičkih ili pravnih lica, čiji osnivač nije država.

Zakon o izmjenama i dopunama Zakona o eksproprijaciji[13] uvodi kategoriju pravične naknade umjesto kategorije naknade iz Zakona o eksproprijaciji iz 1947. godine. Ustav Republike Crne Gore iz 1992.[14] godine propisuje kategoriju tržišne naknade za lišenje prava svojine, a Ustav Crne Gore iz 2007.[15] godine pravičnu naknadu. Prema članu 7 st. 1 Zakona o povraćaju oduzetih imovinskih prava i obeštećenju pravo na povraćaj ili obeštećenje za oduzeta imovinska prava bivši vlasnik ima, ako mu je određena naknada u novcu ili drugim stvarima ili pravima do stupanja na snagu Zakona o izmjenama i dopunama Zakona o eksproprijaciji (Sl. list SFRJ, br. 5/68).

Prema ovom zakonskom rješenju bivši vlasnik kome je određena naknada za oduzeta imovinska prava, ne pravična i tržišna, ima pravo na povraćaj ili obeštećenje.

Bivši vlasnik koji je svojinu prenio pravnim poslom ili jednostranim aktom, po čl. 7 st. 4 ovog zakona, nema pravo na povraćaj i obeštećenje.

Prema čl. 12. st. 1 tačka 10 Zakona o povraćaju oduzetih imovinskih prava i obeštećenju, nije u predmetu povraćaja imovinsko pravo i stvar na kojem je fizičko ili pravno lice steklo pravo svojine u skladu sa zakonom.

Pitanje vraćanja oduzetih imovinskih prava može da izazove povredu prava svojine sadašnjeg titulara i savjesnost sticanja. Ovom odredbom se takva mogućnost isključuje, ako je novi vlasnik pravo stekao u skladu sa zakonom.

9. Korisnici eksproprijacije

Članom 52 Zakona o uređenju prostora i izgradnji objekata određeno je da se donošenjem planskog dokumenta utvrđuje javni interes za eksproprijaciju nepokretnosti za izgradnju planiranih objekata i uređenje prostora.

---

[13] Sl. list SFRJ, br. 5/1968

[14] Sl. list RCG, br. 48/1992

[15] Sl. list Crne Gore, br. 1/2007

Član 1 Zakona o eksproprijaciji definiše eksproprijaciju kao lišenje ili ograničenje prava svojine na nepokretnosti kada to zahtijeva javni interes uz pravičnu naknadu.

Član 7 Zakona o eksproprijaciji određuje da korisnik eksproprijacije može biti država, opština, državni fondovi i javna preduzeća, ako zakonom nije drukčije određeno.

Ovim zakonskim određenjem država nije stvorila pravne pretpostavke za ostvarenje javnog interesa – realizaciju planskog dokumenta. Potrebno je proširiti krug lica koja mogu biti korisnici eksproprijacije u kompletiranju urbanističke parcele od više katastarskih parcela različitih vlasnika. Dešava se u praksi, da urbanistička parcela ostaje neizgrađeno građevinsko zemljište zbog odsustva sporazuma o zajedničkoj izgradnji ili odsustva nastanka pravnog posla o prenosu prava na katastarskoj parceli ili njenom dijelu na sticaoca - suvlasnika urbanističke parcele.

Predlozi za reformu zakonodavstva

1. Vratiti Zakon o građevinskom zemljištu u pravni poredak Crne Gore.
2. Izmijeniti i dopuniti Zakon o eksproprijaciji proširenjem korisnika eksproprijacije.

Dr. sc. *Petar Simonetti**,
redovni profesor građanskog prava u trajnom zvanju,
Rijeka, Republika Hrvatska

USPOSTAVLJANJE PRAVA VLASNIŠTVA NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU U DRUŠTVENOM/ DRŽAVNOM VLASNIŠTVU U REPUBLICI HRVATSKOJ I BOSNI I HERCEGOVINI

Gospodarenje građevinskim zemljištem u vlasništvu javnopravnih osoba

Uvod

U pravnom sustavu društvenog vlasništva FNRJ/SFRJ trajne zgrade su pravno odvojene od zemljišta trajnim pravom korištenja. Ovo načelo nema iznimke upravo kao što nije imalo iznimke ni suprotno načelo rimskog prava *superficies solo cedit*[1].

U Republici Hrvatskoj i Bosni i Hercegovini nakon raspada društvenog vlasništva trajno pravo korištenja pretvara se u pravo vlasništva (suvlasništva) vlasnika (suvlasnika) zgrade, odnosno vlasnika posebnih dijelova zgrade uspostavljanjem pravnog jedinstva zemljišta i zgrade[2] i uspostavlja pravno jedinstvo zemljišta i zgrada.

Nakon uspostavljanja prava vlasništva na građevinskom zemljištu koje je bilo u društvenom vlasništvu jedinice lokalne samouprave, čije su pravne prednice (općine) upravljale i raspolagale cjelokupnim građevinskim zemljištem, zadržale su u svome vlasništvu samo one površine koje pripadaju zgradama u njihovom vlasništvu i male površine neizgrađenog građevinskog zemljišta, koje redovno otuđuju, najčešće radi proračunske (budžetske) potrošnje gubeći tako posljednje izvore stalno rastuće gradske rente koja bi se morala usmjeravati u fondove komunalne infrastrukture pomoću ustanova prava građenja, koncesije, zakupa i služnosti.

---

* Originalni tekst je na lokalnom jeziku.

[1] Šire u: Prava na nekretninama (1945. -2007.),Simonetti, P., izd. Pravnog fakulteta Sveučilišta u Rijeci, 2008., Knj. 1., dio 2., §3., str.46.-56. gdje je izloženo načelo pravnog jedinstva nekretnine.

[2] Šire o tomu u knjizi: Simonetti, P., Prava na građevinskom zemljištu (1945-2007), izd. Pravnog fakulteta Sveučilišta u Rijeci, 2008., str. 259.-282. i 417.-464.

§1 Pretvorba trajnog prava korištenja u pravo vlasništva vlasnika zgrade u Republici Hrvatskoj

1. Načelo pravnog jedinstva nekretnine

Na ovom mjestu šire se raspravlja o pravnom jedinstvu nekretnine, zemljišta sa svim njegovim priraštajima, posebno zemljišta i zgrade, koje se tradicionalno izražava načelom *superficies solo cedit*. Na drugom mjestu se izlaže načelo pravnog dualiteta nekretnina[3], načelu bez iznimke, u sustavu društvenog vlasništva na zemljištu i zgradi ili samo na zemljištu (na zemljištu u društvenom vlasništvu bile su i zgrade u privatnom vlasništvu). Ovo zbog toga što primjena ovih načela pod različitim činjeničnim pretpostavkama ima dalekosežne pravne posljedice koje se odražavaju na stjecanje prava vlasništva i drugih stvarnih prava uspostavom prava vlasništva na zemljištu koje je bilo u društvenom vlasništvu i pravnog jedinstva nekretnine.

1. Pojam načela superficies solo cedit

Pravno jedinstvo nekretnine, osobito pravno jedinstvo zemljišta i zgrade, tradicionalno se izražava načelom rimskog prava *superficies solo cedit*. Zbog toga ovo izlaganje počinje s pojmom načela *superficies solo cedit*.

Superficies doslovno je površina, odnosno u ovom slučaju površina zemljišta (talijanski *la superfice*, francuski *le superficie*).[4] Sintagma *superficies solo cedit* znači: sve što se s površinom zemljišta trajno spoji pripada zemljištu, odnosno vlasniku zemljišta, tj. postaje sastavni dio zemljišta: biljke, drveće, zgrade i druge građevine, kao i sve druge ljudske naprave. Sve tjelesne pokretne stvari koje se trajno inkorporiraju u površinu ili ispod površine zemljišta postaju integralni dio zemljišta, gubeći svoju pravnu autonomiju, jer je zemljište kako po rimskom pravu, tako i u suvremenim građansko-pravnim poretcima, bez iznimke, glavna stvar, a sve druge stvari, bez obzira na njihovu vrijednost u odnosu na zemljište, kada se spoje sa zemljištem postaju - sporedne: integralni dio zemljišta (*accessorium*).

Naprijed je rečeno da je pravilo *superficies solo cedit* specifičan izraz načela *accessorium cedit principale*. Tko je vlasnik zemljišta, vlasnik je i biljaka i drveća, svega što na njemu raste, zgrada i drugih građevina koje su podignute na površini ili ispod površine zemljišta do one dubine dokle se, u konkretnom pravnom poretku, na određenom zemljištu, s obzirom na njegovu namjenu, prostire pravo vlasništva vlasnika zemljišta.

Pravilo *superficies solo cedit* izražava načelo po kome trajna zgrada dijeli pravnu sudbinu zemljišta. Kada se zemljište otuđi, naslijedi ili optereti, otuđuje se, nasljeđuje se i opterećuje i zgrada. Zemljište i zgrada su jedna stvar, jedna nekretnina. Ne može biti jedna osoba vlasnik zemljišta, a druga vlasnik zgrade. Vlasnik zemljišta je vlasnik zgrade i onda kada je

---

[3] Simonetti, P., Prava na nekretninama (1945.-2007.), Pravni fakultet Sveučilišta u Rijeci, 2009., str.89.-95. O trajnom pravu korištenja koje je razdvajalo zgradu od zemljišta u društvenom vlasništvu: Simonetti, P., Prava na građevinskom zemljištu (1945.-2007.), Pravni fakultet Sveučilišta u Rijeci, 2008., str.259.-282. i 303.-328.

[4] Superficies - površina ili na površini od latinskog super-gore, nad, na + facies - vanjski oblik, površina. (A. Romac: Rječnik rimskog prava, Informator, Zagreb, 1975., str. 549.) Forcellini, Totius latinitatis lexikon 1871, t.5., str. 756., cit. prema D. Knežić-Popović, Počeci razvoja superficiesa, Godišnjak PF Univerziteta, Sarajevo, XXIX., 1981., str. 242.

na njegovom zemljištu zgradu izgradila druga osoba bilo sa svojim ili tuđim građevinskim materijalom. Tako je građenje na tuđem zemljištu pretpostavka za originarni način stjecanja prava vlasništva na zgradu *ex iure accessionis*.

2. Superficies solo cedit u rimskom pravu

U rimskom pravu sve što se posije, zasadi i izgradi na površini zemljišta integralni je dio zemljišta. Vlasnik zemljišta stječe pravo vlasništva na svim pokretnim stvarima kada se inkorporiraju u zemljište. *Superficies est omne id, quod supra soli facien est; ut arbores, plante, praeprimis aedificia, que quis in alieno solo aedificavit, consentiente domino*[5] ili kako kaže Gaius: *Ex diverso si quis in alieno sua materia aedificaverit, illius fit aedificium, quius et solum est* (D. 41, 1, 7, 12).

Pravilo *superficies solo cedit* izražava bit rimskog prava vlasništva na zemljištu, njegove neograničenosti, koje se proteže od pakla do zvijezda (*usque ad inferos et usque ad sidera*). Pravo vlasništva na zemljištu, dakle prostorno je neograničeno u dubinu i u visinu. Ono se proteže na sve stvari koje se nerazlučivo spoje sa zemljištem: *cuius est solum eius est usque ad coelum et ad inferos*. Zemljište je *ex iure* glavna stvar, a po načelu *accessorium cedit principale*, sve stvari što se sa zemljištem nerazlučivo spoje gube svoju pravnu autonomiju. Kogentna pravna norma isključuje horizontalnu diobu nekretnine: zemljišta i zgrade kao i same zgrade po katovima. Zato bi ugovor o takvoj diobi bio pravno ništav, odnosno ne bi proizvodio one stvarnopravne učinke koje su htjele ugovorne strane.

Prostorno neograničeno pravo vlasništva na zemljištu u dubinu i u visinu je, dakle zaštićeno imperativnom normom. Prema shvaćanju rimskih pravnika pravilo *superficies solo cedit* izražava harmonično jedinstvo civilnog i prirodnog prava: *„... proprietas et civili et naturali iure eius est cuius... solum"* (D. 43, 18, 2)[6]*; plantae quae terra colescunt solo cedunt*[7] ili kako kaže Ulpianus: „*naturale ius, quid superficies ad dominium soli pertinent"*, odnosno „*semper enim superficies solo cedere"* (D. 43, 17, 3, 7). Ovu misao Paulus izražava riječima: „*sic et in tradendo si quis dixerit se solum sine superficie tradere, nihil proficit, quo minus et superficies transeat quae natura solo cohaerat*" (D. 44, 7, 44, 1). U jednoj konstituciji Severa i Caracallae od 213. godine kaže se: „*...id quod in solo tuo aedificatum est quoad in eadem causa manet, iure ad te pertinet...*" (C. 3, 32, 2, 1).

3. Superficies solo cedit u suvremenom pravu

Prostorna neograničenost prava vlasništva na zemljištu u dubinu i visinu bila je, razumije se, samo juristička načelo pravne neograničenosti prava vlasništva u ono vrijeme kada je zbog vrlo ograničenih tehničkih mogućnosti, korištenje zemljišta bilo svedeno na tanak sloj ispod i iznad njegove površine.[8] Na pragu modernog doba kada se uslijed tehničkih dostignuća šire granice mogućnosti korištenja zemljišta pobjeđuje shvaćanje da je pravo vlasništva na

---

[5] Voet, *ad Pandectas*, lib XLIII, tit. 18.

[6] Integralni tekst D. 43, 18, 2 (*Gaius libro vincesimo quinto ed edictum provinciale*) glasi: *Superficiarias aedes appellamus, quae in conducto solo positae sunt: quarum proprietas et civili et naturali iure eius est, quius et solum.*

[7] *Gaius*, D. 41.1.9. pr.

[8] Biondi, Instituzioni di diritto romano, 4. izd., Milano, 1972., str. 231.; Arangio Ruiz, V. Instituzioni di diritto romano, Jovene, Napoli, 1934., str. 249.-252.

zemljištu prostorno ograničeno. Ovo shvaćanje imalo je svoj odraz i u kanonskom pravu [9] prije suvremenih građanskih kodifikacija.

Danas kada se tehnološke mogućnosti korištenja zemljišta i nadzemnog prostora proteže „od pakla do zvijezda", doslovno do bližih dijelova svemira, pravo vlasništva je toliko zakonom ograničeno u općem (javnom) interesu da se njegov objekt svodi na vrlo tanak sloj ispod i iznad površine zemljišta. Pravo vlasništva ne ovlašćuje vlasnika da koristi zemljište isključivo po svome nahođenju. Naprotiv, čitav niz ograničenja, osobito u urbanom području, prisiljava vlasnika da i onaj mali volumen zemljišta koji je ostao u njegovom vlasničkom domenu koristi dijelom u općem interesu.[10], [11] Tehničke mogućnosti korištenja zračnog stupa neposredno iznad zemljišta, kao i podzemlja, upravo su u obrnutom razmjeru s volumenom prava vlasništva na zemljištu. Danas kada postoje tako velike mogućnosti i potrebe za korištenjem utrobe zemlje i nadzemnog prostora, u interesu uže i šire zajednice i postupno svih ljudskih zajednica, čitavog čovječanstva i za pobornike svetog i neprikosnovenog prava vlasništva koncipiranog u prvim građanskim kodifikacijama na početku 19. stoljeća [12], apsurdna je romanska predodžba o neograničenom pravu vlasništva na zemljištu u dubinu i u visinu.

Sve veća ograničenja prava vlasništva na zemljištu sve do izvlaštenja i same površine zemljišta u općem interesu, nisu uvjetovana samo tehnološkim dostignućima i tehničkim mogućnostima eksploatacije zemljišta, nego u prvom redu promjenama u društvenim odnosima koje su primarno uvjetovane upravo tim dostignućima[13] te koncentracijom velikog broja stanovnika i veoma raznovrsnih ljudskih djelatnosti na uskim prostorima velikih gradova.

---

[9] Prema tadašnjem shvaćanju posvećena zemlja na grobljima prostirala se do uobičajene dubine groba, otprilike do četiri stope ispod površine. Priča se da je povodom smrti slavnog komediografa Molièra nastao problem njegova pogreba u posvećenoj zemlji. Intervenirao je Luis XIV koji je postavio pitanje pariškom nadbiskupu: Dokle se prostire posvećena zemlja, pa kad mu je ovaj odgovorio: „Četiri stope u dubinu". Kralj je rekao: „Dobro, sahranite ga dublje od četiri stope". Tako Molière počiva i danas u pariškom groblju Saint-Joseph (Bulgacov, Vita del Signor di Molière, trad. a cura di Piersigilli, Milano, 1969., str. 238.-239., citirano prema Tenella Sillani, op. cit., str. 1.).

[10] I. Cacciavillani, Urbanistica e regime della proprietà, CEDAM, Padova, 1987.; S. Amorosino, Beni ambientali e culturali e territoriali, CEDAM, Padova, 1995., str. 45.-97.; A. Trabucchi, Instituzioni di diritto civile, CEDAM, Padova, 37a ed., 1997., str. 421.-424.; P. Zatti, V. Colussi, Lineamneti di diritto privato, 4. ed., CEDAM, Padova, 1993., str. 220.-222. (proprietà edilizia); F. Galgano, Diritto privato, 9. ed., CEDAM, Padova, 1996., str. 127.; P. Bon, P. Carrias, Expropriation (Dictionnaire juridique), Dalloz, Paris, 1993., (Index alfabetique, Urbanisme); L. Barassi, La proprietà nel nuovo Codice civile, Giuffrè, Milano, 1941., str. 169.-389.; F. Messineo, Manuale di diritto civile e commerciale, vol. 2., Giuffrè, Milano, 1965., str. 343.-349.; R. Đurović, Uticaj zakonodavstva o građenju i urbanizmu na pravo svojine na nepokretnostima, Anali PF u Beogradu, god. XIII., br. 1-2, 1965.; B. T. Blagojević, Eksproprijacija, pravo na stan i stambena izgradnja, Anali PF u Beogradu, god. IX., oktobar-decembar, 1961.

[11] Ovo ograničenje proizlazi iz bitka suvremenog prava vlasništva, njegovih unutarnjih ograničenja. Ustav Republike Hrvatske propisuje: „Vlasništvo obvezuje. Nositelji vlasničkoga prava i njegovi korisnici dužni su pridonositi općem dobru" (čl. 48. st. 2.). Načelo „vlasništvo obvezuje" prvi je usvojio Ustav Njemačke weimarske Republike, 1919., koji je propisivao: „Vlasništvo obvezuje. Njegova uporaba treba istovremeno služiti općoj koristi.". Slično propisuje Ustav SR Njemačke (1949.g.): „Zajamčeni su vlasništvo i nasljedno pravo. Sadržaj i granice vlasništva određuju se putem zakona. Vlasništvo obvezuje. Njegova uporaba treba istovremeno služiti općem dobru." (čl.14.).

[12] Art. 544. Code civil (1804.); §354. ABGB-a (1811.) – Das Allgemeinen bürgirliche Gesetzbuch.

[13] D. Stojanović, Pozitivnopravna ograničenja prava svojine, Institut za uporedno pravo, Beograd, 1963., str. 11.-70.;isti: Privatna svojina i koncept socijalne pravde, Pravni život, god. XLIX., br. 5–6, 2000., N. Gavella, Sadržaj i granice vlasnikove pravne vlasti, Odabrane teme iz stvarnog prava, Pravni fakultet, Zagreb, 1992.; Ch. Tenella Sillani, I limiti verticali della proprietà fondiaria, Giuffrè, Milano, 1994., str. 93.-380.; F. Messineo, op. cit., str. 327.-330.; A. Trabucchi, op. cit., str. 421.-423.; P. Zatti, V. Colussi, op. cit., str. 205.-222.

Današnji koncept prava vlasništva nije, međutim u sukobu s načelom *superficies solo cedit*, naprotiv ono je izraženo u svim građanskim zakonicima koji su uspoređeni u ovoj raspravi.[14]

Pravilo *superficies solo cedit,* s manjim iznimkama u slučaju građenja na tuđem zemljištu, postojalo je i u građanskim zakonicima koji su se supsidijarno primjenjivali kao pravna pravila u bivšoj FNRJ/SFRJ na temelju čl. 4. Zakona o nevažnosti pravnih propisa.[15],[16]

Ali kako suvremena građanska prava poznaju stvarno pravo koje pravno odvaja zemljište i zgradu, načelo *superficies solo cedit* nije više kogentno pravilo, kao u rimskom pravu, već oboriva predmnjeva – dispozitivna pravna norma.

Prema talijanskom pravu, npr. presumira se pravo (su)vlasništva na zemljištu i zajedničkim dijelovima zgrade, ali se dopušta pravno odvajanje zemljišta i zgrade pravnim poslom pa tako (su)vlasništvo sa zemljišta ne mora se protezati na zgradu.[17] Talijansko superficijarno pravo, naime razdvaja zemljište i zgradu, a za razliku od austrijskog prava građenja (*Baurecht*) i njemačkog nasljednog prava građenja (*Erbbaurecht*) ne preuzima ulogu zemljišta, pa je zgrada samostalna nekretnina, objekt superficijarnog vlasništva (proprietà superficiaria). Zbog toga je moguće pravnim poslom odrediti da jedna osoba bude vlasnik zgrade, druga zemljišta, a treća posebnog dijela zgrade koji se odvaja od zgrade na temelju specifičnog superficijarnog prava proizlazećeg iz ustanove etažnog vlasništva *(condominio negli edifici*, art. 1117.-1139. Codice civile).[18]

Prema jugoslavenskom pravu, odnosno prema hrvatskom (SRH) i bosanskom (SR BiH) pravu u etažnoj zgradi svi su posebni dijelovi bili pravno odvojeni od cjeline (čl. 1. Zakona o vlasništvu na posebnim dijelovima zgrade[19]), a zgrada u etažnom vlasništvu (po pravilu obiteljska) i od zemljišta u privatnom vlasništvu (čl. 6. st. 2.), jer se pravo suvlasništva na zemljištu koje pripada vlasnicima posebnih dijelova zgrade ne proteže na zgradu, već su zajednički dijelovi zgrade objekt zajedničkog vlasništva vlasnika posebnih dijelova. Pravo suvlasništva na zemljištu odvaja zgradu od zemljišta, a posebne dijelove zgrade od zgrade

---

[14] Austrijski Algemeines Bürgerlches Gezezbuch (§§ 294.–297.), Code civil française (čl. 552.-553.); španjolski Codigo civil (čl. 358.-374.), Code civil suisse (čl. 552.-553.); talijanski Codice civile (čl. 812. i 934.), njemački Bürgerlische Gesetzbuch (§§ 94. i 905.), grčki Građanski zakonik (čl. 1001.); Novi nizozemski građanski zakonik (čl. 100.) iz 1992.; Građanski zakonik Quebèca (Kanada) iz 1998. (Code civil de Quebèc).

[15] §§ 297. i 418. OGZ-a, §§ 189. i 278. Srbijanskog GZ i čl. 35. i 1017. crnogorskog OIZ-a, Zakon o nevažnosti pravnih propisa donesenih prije 6. aprila 1941. i za vrijeme neprijateljeske okupacije – pročišćeni tekst – Sl. list FNRJ 86/46.

[16] Simonetti, P., Građenje na tuđem zemljištu, Svjetlost, Sarajevo, 1982., str. 69. – 140.

[17] S. Merz, Manuale pratico del condominio, CEDAM, Padova, 1996., str. 107.-108. Vidjeti sudsku praksu u knjizi: P. Alvigini, Le regole del condominio, CEDAM, Padova, 1995., str. 17.-21.

[18] L. Salis, Proprietà superficaria, CEDAM, Padova, 1936.; isti: La superficie, UTET, Torino, 1958., str. 27.; G. Pugliese, Della superficie, in Commentario del Codice civile, Knj. 3., 4 ed., Zanichelli, Bologna, - Soc. ed. del Foro ital., Roma, 1976., str. 420.; M. Zaccagnini, L'enfiteusi - La superficie - Gli oneri reali - Gli usi civici, Piacenza, 1970., str. 200.-207.; G. Balbi, Il diritto di superficie, Giappiccheli, Torino, 1947.; F. Messineo, op. cit., str. 79.-84.; Barca, A.-Marvasi, C. La superficie, Giuffrè, Milano, 2004., str. 277. i dalje. Vidi prikaz različitih shvaćanja o pravnoj prirodi etažnog vlasništva, odnosno prava koje razdvaja posebne dijelove zgrade u talijanskom pravu, Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu, ZPFR, god. 15., 1994., str. 30. - 35.

[19] Sl. list FNRJ 16/59. i 48/59., proč. tekst, Sl. list SFRJ 43/65. i 57/65.; primjenjivao se u SRH i RH sve do 1.siječnja 1997.(čl.394.st.1.al.3. i 396. Zakona o vlasništvu i drugim stvarnim pravima, NN 91/96, 73/00, 114/01, 79/06, 141/06, 38/09.)

kao cjeline odvaja zajedničko vlasništvo na zajedničke dijelove zgrade *(infra)*. Tako i po Zakonu o svojini na dijelovima zgrada SR BiH (čl.4.st.2. i čl.6.st.2.)[20].U tom sustavu na zgradi u etažnom vlasništvu kao cjelini nitko nema pravo vlasništva[21].

Nasuprot tomu, po austrijskom i njemačkom pravu, kao i po hrvatskom pravu (od 1. siječnja 1997.), pravo suvlasništva sa zemljišta se proteže na zgradu i stoga na sve zajedničke dijelove zgrade pa i na tavan i na krov, što znači da po zakonu pravo nadogradnje pripada nepodijeljeno svim vlasnicima posebnih djelova - suvlasnicima nekretnine koja se sastoji od zemljišta i zgrade; nikome pojedinačno. Oni mogu osnovati isključivo pravo nadogradnje u korist bilo kojeg suvlasnika ili treće osobe samo suglasnim očitovanjem volje u propisanom obliku. Po talijanskom pravu, naprotiv pravo nadogradnje, po zakonu, pripada isključivo vlasniku najvišeg kata (čl. 1127. CC).[22]

Prema ZSP RS pravo vlasništva na posebni dio zgrade, kao i po njemačkom, austrijskom i hrvatskom pravu, proizlazi iz prava suvlasništva na nekretninu koju sačinjava zemljište i zgrada ili pravo građenja i zgrada s kojim je neodvojivo povezano (čl.81., 82., 84., 85. i 87.).

3.1. Pravne pretpostavke za superficies solo cedit

Naprijed je rečeno da sve pokretne stvari koje se trajno spoje sa zemljištem postaju integralni dio zemljišta jer je zemljište po zakonu glavna stvar. Nakon što su izgubile svoju autonomiju zbog uspostave trajne veze sa zemljištem, pokretne stvari ne mogu biti samostalni objekt građanskog prava. U trenutku spajanja ugasilo se pravo vlasništva na pokretnim stvarima kao i druga stvarna prava, a istovremeno se na njih proteglo pravo vlasništva i druga stvarna prava sa zemljišta, jer su pokretne stvari od spajanja priraštaj zemljišta, odnosno po njemačkoj terminologiji, bitni sastavni dio zemljišta. Vlasnik zemljišta je, dakle ujedno, vlasnik svih pokretnih stvari koje su trajno spojene sa zemljištem. Kada se zemljište otuđuje, opterećuje ili nasljeđuje - otuđuju se, opterećuju ili nasljeđuju sve pokretne stvari koje su trajno spojene sa zemljištem, a kada se stječe pravo vlasništva ili neko drugo stvarno pravo na zemljištu po bilo kojoj pravnoj osnovi, stječe se i pravo vlasništva, odnosno drugo stvarno pravo na pokretnim stvarima koje su trajno spojene sa zemljištem. Sve se to odnosi i na pokretne stvari koje su ugrađene u trajne zgrade koje su sastavni dio zemljišta, npr. uređaji za grijanje ili hlađenje prostora, vodovodne i odvodne naprave, kablovi za TV prijemnike i odašiljače itd.

U njemačkom pravu se naglašava čvrsta veza uporedno s trajnom vezom (§§ 94. i 95. st. 1. BGB), ali kada se ova pravila sustavno interpretiraju, dolazi se do zaključka da je i po tom pravu samo trajna veza konstitutivni element pravnog jedinstva zemljišta i zgrade, a da je čvrsta veza, zapravo, samo zakonska predmnjeva postojanja trajne veze, ali se ta predmnjeva može oboriti, dokazom da je zgrada privremena.[23] Osim toga čvrsta veza zgrade, građevine i druge naprave sa zemljištem, makar i privremena, konstitutivan je elemenat svojstva stvari. Takva

---

[20] Sl.list SR BiH 35/77.

[21] Ovo izričito kaže radni nacrt Zakona o svojini i drugim stvarnim pravima (čl. 252. st. 1.) Republike Srbije, jun 2006., koji slijedi ovu koncepciju. Čl. 252. st. 1. glasi: „Na zgradi u etažnoj svojini kao celini niko nema pravo svojine". O koncepcijama (pravnoj prirodi) etažnog vlasništva, Planojević, N., Etažna svojina, Kragujevac 1997., str. 153.-173.

[22] A. Nicoletti, Le inovazioni e la sopraelevazione nel condominio, 2 ed., CEDAM, Padova, 1996., str. 113.-146.; Messineo, op. cit., str. 549.

[23] Vidi: Staudinger, Kommentar zum BGB, Bd. 1, 11 Aufl., Berlin und München, 1957., str. 452.-458.

stvar je nepokretna jer se ne može premjestiti bez razaranja njene strukture ili je to moguće uz nerazmjerne troškove, iako kao privremena, po zakonu nije pripadnost zemljišta.

Po talijanskom pravu, naprotiv sve privremene zgrade su nekretnine *(anche se unite al suolo a scopo transitorio*) neovisno od toga jesu li čvrsto vezane za zemljište (art. 912/1. Codice civile).

3.2. Trajna veza kao pretpostavka pravnog jedinstva zemljišta i pokretnih stvari, trajnih zgrada i drugih građevina

Pokretne stvari koje se trajno spoje sa zemljištem integralni su dio zemljišta. Ovo spajanje u pretežnom dijelu je posljedica ljudskog djelovanja, ali to ne mora biti. Do spajanja pokretnih stvari sa zemljištem dolazi i djelovanjem prirodnih sila. Na ovom mjestu se razmatra, međutim samo umjetno spajanje pokretnih stvari sa zemljištem, ono spajanje koje je uzrokovano smišljenim (svrhovitim) ljudskim djelovanjem, ljudskim radom. Pravni monolit nastaje trajnim spajanjem pokretnih stvari sa zemljištem.

3.3. Privremena zgrada i druga građevina

Pokretne stvari koje su kratkotrajno spojene sa zemljištem ili nekretninom, nisu sastavni dio zemljišta, odnosno nekretnine. Čak ni privremena zgrada nije sastavni dio zemljišta. Takve zgrade i naprave nisu sastavni dio zemljišta i kad su čvrsto ukopane u zemljište i stoga se ne mogu premještati bez razaranja njihove strukture[24]. Prema tomu, treba razlikovati trajnu vezu kao zakonsku pretpostavku pravnog jedinstva zemljišta i zgrade i svih drugih stvari koje su trajno spojene sa zemljištem ili ugrađene u trajnu zgradu, odnosno drugu trajnu građevinu koja zajedno sa zemljištem sačinjava jedinstvenu nekretninu, od čvrste veze pokretnih stvari koje su privremeno spojene sa zemljištem kao zgrade i druge građevine i zbog toga pravno odvojene od zemljišta.

3.4. Čvrsta veza zemljišta i privremenih zgrada i drugih građevina

Zgrade ili druge građevine koje su tako čvrsto povezane sa zemljištem da se ne mogu premjestiti bez oštećenja njihovih bitnih struktura su nepokretne stvari, ali nisu sastavni dio zemljišta ako nisu trajno ili razmjerno trajno povezane sa zemljištem. Istina, čvrsta veza se po pravilu poklapa s trajnom vezom zgrade ili druge građevine spojene sa zemljištem, ali to ne mora biti. Danas se grade i trajne zgrade ili druge građevine od metalnih, armirano betonskih, drvenih ili drugih montažnih elemenata koji se relativno lako mogu rastaviti i ponovno sklopiti na drugom mjestu, dakle premjestiti bez oštećenja njihove strukture. S druge strane, ponekad se grade čvrste zgrade i druge građevine za kratkotrajnu svrhu, npr. sportski objekti za olimpijske ili druge međunarodne sportske igre, paviljoni za međunarodne ili nacionalne gospodarske izložbe. Prema tomu, trajna je veza bitna pretpostavka pravnog jedinstva nekretnine, a čvrsta veza može samo ukazivati da je zgrada ili druga građevina trajna, ali se u pojedinim slučajevima može dokazati suprotno ili je to očigledno s obzirom na kratkotrajnu namjenu zgrade ili druge građevine.

3.5. Pravni učinci premještanja trajnih zgrada i drugih građevina

Suvremene tehnologije omogućavaju premještanje i čvrste trajne zgrade, a da se time ne promjeni njena građevinska i arhitektonska struktura, pa i kulturno – povijesna i umjetnička

---

[24] Čl.14.st.1. ZSP RS. ZV propisuje: „No, nisu dijelovi zemljišta one zgrade i drugo što je s njim spojeno samo radi neke prolazne namjene" (čl. 9. st. 3.).

vrijednost (primjerice, premještanje zgrada te čitavih kompleksa zgrada i spomenika koje imaju kulturno povijesnu vrijednost, da ne budu potopljene vodenim akumulacijama). Tako su sačuvani npr. čuveni hramovi Abu Simbel prilikom izgradnje Asuanske brane na Nilu u Egiptu[25] ili most na ušću Žepe u Drinu (BiH), Pivski manastir kod Plužina u Crnoj Gori. Ali će ista zgrada, odnosno građevina kao sastavni dio zemljišta, zemljišne čestice pravno izmijeniti svoj identitet ako postane sastavni dio katastarske ili građevinske čestice odnosno zemljišnoknjižnog tijela, koje je upisano u drugom zemljišnoknjižnom ulošku pa i čestice nastale geometrijskim cijepanjem i spajanjem s drugom česticom, koja predstavlja drugo zemljišnoknjižno tijelo, iako je u građevinskom, arhitektonskom, kulturno-povijesnom, estetskom i drugom pogledu sačuvala svoju samobitnost. Samo pod pretpostavkom da nije oblikovana građevinska čestica prema postojećoj zgradi pa se zgrada može fizički premjestiti na drugi dio iste katastarske čestice ili na drugu katastarsku česticu istog zemljišnoknjižnog tijela, ne mijenja se njen pravni identitet. Ona je u tom slučaju i dalje sastavni dio iste katastarske čestice, odnosno istog zemljišnoknjižnog tijela, ista nekretnina. Pravni identitet nekretnine u cjelini se ne mijenja ni u slučaju razaranja i ponovne izgradnje zgrade na istoj katastarskoj ili građevinskoj čestici, odnosno istom zemljišnoknjižnom tijelu. Identitet zgrade pravno odvojene od zemljišta se mijenja samo ako nova zgrada nema one samostalne dijelove (stanove ili druge samostalne prostorije) koje je imala srušena zgrada ili ako nova zgrada pored ranijih samostalnih dijelova ima i nove dijelove. Pravno odvajanje zemljišta i zgrade moguće je: pravom građenja, pravom služnosti i na zakonu osnovanom koncesijom. [26]

4. Ratio načela superficies solo cedit

Načelo *superficies solo cedit* proizlazi iz činjenice što je zemljište glavna stvar, ali ono ne daje odgovor na pitanje zašto je zemljište bez iznimke glavna stvar bez obzira na odnos vrijednosti zemljišta i zgrade ili druge građevine koja je po pravilu višestruko vrijednija od zemljišta. I najveće i najvrijednije zgrade i druge građevine na svijetu kao i najznačajniji kulturno-povijesni spomenici sastavni su dio zemljišta, njegova pripadnost *(accessorium)*. Pored društvenog i gospodarskog značaja zemljišta *(supra)* ističu se još dva razloga: prvi je pravna sigurnost u pravnom prometu, a drugi povlašteni položaj vlasnika zemljišta.

4.1. Pravna sigurnost

Zašto je, dakle zemljište glavna stvar u odnosu na sve pokretne stvari koje se s njime trajno spoje pa i u odnosu na trajnu zgradu na površini ili ispod površine, bez obzira na odnos vrijednosti. Čini se da je najtočniji odgovor na ovo pitanje: pravna sigurnost, a pravna sigurnost bitna je pretpostavka pravnog prometa u koji su u tržišnom gospodarstvu, danas više nego ikada, u velikim razmjerima uvučena i zemljišta (čestice Zemljine površine) sa svim svojim pripadnostima.

a) Trajnost zemljišta

Zemljište je djelo prirode, a sve naprave na njegovoj površini ili ispod nje - ljudske su tvorevine podložne propadanju. Zemlja, dakle ostaje, a ljudske tvorevine se podižu i ruše ili uklanjaju bilo zbog geomehaničkih ili drugih promjena (klizišta i slijeganja zemljišta) iza-

---

[25] Gööck, R., Sva čuda svijeta, Marjan tisak (prijevod O. Šolc), Split, 2005., str. 170.-174.

[26] Čl.7.st.4. (koncesija); čl.14.st.3. i čl. 286.-302. ZSP RS (pravo građenja). Čl. 280.-296. ZV-a (pravo građenja); čl. 196. ZV-a (o pravu imati dio zgrade i naprave na tuđem zemljištu); čl. 3. st. 4. i čl. 9. st. 4. ZV-a (koncesija koja odvaja zgradu i drugu građevinu od zemljišta ili općeg dobra).

zvanih prirodnom kauzalnošću tijekom vremena ili zbog djelovanja čovjeka, zbog ratnih razaranja ili zbog urbanističkih i drugih razloga radi uređenja urbanog prostora, a zemljište je prema tim promjenama ravnodušno. Zato ostaje identitet zemljišta i kada se zgrada izgradi i kada se sruši.[27]

Pojedino zemljište može propasti i kao objekt prava vlasništva, npr. uslijed potapanja[28], ili promjena riječnog toka ili uslijed tektonskih i drugih promjena izazvanih prirodnim silama, ili ljudskim zahvatima, ali prema promjenama koje kontinuirano nastaju na svim ljudskim napravama, koje „grize" i „zub vremena"[29], a čovjek razara, te su promjene zanemarive. Osim toga s fizičkom propašću zemljišta propadaju i zgrade. Obrnuto, s propašću zgrade po pravilu ne propada i zemljište. Zbog činjenice što zemljište po pravilu ne propada, a u onim rijetkim slučajevima kada propadne (fizički ili pravno) s njim propada i zgrada,[30] pravo vlasništva na zemljište, koje po pravilu ne mijenja svoj pravni identitet, predstavlja uporišni stup pravne sigurnosti u pravnom prometu i zaštiti prava vlasništva na tome neponovljivom i neobnovljivom prirodnom dobru i svemu što je s njime trajno spojeno.

b) Identitet zemljišta

Po prirodi stvari identitet zemljišta određuje prostor, jer je zemljište po prirodi nepokretno i neponovljivo. Zato su i zemljišnoknjižne i katastarske oznake zemljišta u načelu nepromjenjive. U sustavu zemljišno-knjižnog prava dvije su bitne oznake identiteta zemljišta. Broj katastarske čestice i katastarska općina. U katastarskoj općini svaka katastarska čestica ima svoj broj. Stoga zemljišnoknjižni uložak nije bitan za utvrđivanje pravnog identiteta katastarske čestice. Katastarska se čestica može cijepati, ali nove čestice zadržavaju osnovni broj čestice od koje su nastale cijepanjem dobivajući svoj podbroj, npr. k.č. 7. u k.o. K. cijepanjem nastaju kč. 7/1, 7/2 itd. bez obzira hoće li odcijepljena čestica ostati u istom zk. ul. ili

---

[27] Čl.16., 25. ZZK RS, odnosno čl.7., 13. ZZK FBiH. Vidi: čl. 10. i 145. st. 4. i 5. ZZK, NN 91/96.; 114/01.; ZID ZPS NN 68/98. koji ukida čl. 225. ZZK USRH (NN 137/99.) ukida čl. 221. st. 1. ZZK, 114/01; Zakon o izmjenama i dopunama Zakona o prodaji stanova koji ukida čl. 225. Zakona o zemljišnim knjigama; USRH (NN 137/99.) ukida čl. 221. st. 1. Zakona o zemljišnim knjigama.

[28] U Luisiani (SAD) more je potopilo od 1932. godine do danas 1900 četvornih milja, a za narednih 50 godina pretpostavlja se da će progutati još 500 do 700 četvornih milja, kako navodi vladina agencija La Coast – http://www.lacoast.gov/watermarks/2004-01, crisisofloss/index.htm. Slične pojave su poznate i na drugim oceanskim obalama širom svijeta. U posljednje vrijeme bilježi se porast razine mora zbog otapanja leda na Arktiku i Antarktiku. U sljedećim desetljećima, ako se taj proces nastavi, naći će se pod vodom velike površine zemljišta, naselja i gradova na niskim obalama širom svijeta (Glavač, op. cit., str. 73. – 80., 85. – 93., gdje se navodi da je razina mora u 20. stoljeću narasla za 15 cm, a do kraja 21. stoljeća očekuje se porast još 35 cm, prognoze variraju od 20 do 86 cm). Poznate su i pojave slijeganja i tonjenja zemljišta uslijed prirodne uzročnosti (Venezia) ili ljudskih zahvata, npr. Tuzla gdje je za nekoliko desetljeća usred grada nastalo jezero popularno nazvano „Panonsko more". Podsjećanje na isušeno Panonsko more (u geološkoj povijesti) koje je za sobom ostavilo naslage soli i slane vode čija je eksploatacija prouzročila tonjenje središta ovog bosanskog grada. U slučaju slijeganja zemljišta (Venezia) identitet zemljišta se ne mijenja; tonjenje zemljišta (Tuzla) dovodi i do toga (nekada gradska četvrt, nekoliko ulica – sada jezero). Nema više onih nekretnina koje su bile objekti prava vlasništva određenih osoba. Sada je dno jezera – opće dobro. Česta su pojava veliki odroni zemljišta pod utjecajem planinskih bujica i klizanja zemljišta ili tektonskih poremećaja koji deformiraju površinu zemljišta.

[29] U posljednje vrijeme aktualizirana je zaštita Kineskog zida od naglog propadanja.

[30] Osim u slučajevima kada se zgrada koja ima velike kulturnopovijesne vrijednosti premjesti na drugo zemljište (infra), ali i ta iznimka potvrđuje pravilo da se identitet nekretnine utvrđuje prema zemljištu (katastarskoj ili građevinskoj čestici), a ne prema zgradi ili drugoj građevini koja se premješta na drugo zemljište.

će biti pripisana drugom z.k. ul. ili eventualno upisana u novo osnovani zk. ul. Isto vrijedi i za građevinsku česticu.

c) Propast zemljišta za određenu namjenu ne utječe na njegov identitet

Zemljište može propasti za odgovarajuću namjenu, npr. građevinsko zemljište propada kada se zbog tektonskih ili geomehaničkih promjena (deformacija) ne može koristiti za izgradnju zgrade kakva se do tih promjena mogla izgraditi ili kada je propisom zbog nekih razloga isključena izgradnja ili zbog promjene prostornog (urbanističkog) plana, detaljnog plana uređenja, ali zemljište i tada ostaje kao objekt prava vlasništva, njegov pravni identitet time se nije izmjenio. Promijenila se samo njegova namjena i tržišna vrijednost. Zato je i po općem shvaćanju prirodno da je zemljište glavna stvar u odnosu na zgrade i druge građevine, na njegovoj površini i ispod nje, bez obzira na odnos vrijednosti zemljišta i zgrade.

4.2. Povlašteni položaj vlasnika zemljišta

Načelo *superficies solo cedit* proizvodi bitne pravne i ekonomske učinke. Ono nesumnjivo povlašćuje vlasnika zemljišta time što se njegovo pravo vlasništva proteže na sve pokretne stvari koje se trajno spoje sa zemljištem. Još više je povlašten vlasnik zemljišta time što se vrijednost zemljišta stalno povećava ulaganjem u izgradnju zgrada različitih namjena, za obavljanje raznovrsnih djelatnosti, ulaganjem u javnu, komunalnu i drugu infrastrukturu, na užem ili širem kompleksu, bez njegova doprinosa i rizika[31]. Zemljište ima i to svojstvo što „usisava“ sve stvari koje se sa zemljištem trajno spoje, sav inkorporirani kapital, poznatog i anonimnog ulagatelja (investitora), jer sve što se sa zemljištem trajno spoji na njegovoj površini ili ispod nje postaje njegov integralni dio te po zakonu pripada vlasniku zemljišta (*superficies solo cedit*), ako nije drukčije određeno zakonom ili pravnim poslom u skladu sa zakonom.[32] Uključenjem zemljišta u građevinsko područje donosi njegovom vlasniku neočekivano bogatstvo bez ikakvog ulaganja (prostornim planom), jer mu je time višestruko porasla vrijednost zemljišta.

5. Relativnost pravnog jedinstva zemljišta i zgrade u suvremenom pravu

U privatnovlasničkim sustavima, u rimskom pravu i u suvremenim građanskim pravima, zemljište je uvijek glavna stvar (*res principale*), a zgrada i druga građevina koja je sa zemljištem trajno spojena bez obzira na njenu vrijednost – sporedna stvar (*res accessorium*). Ovo pravilo proizvodi dva pravna učinka. Prvi, da je sve što je sa zemljištem trajno spojeno po zakonu vlasništvo vlasnika zemljišta – *accessorium cedit principale – superficies solo cedit*. I drugi, tako spojene stvari u pravnom prometu dijele pravnu sudbinu zemljišta (*accessorium sequitur principale*). Založno pravo na zemljištu proteže se na sve što se sa zemljištem trajno spoji (ekstenzivnost hipoteke). S prijenosom vlasništva na zemljištu prenosi se i vlasništvo na trajnu zgradu, hipotekarnim zalaganjem zemljišta hipoteka se proteže na zgradu, nasljeđivanjem zemljišta – nasljeđuje se i zgrada. Ne mogu postojati različiti suvlasnički

---

[31] Kakav utjecaj ima izgradnja autocesta na prometnu vrijednost nekretnina pokazuju najnoviji primjeri na gravitacijskom području novosagrađenih autocesta u Republici Hrvatskoj gdje je cijena nekretnina preko noći višestruko porasla.

[32] Čl. 2. st. 3. ZV-a.

dijelovi na zemljištu i zgradi jer su zemljište i zgrada jedna homogena cjelina,[33] nedjeljiva stvar – nekretnina.

Ova pravila nisu apsolutna. Suvremena prava poznaju pravne ustanove koje pravno odvajaju zemljište i zgradu, kao i drugu građevinu, a po nekim pravima može se pravno odvojiti i drveće od zemljišta (*infra*) na temelju subjektivnog prava koje se po pravilu stječe na temelju pravnog posla, rjeđe odlukom suda ili drugog nadležnog tijela.

Zgrade su bez iznimke po zakonu bile odvojene od zemljišta u društvenom vlasništvu, a zgrade u etažnom vlasništvu i od zemljišta u privatnom vlasništvu (infra). Na temelju pravnog posla mogle su se i druge zgrade pravno odvojiti od zemljišta u privatnom vlasništvu.

Pravo koje odvaja trajnu zgradu od zemljišta može se osnovati prije izgradnje zgrade, pa se time pravno neutralizira djelovanje atracijske snage zemljišta (prava vlasništva na zemljište), a može se osnovati i nakon izgradnje zgrade čime se otklanja djelovanje pravila *accessorium sequitur principale* (otuđuje se zgrada bez zemljišta ili zemljišta bez zgrade ili zemljište se prenosi u vlasništvo jednoj osobi, a zgrada - drugoj). Takva mogućnost postojala je po saveznom Zakonu o prometu zemljišta i zgrada (čl.6.st.1.) od 1. srpnja 1954. u odnosu na zemljište u privatnom vlasništvu. Zakon o prometu nepokretnosti SR BiH[34] ovu je mogućnost isključio (čl.7.st.1.). Danas u RS zemljište i zgradu razdvaja samo pravo građenja (čl.286.-301. ZSP RS) i na zakonu osnovana koncesija (čl.7.st.4.).

Prestankom prava građenja, odnosno koncesije, zgrada, odnosno druga građevina postaje sastavni dio zemljišta po načelu *superficies solo cedit*. Ovo je dokaz da je unatoč djelovanju prava građenja ili koncesije, zemljište zadržalo svojstvo glavne stvari kojoj je bila oduzeta privlačna pravna snaga dok su ta prava trajala.

6. O uspostavljanju pravnog jedinstva zemljišta i zgrade

Pravno jedinstvo nekretnine u Republici Hrvatskoj uspostavljalo se, po samom zakonu, od 8. listopada 1991. do 1. siječnja 1997. pretvorbom trajnog prava korištenja u pravo vlasništva vlasnika zgrade (čl. 9. ZP ZOVO), [35] a od 1. siječnja 1997., nominalno (prividno) spajanjem zemljišnoknjižnih tijela, zgrade i zemljišta po pravilima ZV-a[36] (čl. 366-373.). Stvarno se pravno jedinstvo i po Zakonu o vlasništvu uspostavlja također pretvorbom trajnog prava korištenja u pravo vlasništva jer je zemljišnoknjižno tijelo građevinska čestica koja je objekt trajnog prava korištenja (*infra*). Dakle, pravno jedinstvo nekretnine se ne uspostavlja prestankom trajnog prava korištenja, koje je trajalo dok postoji zgrada, nego njegovom pretvorbom u pravo vlasništva.

---

[33] Županijski sud Bjelovar Gž 996/2004-2 od 16. rujna 2004.; IO VSRH-a 2/2004., t. 4.

[34] Sl.list SR BiH 38/78.

[35] Zakon o preuzimanju Zakona o osnovnim vlasničkopravnim odnosima, NN 53/91.

[36] Zakon o vlasništvu i drugim stvarnim pravima, NN 91/96., 73/00. i 114/01. ZID Zakona o prodaji stanova na kojima postoji stanarsko pravo (NN 68/98.) ukida čl. 371. ZV-a; USRH (NN 137/99.) ukida čl. 388. st. 4. ZV-a; USRH (NN 22/00.) ukida čl. 356. st. 5., čl. 357. st. 5. i čl. 367. st. 3. ZV-a; ZID Stečajnog zakona (NN 129/00.) ukida primjenu čl. 366. do čl. 373. ZV-a ako glede određene nekretnine u vrijeme otvaranja stečajnog postupka nije uspostavljena pravna jedinstvenost nekretnine; u parnicama zbog smetanja posjeda primjenjivat će se odredbe Zakona o parničnom postupku. Odredbe ZV-a o pravnim posljedicama povrede načela pravne jedinstvenosti nekretnine ne primjenjuju se u stečajnom postupku ako glede određene nekretnine u vrijeme otvaranja stečajnog postupka nije uspostavljena pravna jedinstvenost nekretnine.

Pravo vlasništva (suvlasništva) na izgrađenom građevinskom zemljištu stječe ona površina zemljišta na koju se prostire pravo korištenja vlasnika zgrade, tj. zemljište na kojem je zgrada izgrađena „i zemljište što služi za redovnu upotrebu te zgrade“ (čl. 12. st. 1. ZOVO-a[37]), a ne cijela katastarska čestica, pa se zbog toga ne može uknjižiti kao objekt prava vlasništva vlasnika zgrade prije nego što se odlukom nadležnog tijela oblikuje građevinska čestica (*infra* ZGZ 2003.„BiH, čl.39.-41.) – zemljište koje pripada zgradi u sustavu pravnog dualiteta zemljišta i zgrade.

Pravno jedinstvo nekretnine uspostavlja se u korist vlasnika (suvlasnika) zgrade inverzijom načela *superficies solo cedit,* jer je u sustavu pravnog dualiteta nekretnine zgrada bila glavna stvar. Dosljedno se provodi načelo: vlasnik zgrade stječe pravo vlasništva na zemljište, koje pripada zgradi ili tko je stekao pravo vlasništva zgrade, odnosno posebnog dijela zgrade, taj je stekao pravo vlasništva, odnosno pravo suvlasništva i na zemljište koje pripada zgradi. U tom slučaju, primjena inverzije načela *superficies solo cedit* nužna je za ukidanje pravnog dualiteta zgrade i zemljišta i uspostavljanja pravnog jedinstva nekretnine u korist vlasnika (suvlasnika zgrade). U tom slučaju pravo vlasništva na nekretnini po pravilu stječe nositelj trajnog prava korištenja na zemljištu (vlasnik zgrade).

Vlasnici posebnih dijelova zgrade stjecali su pravo suvlasništva na zemljištu, ali se time nije uspostavljalo pravno jedinstvo zemljišta i zgrade do 1. siječnja 1997. kada je prestao važiti Zakon o vlasništvu na dijelovima zgrade (čl. 394. st. 1. podst. 2. ZV-a),odnosno u Republici Srpskoj 1.7.2009. (čl.355.st.1.t.b. i 357.ZSP)[38] koji je pravno odvajao i zgradu od zemljišta u privatnom vlasništvu pomoću tri oblika vlasništva: na zemljištu – suvlasništvo, na zajedničkim dijelovima zgrade – zajedničko vlasništvo, na posebnim dijelovima zgrade - pravo vlasništva (čl. 5. st. 3. i 6. st. 2.). Pravo vlasništva na posebni dio zgrade, dakle ne proizlazi iz prava suvlasništva na nekretninu kao po Zakonu o vlasništvu (čl. 66.–70. Zakon o svojini na dijelovima zgrada koji je još na snazi u F BiH) koji uspostavlja načelo pravnog jedinstva zemljišta i zgrade (čl. 366. ZV; čl.330. ZSP RS).

Pravo vlasništva na nekretnini, inverzijom načela *superficies solo cedit* stječe i ona osoba koja je bespravno izgradila zgradu na zemljištu na kojem je treća osoba imala privremeno pravo korištenja ili pravo korištenja radi građenja, pod uvjetom da je bila legalizirana ova bespravna izgradnja i time izravno ili neizravno konstituirano trajno pravo korištenja u korist graditelja (investitora).

Nakon uspostavljanja pravnog jedinstva zemljišta i zgrade vrijedi načelo *superficies solo cedit*. Ovo načelo ne ukida ni pravo građenja, jer je zgrada pripadnost prava građenja – „kao da je ono zemljište” (čl. 280. st. 3. ZV-a; čl.286.st.3. ZSP RS), a to znači da pravo građenja samo zamjenjuje zemljište - objekt koji pravno privlači zgradu te zajedno sa zgradom čini jedinstvenu nekretninu. *Superficies*, izvorno: površina zemljišta, u ovom slučaju je pravo građenja kao pravno zemljište, a ne prirodno zemljište, kome je pravo građenja ‘’oduzelo’’ privlačnu pravnu snagu. U našem pravu vrijedi načelo: tko je nositelj prava građenja, taj je vlasnik zgrade, bez iznimke. Zgrada se može pravno odvojiti od zemljišta pravom građenja ili koncesijom (čl. 9. st. 4. ZV-a; čl.7.st.2. ZSP RS), a ne može se odvojiti od prava građenja (čl. 280. st. 3. i 285. st. 3. ZV-a; čl.286.st.3. i čl.291.st.3. ZSP RS) ni po jednoj pravnoj osnovi. Samo dio zgrade koji prelazi na susjedno zemljište opterećeno pravom građenja se odvaja od prava građenja na temelju prava služnosti (čl.196. st. 1. ZV-a; čl.219.st.4.t.a) ZSP RS) koje se konstituira prekoračenjem međe građenjem (čl. 157.) ili po drugoj pravnoj osno-

---

[37] Zakon o osnovnim vlasničkopravnim odnosima, Sl.list SFRJ 6/80 i 36/90.

[38] Zakon o stvarnim pravima, Sl.glasnik RS 124/08.

vi (na temelju pravnog posla ili odluke nadležnog tijela) [39]. Dio zgrade koji je pravom služnosti odvojen od susjednog zemljišta ili prava građenja na susjednom zemljištu čini pravno jedinstvo s povlasnom nekretninom (horizontalna akcesija). Po ZSP RS prekoračenjem granica građenjem, savjesni graditelj stječe prava vlasništva na zahvaćenom zemljištu (čl.62. st.2.). Tako i po čl.62.st.2. Nacrta ZSP FBiH.

7. Neposredna pretvorba trajnog prava korištenja u pravo vlasništva (1991 – 1997)

Trajno pravo korištenja na izgrađenom građevinskom zemljištu, koje je razdvajalo zemljište i zgradu pretvoreno je u pravo vlasništva vlasnika (suvlasnika) zgrade (posebnih dijelova zgrada) Zakonom o preuzimanju Zakona o osnovnim vlasničkopravnim odnosima, s time što je noveliran čl. 12. ZOVO-a[40] (8. listopada 1991.) zamjenom riječi „korištenje" riječju „vlasništvo", ali je zadržan završni dio rečenice u st. 1. koji je glasio „dok ona postoji", (tj. zgrada). Time je bilo uspostavljeno, dakle pravo vlasništva na zemljište, koje prestaje pod raskidnim uvjetom, kada se zgrada sruši ili ukloni. Odlukom Ustavnog suda RH od 30. studenog 1994.[41] ukinut je, međutim spomenuti završni dio rečenice („dok ona postoji") s obrazloženjem da nije u skladu s načelima Ustava Republike Hrvatske o jamstvu i nepovredivosti prava vlasništva (čl. 48. st. 1. i čl. 3.) koje može prestati protiv volje vlasnika samo pod uvjetima i u postupku koji je propisan Zakonom u interesu Republike Hrvatske i to uz naknadu tržišne vrijednosti (čl. 50. st. 1. Ustava RH)[42].

Pretvorbom trajnog prava korištenja u pravo vlasništva bilo je uistinu uspostavljeno načelo prema kome zgrada u privatnom vlasništvu ne može stajati na zemljištu u društvenom vlasništvu. To znači da je prelaženjem zgrade iz društvenog u privatno vlasništvo, po bilo kojoj pravnoj osnovi, u vremenu od 8. listopada 1991. do 1. siječnja 1997., po samom zakonu vlasnik zgrade stjecao pravo vlasništva na zemljištu koje pripada zgradi. Pretvorbom prava upravljanja, prava korištenja ili prava raspolaganja društvenopravne osobe na zgrade ili prava raspolaganja na posebne dijelove zgrade u pravo vlasništva njenog pravnog sljednika, vlasničkopravne osobe;[43] stjecanjem prava vlasništva ugovorom o kupovini stana,[44] drugog posebnog dijela zgrade ili zgrade u cijelosti na temelju pravnog posla kome je cilj stjecanje prava vlasništva pretvaralo

---

[39] Npr. na temelju sporazuma suvlasnika u postupku fizičke (geometrijske) diobe.

[40] ZP ZOVO-a, NN 53/91., čl. 9.

[41] NN 92/94.

[42] Vidi Zakon o izvlaštenju, NN 9/94., 35/94., 112/00. i 114/01.

[43] Josipović, T., Upis vlasništva pravnih osoba u zemljišne knjige, Godišnjak 1, Aktualnosti hrvatskog zakonodavstva, Organizator, Zagreb, 1994., str. 231.-246.; Koketi, B., Uknjižba nekretnina trgovačkih društava nastalih pretvorbom u zemljišnu knjigu, Zbornih radova: Nekretnine u pravnom prometu, Inženjerski biro, Zagreb, 2000.

[44] O otkupu stanova u društvenom vlasništvu, u monografiji Uređenje prava na nekretninama, Knjiga druga; Tumbri, T., Stambena reforma - prodaja stanova na kojima postoji stanarsko pravo, Zakonitost, br. 2-3/91, str. 291.-303.; ista: Prodaja stanova na kojima postoji stanarsko pravo, Informator, br. 4206/94; Turčić, Z., Primjena Zakona o prodaji stanova, Informator, god. XL., br. 4008-4009, 1992, isti: Uredba o izmjenama Zakona o prodaji stanova na kojima postoji stanarsko pravo, Informator, god. XL., br. 3962, 1992.,; Koketi, B., Prodaja stanova na kojima postoji stanarsko pravo, Informator, god. XXXIX., br. 3939 i 3940, 1991.; Josipović, T., Otkup stanova u društvenom vlasništvu i denacionalizacija, Zakonitost, god. 45, br. 7-8, 1991., str. 93.3-941.; Bagić, S., Otkup nacionaliziranih stanova, Pravo u gospodarstvu, vol. 36, br. 4, 1997., Radolović, A., Naknada za oduzete stanove i oduzeti poslovni prostor, ZPFR, vol. 18, br. 1., 1997., str. 107.-117.

se trajno pravo korištenja na građevinskom zemljištu u društvenom vlasništvu u pravo vlasništva[45] vlasnika (suvlasnika) zgrade, odnosno posebnih dijelova zgrade.

Objekt prava korištenja na zemljištu koje se pretvorilo u pravo vlasništva (suvlasništva) vlasnika (suvlasnika) zgrade bila je građevinska čestica, a kada građevinska čestica nije bila oblikovana, to se pravo protezalo na onu površinu zemljišta koju pokriva zgrada „i zemljište što služi za redovnu upotrebu zgrade".[46],[47]. Pretvaranjem trajnog prava korištenja na zemljištu koje pripada zgradi u pravo vlasništva vlasnika zgrade, uspostavljeno je pravno jedinstvo zemljišta i zgrade.

§2. Uspostava pravnog jedinstva zemljišta i zgrade spajanjem zemljišnoknjižnih tijela (posredna pretvorba trajnog prava korištenja od 1. siječnja 1997.) u Republici Hrvatskoj

Pravo vlasništva vlasnika (suvlasnika) zgrade, odnosno posebnih dijelova zgrade na građevinskom zemljištu u društvenom vlasništvu uspostavlja se spajanjem zemljišta i zgrade u jedno zemljišnoknjižno tijelo (čl. 366.-373. ZV-a).[48]

1. Opća pitanja

1.1. Vremensko važenje načela pravnog jedinstva zemljišta i zgrade

Pravno jedinstvo zgrade i zemljišta u društvenom vlasništvu uspostavlja se po sili zakona imperativnom normom tako da se pravnim poslom ne može suprotno odrediti. Štoviše, od dana stupanja na snagu ZV-a ni raniji „pravni poslovi koji su suprotni načelu jedinstvenosti nekretnine ne proizvode pravne učinke" (čl. 366. st. 3.). Sve do 1. siječnja 1997., bio je, naime dopušten i proizvodio je pravne učinke pravni posao o razdvajanju zgrade od zemljišta u privatnom vlasništvu (čl. 6. st. 1. Zakona o prometu zemljišta i zgrada[49] i čl.10.st.2. ZGZ-a)[50], što znači da je do 1. siječnja 1997. pravno jedinstvo zemljišta i neetažirane zgrade bilo dispozitivna norma koja je važila ako nije bilo suprotno ugovoreno. Danas je načelo pravnog

---

[45] Šire Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva, ZPFR, vol. 20, br. 2., 1999., str. 487.-528.

[46] Čl. 12. st. 1 ZOVO-a, odnosno čl. 9. ZP ZOVO-a, čl. 36. i 37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta, Sl. list FNRJ 52/58.; i čl. 6. st. 2. ZPZZ, Sl. list FNRJ 26/54., 19/55., 48/58., 30/62., Sl. list SFRJ, br. 15/65., 43/65. (proč. tekst), 57/65., 17/67., 11/74. i NN 52/73., koji je u Republici Hrvatskoj prestao važiti 1. siječnja 1997. (čl. 394. st. 1. al. 3. ZV-a).

[47] Simonetti, P., Prava na građevinskom zemljištu (1945-2007).

[48] Šire o tome: Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva ZPFR, vol. 20., br. 2., 1999., str. 487. -528.; isti: Pravno jedinstvo nekretnine i njenih posebnih dijelova u: Rasprave iz stvarnog prava, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2001., str. 165.-201.

[49] Zakon o prometu zemljišta i zgrada (u daljnjem tekstu: ZPZZ), na snazi od 1. srpnja 1954. godine, kao savezni zakon, Sl. lsit FNRJ 26/54. Nakon više izmjena i dopuna - pročišćeni tekst iz 1965., koji je također pretrpio izmjene i dopune, preuzet je kao zakon SRH, NN 53/73., bio je na snazi do 1. siječnja 1997. (čl. 394. st. 1. al. 3. ZV-a).

[50] Šire o pravnom razdvajanju zemljišta i zgrade po propisima koji su bili na snazi do 1. siječnja 1997.: Simonetti, P., Rasprave iz stvarnog prava, Pravni fakultet Sveučilišta, Rijeka, 2001., str. 236.-249.

jedinstva zemljišta i zgrade imperativna norma koja isključuje suprotno ugovaranje. U Bosni i Hercegovini bio je dopušten ovaj pravni dualitet do 4.1.1979. kad je prestao važiti ZPZZ, stupanjem na snagu ZPN-a[51] koji je isključio pravno razdvajanje zgrade od zemljišta u privatnom vlasništvu (čl.7.st.1.).

Pravno jedinstvo zemljišta i zgrade u etažnom vlasništvu uspostavlja se u Republici Hrvatskoj 1. siječnja 1997. stupanjem na snagu Zakona o vlasništvu, kada je prestao važiti Zakon o vlasništvu na dijelovima zgrada (čl.394.st.1.al.3. ZV-a). Prema tomu, ugovorom o kupovini stana u društvenom vlasništvu, uknjižbom ili polaganjem ugovora u sud, stjecalo se pravo vlasništva na stan i suvlasnički dio zemljišta koje pripada zgradi. Time se nije uspostavljalo pravno jedinstvo zemljišta i etažirane zgrade te su i dalje egzistirala dva samostalna zemljišnoknjižna tijela, iako i jedno i drugo u privatnom vlasništvu. I to sve do 1. siječnja 1997. kada se stupanjem na snagu Zakona o vlasništvu uspostavlja pravno jedinstvo zemljišta i zgrade (čl. 370.).

Zakon o vlasništvu propisuje da od njegova stupanja na snagu (1. siječnja 1997.) u Republici Hrvatskoj vrijedi načelo pravne „jedinstvenosti" nekretnine određeno odredbama iz čl. 2. st. 3. i čl. 9., osim u slučaju ako je posebnim zakonom drukčije određeno (čl. 9 st. 4 i 5. i čl. 366. st. 1. ZV-a), kao na primjer po Zakonu o izmjenama i dopunama Stečajnog zakona od 19. prosinca 2000.[52],[53] Sve to uz isključenje nekretnina (zgrada) iz čl. 390. ZV-a[54] na koje do tada nije uspostavljeno pravo vlasništva, jer zgrada u društvenom vlasništvu ne čini pravno jedinstvo sa zemljištem. Pretvaranjem prava raspolaganja na te zgrade u pravo vlasništva nakon 1. siječnja 1997. uspostavljalo se pravno jedinstvo zemljišta i zgrada.

Pravno jedinstvo nekretnina u privatnom vlasništvu prije ZV-a bilo je uređeno pravnim pravilima OGZ-a (§§ 294.-297.)[55] koja su se supsidijarno primjenjivala u FNRJ/SFRJ i nakon 15. svibnja 1945.[56]

---

[51] Zakon o prometu nepokretnosti, Sl.list SR BiH 38/78.

[52] Zakon o izmjenama i dopunama Stečajnog zakona, NN 129/00.

[53] Dika, M., Neprimjenjivanje načela jedinstva nekretnine u stečajnom postupku, Informator, god. IXL., br. 4914 – 4915, od 11. i 14. travnja 2001.

[54] Čl. 390. propisuje:

„(1) Odredbe čl. 360. do 365. ovoga Zakona ne odnose se na stvari na kojima su pravo upravljanja, korištenja i raspolaganja imale bivše društvene i društveno političke organizacije, na stvari koje nisu unesene u društveni kapital pravnih osoba u postupku pretvorbe na temelju Zakona o pretvorbi društvenih poduzeća, te na stvari pravnih osoba u društvenom vlasništvu sa sjedištem na prije okupiranom, a sada oslobođenom području Republike Hrvatske.

(2) Pretvorba prava upravljanja, korištenja i raspolaganja na stvarima iz stavka 1. ovoga članka uredit će se posebnim zakonom."

[55] Klang, H., Kommentar zum allgemeinen bürgerlichen Gesetzbuch, T. 2, Wien, 1950. uz §§ 294-297. ABGB-a; Rušnov, Tumač k Općemu austrijskomu građanskomu zakoniku, Knj. 1., Zagreb 1893.; Rummel, Kommentar zum Allgemeinen bürgerlichen Gesetzbuch, Bd. 1, Wien, 1990., uz §§ 294-297. ABGB-a.

[56] Pravna pravila OGZ-a primjenjivala su se do 31. prosinca 1991. na temelju čl. 4. Zakona o nevažnosti pravnih propisa donijetih do 6. travnja 1941 i za vrijeme neprijateljske okupacije, Sl. list FNRJ 84/46, od 31. prosinca 1991. do 1. siječnja 1997. primjenjivala su se na temelju čl. 1. i 2. Zakona o načinu primjene pravnih propisa donijetih do 6. travnja 1941., NN 73/91.

U knjizi Prava na nekretninama (1945.–2007.)[57], Knj. 1., dio 2., gdje je obrađeno načelo pravnog jedinstva nekretnine istaknuto je da je bitna pretpostavka za to pravno jedinstvo trajna veza pokretnih stvari koje su pripojene zemljištu, pa je samo trajna, odnosno relativno trajna zgrada sastavni dio zemljišta.

2. Pravila uspostave pravnog jedinstva nekretnine spajanjem zemljišnoknjižnih tijela – zemljišta i zgrade

2.1. Pravilo uspostavljanja pravnog jedinstva zemljišta i zgrade

2.1.1. Izvanknjižno

Pravno jedinstvo zemljišta i zgrade uspostavlja se izvanknjižno po samom zakonu. Ono je, dakle, u RH uspostavljeno 8. listopada 1991. ako je zgrada već toga dana bila u privatnom vlasništvu ili nakon toga dana do 1. siječnja 1997., prelaskom zgrade iz društvenog u privatno vlasništvo i kada se ništa nije promijenilo u zemljišnoj knjizi jer se ta pravna promjena događa silom zakona.

Stoga treba razlikovati uspostavu pravnog jedinstva zemljišta i zgrade koja se događa izvanknjižno, po samom zakonu, od uspostave zemljišnoknjižnog jedinstva nekretnine koje u načelu ima deklarativan značaj jer se pravno jedinstvo već dogodilo izvanknjižno po samom zakonu.

2.1.2. Knjižno

Zemljišnoknjižni upis pravnog jedinstva nekretnine i zgrade ima prvorazredni značaj iz dva razloga:

prvo, dok se ne uspostavi zemljišnoknjižno jedinstvo nekretnine, u zemljišnoj knjizi postoje dva zemljišnoknjižna tijela: zemljište i zgrada, unatoč izvanknjižnoj promjeni;

drugo, u slučaju kada nije oblikovana građevinska čestica u skladu sa zakonom do njenog konačnog oblikovanja nema pretpostavke za upis u zemljišnu knjigu i ne znaju se granice i površina nekretnine koju čini zemljišnoknjižno tijelo – zemljišta i zgrade.

Pravila po kojima se, pod različitim hipotezama, uspostavlja zemljišnoknjižno jedinstvo nekretnine promjenom upisa u zemljišnoj knjizi propisao je Zakon o vlasništvu (čl. 366.–373.), ako posebnim zakonom nije drukčije određeno (čl. 366. st. 2. i čl. 390.). To je načelo od kojeg se može odstupiti samo zakonskom odredbom: iznimke od zakonskog načela mogu se samo zakonom propisati.

2.2. Iznimka od pravila

Tako je posebnim zakonom propisano odstupanje od načela pravnog jedinstva nekretnine ako nije uspostavljeno prije otvaranja stečajnog postupka u pogledu nekretnina koje su unesene u stečajnu masu.[58], [59] Posredno odstupanje od načela uspostavljanja pravnog jedin-

---

[57] Simonetti, P., Prava na nekretninama (1945.-2007.), izd. Pravni fakultet Sveučilišta u Rijeci, 2009.

[58] Čl. 71. ZID Stečajnog zakona, NN 129/00.

[59] Dika, M., Neprimjenjivanje načela jedinstva nekretnine u stečajnom postupku, Informator, god. IXL., br. 4914 – 4915, od 11. i 14. travnja 2001.

stva zemljišta i zgrade postojalo je u onim slučajevima u kojima je po Zakonu o vlasništvu bila odgođena pretvorba prava na nekretninama u društvenom vlasništvu (čl. 390.).

2.3. Ništavost i prenova (novacija) pravnog posla koji je suprotan načelu pravnog jedinstva

Od zemljišta u privatnom vlasništvu zgrade su se mogle pravno odvojiti na temelju pravnog posla (čl. 6. st. 1. ZPZZ-a[60] i čl. 10. st. 2. ZGZ-a) upisom u zemljišnu knjigu.[61] Na temelju pravnog posla prije upisa u zemljišnu knjigu nastaje samo pravo i obveza uspostavljanja ovog pravnog dualiteta, rastakanja nekretnina na dva samostalna zemljišnoknjižna tijela: zemljišta i zgrade.

Prema Zakonu o vlasništvu pravni poslovi koji su suprotni načelu pravnog jedinstva nekretnine (zemljišta i zgrade) ne proizvode pravne učinke od 1. siječnja 1997. (čl. 366. st. 3.) pa se na temelju njih ne mogu provoditi nikakvi upisi (uknjižbe, predbilježbe i zabilježbe) u zemljišnim knjigama. Ali kako se ovo pravilo odnosi na inače valjane pravne poslove koji su do 1. siječnja 1997. bili dopušteni i proizvodili sve pravne učinke, zakon propisuje: „svaka ugovorna strana, a i treći u čiju je korist ugovor sklopljen, ima pravo na pravednu izmjenu ugovora kojom bi se taj nedostatak uklonio" (čl. 366. st. 3. ZV-a). Pravedna izmjena bila bi promjena osnove (*causae*) ili glavne činidbe – prijenos prava vlasništva (suvlasništva) i na zemljištu s prijenosom prava vlasništva na zgradu odnosno na cijeloj nekretnini uz ugovorenu ili odgovarajuću naknadu za zemljište (naplatni pravni posao), ukoliko već cijena zemljišta nije uračunata u cijenu iz postojećeg ugovora. Ili u skladu sa Zakonom o vlasništvu, osnivanje prava građenja koje razdvaja zemljište i zgradu preuzimajući ulogu zemljišta, pa je zgrada njegova pripadnost kao da je ono zemljište (čl. 280. st. 3. ZV-a). U oba slučaja, uknjižbom u zemljišnu knjigu na temelju noviranog ugovora uspostavlja se pravno jedinstvo nekretnine: u prvom – zemljišta i zgrade, u drugom - prava građenja i zgrade.

Prenovom (novacijom) pravnog posla nastaje novi obveznopravni odnos kada sudionici pravnog posla kojim je zasnovan određen obveznopravni odnos postignu suglasnost o promjeni činidbe, ili osnove (kauza) pravnog posla, ili obadvoje [62]. Mogućnost prenove ništavog pravnog posla u pravnom razdvajanju zemljišta i zgrade zaključenog prije 1. siječnja 1997., kao što se vidi, predviđa Zakon o vlasništvu – provedena izmjena ugovora kojim se uklanja njegova ništavost.

Ukoliko je do 1. siječnja 1997. provedena uknjižba zemljišta i zgrade kao dva samostalna tijela na temelju pravnog posla (čl. 6. st. 1. ZPZZ i čl. 10. st. 2. ZGZ-a[63]) ugovor je konzumiran. U tom slučaju ne uspostavlja se pravno jedinstvo nekretnine po samom zakonu jer bi se time vrijeđala stečena prava zasnovana pravnim poslom, dakle voljom vlasnika nekretnina[64], koja štiti Zakon o vlasništvu (čl. 389. st. 1.).Tada je moguće uspostaviti pravno jedin-

---

[60] Zakon o prometu zemljišta i zgrada, Sl.list FNRJ 26/54, 19/55, 30/62, Sl.list SFRJ 15/65; preč. tekst 4/65, 57/65, 17/65, 11/74; NN 52/73, koji je prestao važiti 1.siječnja 1997. (čl.394.st.1.al.3. ZV-a).

[61] Simonetti, P., Rasprave…, op. cit., str. 236.-254.

[62] Vuković, M., Opći dio građanskog prava, Knj. 2., Školska knjiga, Zagreb, 1960., str. 325.; Perović, S., Obligaciono pravo, Službeni list SFRJ, Beograd, 1980., str. 132. i 137.

[63] Zakon o građevinskom zemljištu SRH-a iz 1980., preč.tekst 48/88, 16/90 i 53/90., koji je prestao važiti 1.siječnja 1997. (čl.394.st.2. ZV-a).

[64] Perović, S., Retroaktivnost zakona i drugih opštih akata (teorija sukoba zakona u vremenu), Svetozar Marković, Beograd 1984., str. 104.; tako i Geršić, G., Teorija o povratnoj sili zakona u: Klasici jugoslovenskog prava, NIU, Službeni list SFRJ, Beograd, 1985., T. 8., str. 381., koji je kritički ocijenio dotadašnje teorije o zaštiti stečenih prava. Lasalovu teoriju o stečenim pravima (Lasal, F., Thèorie des droit acquis et de conflits de lois, 1861., trad. fr. Paris, Giard, 1904.) potisnula je koherentnija teorija Roubiera (Roubier, P., Les conflits des lois dan le temps – thèorie dite de la non – reactivite de lois, Paris, 1929.).

stvo zemljišta i zgrade samo voljom vlasnika ta dva zemljišnoknjižna tijela. Njihovom voljom (pravnim poslom) može se modificirati autonomnost te dvije nekretnine i osnivanjem prava građenja koje odvaja zemljište i zgradu, a sâmo preuzima ulogu zemljišta te zgrada postaje njegov sastavni dio kao da je ono zemljište (čl. 280. ZV-a). Pravno jedinstvo po samom zakonu uspostavlja se pod pretpostavkom da je vlasnik zgrade po bilo kojoj osnovi stekao pravo vlasništva na zemljište ili vlasnik zemljišta na zgradu.

3. Oprečne interpretacije ustanove spajanja zemljišnoknjižnih tijela

3.1. Uvodna napomena

Ustanova spajanja zemljišnoknjižnih tijela po prijelaznim odredbama Zakona o vlasništvu različito se interpretirala od početka. Po jednom shvaćanju vlasnik zgrade stječe pravo vlasništva i kada nije oblikovana građevinska čestica, na cijelo zemljišnoknjižno tijelo (katastarsku česticu ili skup katastarskih čestica). Po drugom shvaćanju koje se zastupa u ovoj knjizi, vlasnik zgrade stječe pravo vlasništva na onu površinu zemljišta koja služi za redovnu upotrebu zgrade, ako nije oblikovana građevinska čestica u skladu sa zakonom, a utvrđuje je nadležni organ po smjernicama za oblikovanje prostora i detaljnog plana prostornog uređenja, odnosno lokacijske dozvole po pravilima ZPU-a[65] ako taj plan nije donijet. Ova površina se utvrđuje po zakonskom pravilu koje određuje da građevinsku česticu čine zemljište na kome je zgrada izgrađena i zemljište koje služi za redovnu upotrebu te zgrade.[66]

Pobornike prvog gledišta[67] nije pokolebao ni ZID ZPS-a[68] koji je propisao da se ne može uknjižiti pravo vlasništva kupljenog stana prije oblikovanja građevinske čestice na kojoj je zgrada pa ni odluka Ustavnog suda Republike Hrvatske[69] kojom je ukinuta odredba iz čl. 367. st. 3. ZV-a o uspostavljanju prava suvlasništva kada je na istom zemljištu (zemljišnoknjižnom tijelu) izgrađeno više zgrada različitih vlasnika, kao ni brisanje odredbe iz čl. 367. st. 4. ZV-a o ishođenju utvrđenja veličine suvlasničkih dijelova,[70] koja je nakon ukidanja čl. 367. st. 3. ZV-a izgubila razlog postojanja[71].

---

[65] Zakon o prostornom uređenju, NN 30/94., 68/98., 35/99., 61/00., 32/02. i 100/04. (čl. 26.a, 26.b, 27. – 33. i čl. 36. st. 1. al. 1.).

[66] Čl.12.st.1. Zakona o osnovnim vlasničkopravnim odnosima, odnosno čl.36.st.1. i 2. i čl.37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta na koje upućuje čl.388.st.2. ZV-a, odnosno čl.344.st.2. ZSP RS-e.

[67] Gavella, N., Josipović, T., Pravni učinci pretvorbe društvenih poduzeća s osobitim osvrtom na imovinskopravne učinke, Informator, god.LI., br. 5108 od 19. veljače 2003., 2. dio, točka 27, str. 12.

[68] Zakon o izmjenama i dopunama Zakona o prodaji stanova, NN 68/98. koji je stupio na snagu 20. svibnja 1998.

[69] Od 17. studenog 1999., NN 137/99.

[70] ZID ZV-a, NN 114/01.

[71] Na mogućnost pretvorbe trajnog prava korištenja u pravo građenja umjesto u pravo vlasništva, ukazali smo 1991., Simonetti P., Vlasničkopravni režim građevinskog zemljišta u Republici Hrvatskoj-Preobražaj prava korištenja u pravo građenja, Informator, vol. L., 3921-3922, 1991. i 1992., Simonetti, P., Reprivatizacija građevinskog zemljišta i preobražaj prava korištenja, Zakonitost, god. 46., br. 3, 1992., str. 403.-421.).

3.2. Pojam zemljišnoknjižnog tijela

3.2.1. Zemljišnoknjižno tijelo u sustavu pravnog jedinstva zemljišta i zgrade

Zemljišnoknjižno tijelo može se sastojati ‘’od jedne ili više zemljišnoknjižnih čestica koje se nalaze u istoj katastarskoj općini’’ (čl. 19. st. 2. ZZK[72], odnosno čl.16.st.3. ZZK FBiH i čl.16.st.3. ZZK RS). Katastarska čestica je ‘’dio zemljišne površine koja je u katastru zemljišta označena posebnim brojem i nazivom katastarske općine u kojoj leži (čl. 2. st. 1. ZZK). Područja i nazive katastarskih općina uređuju katastarski propisi ‘’s time da jedna katastarska općina može obuhvaćati samo zemljišta koja se nalaze na području nadležnosti jednog zemljišnoknjižnog suda. Zemljišta na području nadležnosti jednog zemljišnoknjižnog suda mogu biti podijeljena i na više katastarskih općina’’ (čl. 17. st. 2. ZZK). [73], [74]

3.2.2. Zemljišnoknjižno tijelo u sustavu pravnog dualiteta nekretnina

3.2.2.1. Na zemljištu u društvenom vlasništvu

Samostalna zemljišnoknjižna tijela bile su zgrade koje su u načelu bile u pravnom prometu i kad su bile u društvenom vlasništvu (čl.1.st.3. ZPZZ, odnosno čl.3.st.3. ZPN[75]) i zemljište u društvenom vlasništvu koje je bilo izvan pravnog prometa (čl.1.st.2. ZPZZ, odnosno čl.3.st.2. ZPN). Samostalna zemljišnoknjižna tijela bila su i zgrade u etažnom vlasništvu na zemljištu u privatnom vlasništvu.

U sustavu pravnog dualiteta nekretnina zgrade su bile pravno odvojene od zemljišta u društvenom vlasništvu. Po samom zakonu su egzistirale istovremeno dvije samostalne nekretnine – dva zemljišnoknjižna tijela: zemljište i zgrada. Ovaj sustav važio je za sve zgrade na zemljištu u društvenom vlasništvu, bez obzira jesu li zgrade bile u privatnom ili u društvenom vlasništvu, jer je građevinsko zemljište u društvenom vlasništvu bilo neotuđivo, a i zgrade u društvenom vlasništvu bile su u pravnom prometu pod uvjetima određenim ZPZZ (čl.2.st.3.).

3.2.2.2. Na zemljištu u privatnom vlasništvu

Pravni dualitet zemljišta i zgrade bio je generalno uspostavljen Zakonom o vlasništvu na dijelovima zgrade i kada je zemljište bilo u privatnom vlasništvu, jer se pravo suvlasništva na zemljištu koje je pripadalo vlasnicima posebnih dijelova zgrade nije protezalo na zgradu. Na zajedničke dijelove zgrade etažni vlasnici imali su zajedničko vlasništvo, a ne suvlasništvo. Tri oblika vlasništva razdvajala su ne samo zgradu od zemljišta, nego i posebne dijelove od zajedničkih dijelova zgrade. Od prestanka važenja Zakona o vlasništvu na dijelovima zgrada (1. siječnja 1997.) uspostavlja se pravno jedinstvo s onom površinom zemljišta na koju se prostiralo pravo suvlasništvo vlasnika posebnih dijelova zgrade. Nije, dakle, sporno koja se površina zemljišta u privatnom vlasništvu spaja sa zgradom u etažnom vlasništvu (obiteljske stambene zgrade i druge zgrade koje su po tadašnjim propisima mogle biti objekt prava vlasništva). Sporno je koja se površina zemljišta koje je bilo u društvenom vlasništvu spaja sa zgradom po prijelaznim odredbama Zakona o vlasništvu.

---

[72] Zakon o zemljišnim knjigama, NN 91/96, 137/99, 114/01, 100/04, 107/07, 152/08.; Zakon o zemljišnim knjigama FBiH, Sl.novine FBiH 58/02, 19/03, 54/04; Zakon o zemljišnim knjigama RS, Sl.glasnik RS 74/02.

[73] Vidi čl. 19. st. 3., 4. i 6. te čl. 145.– 148. ZZK.

[74] Josipović, T., Zemljišnoknjižno pravo, str.103. i dalje, ista u: Gavella etc., Stvarno pravo, str. 220.–222.

[75] Zakon o prometu nepokretnosti, Sl.list SR BiH 38/78.

3.3. Zemljište koje se spaja sa zgradom

Pretvorba prava korištenja u pravo vlasništva (suvlasništva) vlasnika (suvlasnika) zgrade, odnosno posebnog dijela zgrade od 8. listopada 1991. do stupanja na snagu Zakona o vlasništvu (8.10. 1991. – 1. siječnja 1997.), nije izazivala nedoumice o površini zemljišta koja se spajala sa zgradom. Ta površina bila je određena građevinskom česticom koja se oblikovala na temelju „dokumenata" prostornog uređenja, po zakonskom načelu: zemljište koje pokriva zgrada i zemljište koje je potrebno za redovnu upotrebu zgrade (čl.12.st.1. ZOSPO, čl.36.st.1. i 2. i čl.37. Zakona o nacionalizaciji…). Građevinska čestica se po pravilu oblikovala prije dodjele zemljišta na korištenje radi građenja, dakle prije konstituiranja prava korištenja radi građenja na građevinskom zemljištu u društvenom vlasništvu upisom u zemljišnu knjigu (čl. 40.-44. i čl. 51. st. 3. ZGZ-a.).

Građevinska čestica je ona površina zemljišta koja je po provedbenom planu,[76] parcelacijskom elaboratu ili drugom aktu urbanističke regulative („dokumentu" prostornog uređenja) namijenjena za izgradnju i uporabu trajne zgrade. Propisi o prostornom planiranju određuju da građevinska čestica mora imati oblik i površinu koja omogućuju izgradnju zgrade i njeno korištenje u skladu s planom, urbanističkim i tehničkim propisima i da ima trajan pristup na ulicu, odnosno na javni put.[77] Zakon o prostornom planiranju SRH izričito je propisivao da se „akt parcelacije građevinskog zemljišta ne može provesti u katastru zemljišta i zemljišnoj knjizi bez potvrde organa nadležnog za utvrđenje uvjeta i uređenje prostora da je parcelacijski elaborat izrađen u skladu s uvjetima uređenja prostora" (čl. 65. st. 1.).[78]

Pod pretpostavkom da nije oblikovana građevinska čestica zemljišta na kojem se nalazi zgrada, pretvorbom trajnog prava korištenja vlasnik (suvlasnik) zgrade stjecao je pravo vlasništva na onu površinu zemljišta koje pokriva zgrada „i koje služi za redovnu upotrebu te zgrade".[79] Nije, prema tome, oblikovana u skladu sa zakonom ona građevinska čestica koja obuhvaća samo zemljište ispod zgrade ili zemljište oko zgrade koje ne omogućava redovnu upotrebu zgrade. Paradoksalan primjer, u praksi, je takav oblik i površina građevinske čestice koja onemogućava ulaz u zgradu s javne površine tako da je ulaz u zgradu moguć samo preko susjednog zemljišta. U tom slučaju se prije upisa nekretnine u zemljišnu knjigu mora oblikovati građevinska čestica u skladu sa zakonom, a to je ona površina koja je potrebna za redovnu upotrebu zgrade; upravo na tu površinu se prostiralo trajno pravo korištenja.

3.4. Suprotstavljene interpretacije u svjetlu mogućih hipoteza

Nakon stupanja na snagu Zakona o vlasništvu (1. siječnja 1997.) javljaju se dvojbe u slučaju spajanja zemljišta, kao samostalnog zemljišnoknjižnog tijela s jednom ili više samostalnih zgrada (kao zemljišnoknjižnih tijela) u jedno zemljišnoknjižno tijelo. Ovo zbog toga što su u hrvatskom pravu prividno moguće dvije različite interpretacije pojma „zemljišno knjižno tijelo" koje čini zemljište na kojem se nalazi zgrada.[80] Po jednoj je zemljišnoknjiž-

---

[76] Danas detaljni plan uređenja (čl. 44. podst. 1. i čl. 69. Zakona o prostornom uređenju, NN 30/94., 68/98., 61/00., 32/02., 100/04.).

[77] Čl. 64. st. 3. Zakona o prostornom planiranju i uređenju prostora SRH, NN 54/80.

[78] Vidi, Golubović-Munjaković, Lj., op. cit.

[79] Čl. 9. ZP ZOVO-a, odnosno čl. 12. st. 1. ZOVO-a; ranije čl. 37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta, Sl.list FNRJ 52/58 (čl.36.st.1. i 2. i čl.37.).

[80] Kako se ove interpretacije odnose samo na hrvatsko pravo, u nastavku se ne citiraju pravni izvori entiteta Bosne i Hercegovine, gdje se taj problem nije pojavio zbog toga što su nedvosmisleni propisi o pretvorbi trajnog prava korištenja i o opsegu njegova objekta – zemljišta koje pripada zgradi *(infra)*.

no tijelo katastarska čestica (čl. 2. st. 1. ZV-a), odnosno sve katastarske čestice koje su upisane u glavni zemljišnoknjižni uložak i čine jedno zemljišnoknjižno tijelo (čl. 19. i čl. 145. ZZK-a).[81] Po drugoj, zemljišnoknjižno tijelo u sustavu pravnog dualiteta zemljišta i zgrade samo je ona površina zemljišta na kojoj je zgrada i koja služi za njenu redovnu uporabu, jer se samo na tu površinu prostiralo trajno pravo korištenja koje se pretvara u pravo vlasništva, pa samo na tu površinu vlasnik zgrade stječe pravo vlasništva spajanjem zemljišnoknjižnih tijela. Pri tome su moguće različite hipoteze. Prva, najjednostavnija, da je oblikovana građevinska čestica u skladu s uvjetima prostornog uređenja. Druga, da na jednoj zemljišnoj čestici (katastarskoj) postoji više zgrada koje pripadaju različitim vlasnicima (suvlasnicima, etažnim vlasnicima). Treća, da je zgrada izgrađena na jednoj ili na više katastarskih čestica čiji oblik se ne podudara s potencijalnom građevinskom česticom, iako površina tih zemljišnih čestica znatno nadmašuje njezinu površinu, a unatoč tomu zgrada je izgrađena na samoj međi te (tih) katastarske čestice (čestica), tako da s jedne (dvije ili tri) strane zgrade postoji površina zemljišta koja nije potrebna za redovnu uporabu zgrade, a s druge strane zgrade upravo to zemljište nedostaje (zid uz među). Četvrta, površina katastarske čestice na kojoj postoji zgrada znatno je manja od čestice koja je po uvjetima prostornog uređenja predviđena za građevinsku česticu. Zato je interpretacija odredbe ''zemljišnoknjižno tijelo'' u pravnoj ustanovi: *uspostava pravnog jedinstva nekretnine* (čl. 366. – 373. ZV-a) moguća samo u kontekstu pravnog dualiteta nekretnine. U vezi s tim treba imati u vidu kako je cjelokupno zemljište u građevinskom području bilo u društvenom vlasništvu (čl. 3. – 7. ZGZ-a)[82] pa granice katastarskih čestica nisu bile nikakva prepreka za oblikovanje građevinskih čestica.

U nastavku se interpretiraju pravila pravne ustanove spajanja zemljišnoknjižnih tijela pod mogućim hipotezama.

3.4.1. Zgrada na oblikovanoj građevinskoj čestici

Kada postoji zgrada na oblikovanoj građevinskoj čestici koja u trenutku spajanja ima konačne (relativno nepromjenjive) granice, utvrđene odlukom nadležnog tijela u skladu s aktima prostornog uređenja, spajanjem građevinske čestice sa zgradom nastaje nekretnina na koju ima pravo vlasništva (suvlasništva) vlasnik (suvlasnici) zgrade, odnosno vlasnici posebnih dijelova zgrade, a nakon spajanja zemljišta i zgrade – vlasnici posebnih dijelova nekretnine koji su istovremeno suvlasnici te nekretnine. U tom slučaju nema dvojbe o površini zemljišta koje se spaja sa zgradom. Novo zemljišnoknjižno tijelo čine zgrada i zemljište (građevinska čestica).

Redovito je postupak oblikovanja građevinske čestice prethodio deposediranju neizgrađenog građevinskog zemljišta i davanju tog zemljišta na korištenje radi građenja fizičkoj ili pravnoj osobi po odredbama Zakona o građevinskom zemljištu (čl. 40.-44.).[83] Ovaj Zakon je propisivao da se građevinsko zemljište može „oduzeti iz posjeda prijašnjeg vlasnika, odno-

---

[81] Zakon o zemljišnim knjigama, NN 91/96., i 114/01. ZID-om Zakona o prodaji stanova na kojima postoji stanarsko pravo NN 68/98., ukinut je čl. 225. ZZK-a, a odlukom UsRH, NN 137/99. Ukinuta je odredba druge rečenice čl. 221. st. 1. ZZK-a.

[82] Od 26. prosinca 1958., čl. 34. i 35. Zakona o nacionalizaciji… od 8. kolovoza 1968. Zakon o određivanju građevinskog zemljišta u gradovima i naseljima gradskog karaktera, NN 30/68. – Opis granica građevinskog zemljišta u gradovima i naseljima gradskog karaktera.

[83] ZGZ koji je prestao važiti 1. siječnja 1997. godine (čl. 394. st. 2. ZV-a) stupio je na snagu 8. siječnja 1981. godine (NN 54/80.) - pročišćeni tekst: NN 48/88., 16/90. i 53/90. U ovom tekstu se citira ZGZ prema redakciji M. Žuvele, Informator, Zagreb, 1992.

sno korisnika i dati na korištenje novom korisniku tek nakon što je za odnosno zemljište izrađen parcelacioni elaborat u skladu s provedbenim planom" (čl. 43. st. 1.).[84]

Radi formiranja novih građevinskih čestica u skladu s provedbenim planom moglo se u svrhu davanja na korištenje građevinskog zemljišta za izgradnju zgrada i drugih građevina oduzeti iz posjeda prijašnjeg vlasnika, odnosno korisnika građevinskog zemljišta u društvenom vlasništvu, dio tog zemljišta, odnosno zemljište koje ne služi za redovnu uporabu zgrade, da bi se njegovim pripajanjem sa susjednom česticom oblikovala nova građevinska čestica (čl. 44. st. 1.).[85] Rješenjem nadležnog tijela moglo se od nositelja prava korištenja, kojem je bilo dano zemljište na korištenje radi izgradnje, oduzeti iz posjeda dio tog zemljišta koji prema parcelacijskom elaboratu premašuje površinu potrebnu za redovnu uporabu zgrade, ako mu je zemljište dano na korištenje prije donošenja provedbenog plana s kojim se ta građevinska čestica morala uskladiti (čl. 44. st. 2.).[86] Na zahtjev vlasnika, odnosno korisnika zgrade, izgrađene na građevinskom zemljištu u društvenom vlasništvu, rješenjem nadležnog organa davalo se na korištenje određeni dio susjedne čestice, koji prema provedbenom planu čini novu građevinsku česticu s česticom na kojoj je bila izgrađena zgrada i to najviše do 50% površine novoformirane građevinske čestice (čl. 45.).

Oblik i površina građevinske čestice bili su načelno određeni 26. prosinca 1958. Zakonom o nacionalizaciji… koji je propisivao da se pravo „besplatnog korištenja zemljišta," koje pripada vlasniku zgrade koja nije nacionalizirana, proteže na ono zemljište „koje pokriva zgrada i zemljište koje služi za redovnu upotrebu te zgrade" (čl.36.st.2. i čl.37.) [87]. Prije toga određivao se oblik i površina zemljišne čestice dodijeljene radi izgradnje zgrade po odredbama Uredbe o izgradnji stambenih zgrada radnika i službenika[88] od 23. kolovoza 1951. koja je važila do 6. travnja 1965. (čl.61. ZID ZPZZ[89]).

3.4.2. Više samostalnih zgrada na jednoj zemljišnoj čestici

U slučaju da na jednoj zemljišnoj čestici (po pravilu na katastarskoj čestici) postoji više samostalnih zgrada (zemljišnoknjižnih tijela) koje su vlasništvo (suvlasništvo ili etažno vlasništvo) različitih osoba, prema prvoj interpretaciji sva ta zemljišnoknjižna tijela spajaju se u jedno. Na tako spojenom tijelu (nekretnini) stječu pravo suvlasništva svi dosadašnji vlasnici (suvlasnici, etažni vlasnici) samostalnih zgrada, odnosno posebnih dijelova zgrade koji su do spajanja bili samostalna zemljišnoknjižna tijela. Kako nije uočeno da se u sustavu pravnog dualiteta zemljišnoknjižno tijelo podudara s onom površinom zemljišta koje je namijenjeno

---

[84] Provedbenim planom detaljno su se određivali uvjeti i način uređenja prostora u okviru prostornog plana šireg područja, odnosno s odlukom o građevinskom području (čl. 13. Zakona o prostornom planiranju i uređivanju prostora, NN 54/80., 16/86., 18/89., 34/91., 61/91. i 59/93.).

[85] UpSH, Us-465/88 od 26. svibnja 1988., PSP 39, sentenca br. 241.

[86] VSH, U-3082/73 od 2. listopada 1974. (PSP 6/301); UpSH, Us-1707/80 od 16. srpnja 1980., (PSP 18/318); VSH, Gž-500/1981 od 15. prosinca 1981. (PSP 20/44); UpSH, Us-3618/84 od 20. veljače 1985. (PSP 26/359); UpSH, Us-7364/85 od 16. srpnja 1986. (PSP 32/287); UpSH, Us-1467/86 od 23. srpnja 1986. (PSP 32/290); USH, Us-5752 od 18. veljače 1987. (PSP 34/271); UpSH, Us-2325/88 od 28. prosinca 1988. (PSP 41/195); UpSH, Us-1028/81 od 22. travnja 1981. (iz: Žuvela, M., ZOVO, 4. izd., Prilog II.j., br. 168.); Pravno shvaćanje sjednice UpSH od 12. listopada 1982., (iz: Žuvela, M., ZOVO, 4. izd., Prilog II.j., br. 169.).

[87] Zakon o nacionalizaciji najamnih zgrada i građevinskog zemljišta, Sl. list FNRJ 52/58. donijet je, proglašen, objavljen i stupio na snagu 26. prosinca 1958.

[88] Sl.list SFRJ 23/51.

[89] Zakon o izmjenama i dopunama Zakona o prometu zemljišta i zgrada, Sl.list SFRJ 15/65.

za redovnu uporabu zgrade, a ne s katastarskom česticom (česticama), ZV je propisivao načelo spajanja više zgrada koje su postojale kao zasebna zemljišnoknjižna tijela u jedno zemljišnoknjižno tijelo s pripadajućim zemljištem u korist svih vlasnika zgrada kao suvlasnika tako stvorene nekretnine s jednakim suvlasničkim dijelovima (čl. 367. st. 3.). Svaki od bivših vlasnika zgrada koji su takvim upisom postali suvlasnici jedinstvene nekretnine „može putem suda ishoditi utvrđenje veličine suvlasničkih dijelova prema odnosu vrijednosti zgrada u trenutku spajanja u zemljišnoknjižno tijelo" (čl. 367. st. 4.). Time se ne dira u prava koja su do spajanja postojala u korist ili na teret jednog ili drugog zemljišnoknjižnog tijela, nego će se po službenoj dužnosti upisati u korist, odnosno na teret odnosnog suvlasničkog dijela (točnije: njihovog svakodobnog vlasnika). Ako to nije moguće, upisat će se u korist, odnosno na teret spojenog zemljišnoknjižnog tijela, svako s onim prvenstvenim redom koji ima prema vremenu svoga nastanka, odnosno prema provedenom ustupu prvenstva (čl. 367. st. 5.).

Spajanjem zemljišnoknjižnih tijela po samom zakonu uspostavlja se, dakle pravo suvlasništva i protiv volje dosadašnjih vlasnika zgrada, odnosno posebnih dijelova zgrade. Ova zakonska odredba izazivala je ponekad nepremostive poteškoće u praksi. Nije bilo teško zamisliti njene pravne učinke kada se na jednoj ili više katastarskih čestica koje prema prvoj interpretaciji čine jedinstveno zemljišnoknjižno tijelo nađu dviju ili više zgrada s nekoliko desetina ili stotina posebnih dijelova. Vlasnici svih tih posebnih dijelova zgrade postali su po samom zakonu suvlasnici presumptivno s jednakim suvlasničkim dijelovima na tom mamutskom zemljišnoknjižnom tijelu, a veličina njihovih suvlasničkih dijelova mogla se utvrditi samo njihovom suglasnom voljom (desetina ili stotina vlasnika posebnih dijelova). Kada se ne bi postigla apsolutna suglasnost, ovi dijelovi su se mogli utvrditi u sudskom postupku u koji su svi bili uključeni. Stoga su se s vremenom ovi odnosi sve više kompliciral i otežavali pravni promet nekretnina, kao i njihovo opterećenje radi osiguranja potraživanja ili osnivanja prava služnosti ili stvarnih tereta.

Zato je pokrenut postupak pred Ustavnim sudom radi ocjene je li takva zakonska odredba u suglasnosti s Ustavom koji jamči pravo vlasništva i njegovu nepovredivost (čl. 48. st. 1. i čl. 3.).

3.4.2.1. Ukidanje st. 3. i brisanje st. 4. čl. 367. ZV-a

U postupku za ocjenu ustavnosti ukinuta je odredba iz čl. 367. st. 3. ZV-a odlukom Ustavnog suda Republike Hrvatske od 17. studenog 1999.[90] U obrazloženju ove odluke, pored ostalog, se navodi da spajanje zemljišnoknjižnih tijela prema odredbi čl. 367. st. 3. ZV-a može dovesti do promjene obujma prava vlasništva „glede zemljišta, a i same zgrade", koje je uspostavljeno pretvaranjem trajnog prava korištenja u pravo vlasništva, što „nije u suglasju" s ustavnim načelom jamstva i nepovredivosti prava vlasništva. Stoga, „Sud utvrđuje da odredba čl. 367. st. 3. Zakona o vlasništvu, kad pretvara vlasnika stvari u suvlasnika te iste njegove stvari, protiv ili mimo njegove volje i vodi do mogućnosti mijenjanja obima njegova prava glede zemljišta, a i same zgrade, nije u suglasju s odredbom čl. 48. st. 1, odredbom čl. 50. st. 1. Ustava, pa i s odredbom čl. 3. Ustava kojim se kao temeljna vrednota ustavnog poretka utvrđuje nepovredivost vlasništva." Nakon što je Ustavni sud ukinuo odredbu o uspostavljanju prava suvlasništva spajanjem zemljišnoknjižnih tijela Zakonom o izmjenama i dopunama ZV-a je brisana odredba o utvrđenju veličine suvlasničkih dijelova iz čl. 367. st. 4. kao suvišna.[91] Tako se u ustanovi spajanja zemljišnoknjižnih tijela pojavila velika provalija koja se može premostiti samo interpretacijom pojma zemljišnoknjižnog tijela u kontekstu

[90] Odluka UsRH, br. U-I-58/1997. od 17. studenoga 1999., objavljena u NN 137/99.

[91] Vidi čl. 1. st. 1. ZID ZV-a, NN 114/01.

pravnog dualiteta nekretnina, tj. pretvorbom stečenog trajnog prava korištenja u pravo vlasništva. U ovom slučaju (hipotezi) do uknjižbe prava vlasništva samostalne nekretnine, svaka zgrada na građevinskom zemljištu u društvenom vlasništvu je samostalna nekretnina pravno odvojena od zemljišta. Upis prava vlasništva na nekretninu koja se sastoji od zemljišta i zgrade ne može se tražiti prije oblikovanja građevinske čestice za svaku samostalnu zgradu, jer se pravo vlasništva može uknjižiti samo na određenoj stvari (nekretnini), prostorno ograničenoj, na građevinskoj čestici. Time je potvrđena teza da zemljišnoknjižno tijelo po prijelaznim odredbama ZV-a (čl. 367. i dalje) čini samo ona površina zemljišta koju pokriva zgrada i ona koja je potrebna za njenu redovnu uporabu. Samo na tu površinu zemljišta po ZOVO-u se prostiralo pravo korištenja vlasnika zgrade izgrađene u skladu sa zakonom (čl. 12. st. 1.), [92] a to pravo se po zakonu pretvorilo u pravo vlasništva (8. listopada 1991.) [93]. Vlasnik zgrade ne može steći pravo vlasništva na onu površinu na koju nije imao pravo korištenja, kao vlasnik zgrade odnosno nositelj prava raspolaganja na zgradu u društvenom vlasništvu, jer se pretvorbom iz ne-prava ne može steći pravo[94]. Na tu površinu zemljišta, vlasnik zgrade mogao je imati pravo korištenja po drugom osnovu, na primjer kao bivši vlasnik podruštvovljenog zemljišta (privremeno pravo korištenja) koje je predmet denacionalizacije (čl. 15. t. 1. Zakona o naknadi…) ili je na nju imala pravo korištenja treća osoba, odnosno općina pravo raspolaganja (čl.25. i dr. ZGZ-a). Zakonodavac koji se opredijelio za pretvaranje trajnog prava korištenja u pravo vlasništva noveliranjem ZOVO-a i Zakonom o vlasništvu nije mogao propisati pravnu osnovu oduzimanja trećoj osobi prava korištenja koje se pretvara u pravo vlasništva na neizgrađenom građevinskom zemljištu i ‘’davati’’ vlasniku zgrade onu površnu zemljišta koja nije potrebna za redovnu uporabu zgrade na koju on nije imao pravo korištenja. Takva odredba bila bi protivna Ustavu Republike Hrvatske koji jamči pravo vlasništva i njegovu nepovredivost (čl. 48. st. 1. i čl. 3.)[95] i stoga i pravo na restituciju prava vlasništva, osim kada bi se restitucijom vrijeđalo stečeno pravo ili kada je zakon isključuje u javnom interesu [96]. Pravo vlasništva prema Ustavu RH može se po zakonu oduzeti i to uz naknadu tržišne vrijednosti, samo u interesu Republike Hrvatske (čl. 50. st. 1.). U tom slučaju Zakon o vlasništvu koji jamči stečena vlasnička i druga stvarna prava (čl. 398. st. 1.) proturiječio bi samom sebi, a bio bi u sukobu s pravilom djelovanja zakona u vremenu (čl. 388. st. 2.).

Prema suprotnoj interpretaciji zemljišnoknjižnog tijela, kao da zakon nije odredio njegov opseg prije ZV-a, nekretnini se priključuje površina zemljišta izvana granica unutar kojih se prostiralo trajno pravo korištenja vlasnika zgrade, odnosno nositelja prava raspolaganja pa i u slučaju da zemljište izvan tih granica ni po kojem osnovu nije pripadalo vlasniku zgrade, odnosno nositelju prava raspolaganja na zgradu u društvenom vlasništvu.

3.4.3. Zgrada na jednoj ili više katastarskih čestica

Pod pretpostavkom da postoji zgrada (samostalno zemljišnoknjižno tijelo) na jednoj ili više katastarskih čestica koje sve zajedno čine drugo zemljišnoknjižno tijelo, spajanjem tih dvaju zemljišnoknjižnih tijela mogu nastati različite pravne posljedice, npr.: da vlasnik

---

[92] Ranije čl. 37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta i čl. 6. st. 2. ZPZZ-a.

[93] Čl. 9. ZOVO-a.

[94] *Ex nihilo nihil fit*, Sec. Lucretius – 1,155.

[95] Ustavni pojam prava vlasništva obuhvaća sva stvarna prava pa i prava na nekretninama u društvenom vlasništvu koja se pretvaraju u pravo vlasništva.

[96] Simonetti, P., Denacionalizacija, str. 24. – 34.

(suvlasnici) zgrade, odnosno vlasnici posebnih dijelova zgrade, steknu pravo vlasništva (suvlasništva) i na dijelu zemljišta koje ne služi za redovnu uporabu te zgrade, a služi za redovnu uporabu susjedne zgrade, iako ni oni ni njihovi preci nisu bili vlasnici (suvlasnici) toga zemljišta do prisilnog prijenosa u društveno vlasništvo[97] niti su na njemu nakon podruštvovljenja stekli neko drugo pravo koje bi se pretvorilo u pravo vlasništva.

Unatoč tomu, što s jedne strane postoji „višak" zemljišta koje nije potrebno za redovnu uporabu zgrade, moguće je da se jedna ili dvije strane zgrade nalaze na samoj međi katastarske čestice (čestica) pa vlasnik (suvlasnik) zgrade ili posebnog dijela zgrade ne stječe pravo vlasništva (suvlasništva) na zemljište koje po uvjetima („dokumentima") prostornog uređenja služi za redovnu uporabu te zgrade. Ovo zbog toga što se ta zemljišna čestica ne nalazi u zemljišnoknjižnom tijelu čestice na kojoj je zgrada pa je na nju stekao pravo vlasništva vlasnik susjedne zgrade ili netko drugi. U tom bi slučaju vlasnik zgrade morao tražiti osnivanje prava služnosti prolaza preko tuđeg zemljišta za pristup zgradi (hipoteza da se zemljište koje je pripalo drugome spajanjem zemljišnoknjižnih tijela po drugoj osnovi proteže, s jedne strane do ulaza u zgradu, a s druge do javne površine pa i kad to zemljište ne služi za redovnu uporabu susjedne zgrade).

3.4.4. Zgrada na katastarskoj čestici manjoj od hipotetičke građevinske čestice

Napokon, moguće je da je površina katastarske čestice na kojoj se nalazi zgrada znatno manja od potencijalne građevinske čestice pa će vlasnik nekretnine, nastale spajanjem zemljišta i zgrade, kako bi stekao vlasništvo na potrebnoj površini zemljišta (zaokruženje građevinske čestice), biti prisiljen otkupljivati zemljište po visokoj cijeni od susjeda koji je stekao pravo vlasništva na taj „višak" zemljišta besplatno, iako je na tome zemljištu imao trajno pravo korištenja kupac, a ne prodavatelj koji je na njemu stekao pravo vlasništva spajanjem zgrade sa zemljišnoknjižnim tijelom koje se sastoji od jedne ili više katastarskih čestica upisanih u istom zemljišnoknjižnom ulošku. Ovaj se paradoks može izbjeći samo ako se zemljišnoknjižno tijelo, nastalo u sustavu pravnog dualiteta identificira s onom površinom zemljišta na koju se prostiralo trajno pravo korištenja vlasnika zgrade, odnosno nositelja prava raspolaganja. Uostalom, samo se trajno pravo korištenja moglo pretvoriti u pravo vlasništva u slučaju spajanja zemljišnoknjižnih tijela.

3.5. Utvrđenje oblika i površine građevinske čestice koja se spaja sa zgradom

Suočen s gornjim kontroverzama, koje se javljaju u slučaju spajanja zemljišnoknjižnih tijela ugovorom o kupovini stanova, na kojima je postojalo stanarsko pravo, da bi otklonio dvojbene interpretacije pojma zemljišnoknjižno tijelo zakonodavac je propisao:

„Pravo vlasništva na stan kupac stječe upisom u zemljišne knjige nakon što se provede postupak u kojem će se prema posebnom propisu[98] utvrditi oblik i veličina građevne čestice nužne za redovnu uporabu zgrade, ako taj postupak već ranije nije proveden" (čl. 4. ZID ZPS-a).[99]

---

[97] U kom slučaju bi bili ovlašteni tražiti restituciju ili naknadu po odredbama čl. 16.-19. ZN-a, NN 92/96. Šire: Simonetti, P., Naknada za oduzetu imovinu, ZPFR, vol. 18, br. 1, 1997.; isti: Denacionalizacija…, op. cit.; Bagić, S., Denacionalizacija…, op. cit., str. 238.-246.

[98] Posebni propis je Zakon o izmjenama i dopunama Zakona o prostornom uređenju, NN 68/98. Šire P. Simonetti, P., Pravno jedinstvo nekretnine i njezinih posebnih dijelova, Pravo u gospodarstvu, br. 4, 1998., str. 676.-679.

[99] Zakon o izmjenama i dopunama Zakona o prodaji stanova, NN 68/98.

Time je, dakle Zakon nedvosmisleno potvrdio da je zemljišnoknjižno tijelo ona površina zemljišta na kojoj je zgrada i koja služi za redovnu uporabu zgrade na koju se prema dotadašnjim propisima protezalo trajno pravo korištenja koje se *ex lege* pretvara u pravo vlasništva vlasnika zgrade. Odluka nadležnog tijela o utvrđenju ove površine zemljišta ima deklarativan karakter, jer se zasniva na kriterijima koji su utvrđeni zakonom. Na temelju te odluke kada stekne svojstvo ovršnosti provodi se uknjižba prava vlasništva (suvlasništva) nekretnine sastavljene od zemljišta i zgrade. Ako je nekretnina objekt suvlasništva uz gornju odluku za uknjižbu traži se i sporazum suvlasnika o veličini suvlasničkih dijelova sačinjen u obliku koji je zakonom propisan za tabularnu ispravu ili ako izostane takav sporazum, tabularnu ispravu zamjenjuje pravomoćna i ovršna odluka suda o veličini suvlasničkih dijelova svih suvlasnika. Budući da je objekt prava vlasništva (suvlasništva) određena stvar (*res certa*), odnosno u ovom slučaju određena površina zemljišta do uknjižbe prava vlasništva odnosno prava suvlasništva na nekretninu i prava vlasništva na posebni dio nekretnine u zemljišnoj knjizi zadržava se pravni dualitet zemljišta i zgrade, iako je izvanknjižno po samom zakonu uspostavljeno pravno jedinstvo u vremenu od 8.10.1991. do 1.1.1997., odnosno 1.1.1997. ako je zgrada etažirana, a nakon 1.1.1997. uspostavljanjem prava vlasništva na zgradu na nekretninama iz čl. 390. ZV-a. Kako je pravo vlasništva posebnog dijela nekretnine nedjeljivo povezano s odgovarajućim suvlasničkim dijelom nekretnine (čl. 69. ZV-a) to pravo se ne može upisati u zemljišne knjige prije nego što se pravomoćnom odlukom nadležnog tijela (koja ima deklaratoran značaj) utvrdi „oblik i veličina građevinske čestice nužne za redovnu upotrebu zemljišta“ (čl. 4. ZID ZPS). Ovo pravilo ima univerzalan značaj jer proizlazi iz načelne zakonske odredbe prema kojoj se trajno pravo korištenja koje se pretvara u pravo vlasništva proteže na onu površinu zemljišta koja je potrebna za redovnu uporabu zgrade.[100] Pravnici koji u ovoj odredbi vide iznimku od pravila, a ne kazuistički izraz načela, nailaze na nepremostive poteškoće u interpretaciji pravila o spajanju zemljišnoknjižnih tijela. [101] Pravilo prema kome se pravo korištenja proteže na zemljište koje pokriva zgrada ‘’i zemljište koje služi za redovnu upotrebu te zgrade’’ prije ZOVO-a bilo je propisano i Zakonom o nacionalizaciji najamnih zgrada i građevinskog zemljišta (čl. 36. st. 2. i 37.) od 26. prosinca 1958. [102] Prema tomu, površina zemljišta koja se spaja sa zgradom je zemljišnoknjižno tijelo koje se konstituiralo po samom zakonu, izvanknjižno, u sustavu pravnog dualiteta zemljišta i zgrade pa se ne mora podudarati s površinom zemljišta upisanog u zemljišnoj knjizi i često se ne podudara.

---

[100] Čl. 12. st. 1. ZOVO-a.

[101] Tako Danica Damjanović, nakon što je zaključila da je pravilo o spajanju zemljišnoknjižnih tijela izmijenjeno ZID-om Zakona o prodaji stanova zaključuje: „Međutim, ostaje otvoreno pitanje na koji način će se utvrditi veličina zemljišne čestice ako u istoj zgradi postoje stanovi na kojima je vlasništvo stečeno temeljem Zakona o prodaji stanova na kojima postoji stanarsko pravo i stanovi na kojima je vlasništvo stečeno po drugoj osnovi“.; Pretvorba društvenog vlasništva prema Zakonu o vlasništvu i drugim stvarnim pravima s osvrtom na odredbe drugih zakona kojima je izvršena pretvorba prava vlasništva, u: Nekretnine u pravnom prometu, Zagreb, prosinac 2001., str. 65.

[102] U suštini to pravilo bilo je određeno čl. 6. st. 2. ZOVO-a prema kojem „otuđenjem zgrade koja je u društvenom vlasništvu na prenosi se vlasništvo na zemljištu na kojem se zgrada nalazi, ali stjecatelj zgrade stječe trajno pravo korištenja na tom zemljištu dok zgrada postoji na njemu.” Jasno je da je riječ, ne samo o zemljištu koje pokriva zgrada, nego i o onome zemljištu koje je potrebno za njenu redovnu uporabu.

3.6. Pretpostavke za utvrđivanje oblika i površine građevne čestice po sadašnjem zakonu

Zakon o prostornom planiranju… prestao je važiti 23. travnja 1994., kada je stupio na snagu ZPU,[103], [104] koji je izmijenjen i dopunjen 20. svibnja 1998.[105] Prema ZID ZPU parcelacija građevinskog zemljišta u svrhu osnivanja građevne čestice provodi se u skladu s lokacijskom dozvolom[106], ako se predviđaju zahvati u prostoru (čl. 35. st. 1.), odnosno detaljnim planom uređenja.

Raniji provedbeni urbanistički planovi koji su na snazi, a doneseni su prije Zakona o prostornom uređenju, smatraju se detaljnim planovima uređenja iz čl. 9. ZID ZPU-a (čl. 54. ZID ZPU-a).

Ukoliko za već izgrađenu zgradu nije utvrđena građevna čestica, nadležno tijelo utvrđuje površinu zemljišta koje je nužno za redovnu uporabu te zgrade. Oblik i veličinu te građevne čestice određuje županijski ured, odnosno gradski ured Grada Zagreba, nadležan za poslove prostornog uređenja (čl. 36. st. 2. ZID ZPU-a).

Pravo vlasništva nekretnine kada nije oblikovana građevinska čestica proteže se na onu površinu zemljišta koju utvrđuje nadležno tijelo iz čl. 35. ZPU-a kao građevnu česticu u skladu s detaljnim planom uređenja, odnosno lokacijskom dozvolom.[107], [108] Samo na izgrađenoj građevnoj čestici u društvenom vlasništvu postojalo je pravo korištenja (trajno pravo korištenja) koje se pretvaralo u pravo vlasništva vlasnika zgrade na osnovu novele ZOVO-a,[109] odnosno neposrednim spajanjem zemljišnoknjižnih tijela kada je oblikovana građevna čestica u skladu s odredbama o uspostavi pravnog jedinstva nekretnine iz ZV-a. Ovo vrijedi i za pravo korištenja na izgrađenoj građevinskoj čestici čiji su oblik i površina utvrđeni nakon stupanja na snagu ZV-a i gornje novele ZPU-a. Vlasnik zgrade ne može spajanjem zemljišnoknjižnih tijela steći pravo vlasništva na zemljištu preko granica građevinske čestice koje se utvrđuju po propisanim zakonskim kriterijima parcelacije izgrađenog zemljišta. Ima li vlasnik zgrade na preostaloj, neizgrađenoj površini zemljišta drugo pravo koje se pretvara u pravo vlasništva (npr. pravo upravljanja, pravo korištenja, ili raspolaganja društvene pravne osobe), ili pravo restitucije prava vlasništva (npr. prijašnji vlasnik ili njegov pravni sljednik), ili izvanknjižno vlasništvo stečeno po valjanoj pravnoj osnovi, ili pravnu osnovu za stjecanje prava vlasništva uknjižbom u zemljišnu knjigu, u slučaju spora utvrđuje redovni sud u parničnom postupku (čl. 1. i 187. Zakona o parničnom postupku i čl. 365. st. 6. ZV-a).

3.7. Osporavanje pravila o utvrđenju oblika i površine građevne čestice koja se spaja sa zgradom

Po shvaćanju onih pravnika koji smatraju da je vlasnik (suvlasnik) zgrade, odnosno posebnog dijela zgrade, stekao pravo vlasništva (suvlasništva) spajanjem zemljišnoknjižnih tijela i na onoj površini zemljišta koje se nalazi izvan granica naknadno oblikovane građevin-

---

[103] Zakon o prostornom uređenju, NN 30/94.

[104] Čl. 62. ZPU-a.

[105] ZID ZPU, objavljen je u NN 68/98., a stupio je na snagu 20. svibnja 1998. (čl. 61. ZID ZPU).

[106] Andrijašević-Rac, S., Lokacijska dozvola, Informator, br. 4257-4260; o lokacijskoj dozvoli i u: Informator god. XXXIX., 4923, 2001., god. XXXIX., 4929, 2001. i god. XXXIX., 4930, 2001.

[107] Čl. 27. i čl. 28., čl. 34.-40. ZID ZPU (vidjeti i izmjene Glave IV., koja postaje Glava V.).

[108] Golubović-Munjaković, Lj., Oblikovanje građevinske parcele i utvrđivanje zemljišta potrebnog za redovnu upotrebu zgrade, Informator, god XLIV, br. 4408, Zagreb, 1996.; Bienefeld, J., Položaj stranaka u postupku izdavanja lokacijske dozvole, Informator (Male stranice), br. 4730-4731.

[109] Čl. 9. ZP ZOVO-a.

ske čestice gornja novela ZPS-a protivna je Ustavu Republike Hrvatske koji jamči pravo vlasništva i njegovu nepovredivost (čl. 48. st. 1. i čl. 3).[110] Neki pravnici to nazivaju novom nacionalizacijom. Po njihovom shvaćanju pod pretpostavkom da postoji razlog za izvlaštenje tog dijela zemljišta (interes Republike Hrvatske), izvlaštenik bi imao pravo na naknadu u visini tržišne vrijednosti koju mu jamči Ustav (čl. 50. st. 1). iako nije ništa platio za dio zemljišta na kome nije imao trajno pravo korištenja niti je po zakonu bio dužan platiti naknadu za zemljište na koje je stekao pravo vlasništva otkupom stana[111] ili po drugom pravnom osnovu. Naknada se utvrđuje po pravilima propisanim Zakonom o izvlaštenju (čl. 32.-42.).[112]

Tako će imati pravo na naknadu po tržišnoj cijeni, u slučaju izvlaštenja, npr. i nositelj stanarskog prava u zgradi s jednim stanom (vila) koji je ugovorom o kupovini stana stekao pravo vlasništva nekretnine (zemljišta i zgrade) za cijenu stana koja je i deset puta manja od tržišne cijene ove zgrade, a time je stekao i pravo vlasništva na atraktivno zemljište koje znatno nadmašuje površinu potencijalne građevinske čestice bez ikakve naknade.[113]

3.8. Zakonske pretpostavke za oblikovanje građevinske čestice koja se spaja sa zgradom

Pobornici gornjeg shvaćanja, prema tomu osporavaju ustavnost odredbe iz čl. 4. ZID ZPS-a. Njihov zaključak, međutim zasniva se na neodrživoj interpretaciji: da se spajanjem zemljišnoknjižnih tijela stječe pravo vlasništva i na onoj površini zemljišta koja nije potrebna za redovnu uporabu zgrade, na kojoj vlasnik zgrade nije imao niti je mogao imati trajno pravo korištenja (čl. 12. st. 1. ZOVO-a). Pozivajući se na pravilo zemljišnoknjižnog prava po kome zemljišnoknjižno tijelo čini cijela katastarska čestica (ili više katastarskih čestica upisanih u isti zemljišnoknjižni uložak) i sve što je s njom trajno spojeno, oni ignoriraju prisilne propise koji su propisivali da se pravo korištenja (trajno pravo korištenja) vlasnika zgrade na građevinskom zemljištu u društvenom vlasništvu proteže na građevinsku česticu. Odnosno, kada ta čestica nije oblikovana, samo na onu površinu zemljišta koju pokriva zgrada i koja je potrebna za njenu redovnu uporabu; oni smatraju protuustavnim sadašnje propise o određivanju površine i oblikovanju građevinske čestice (uvjeti, „dokumenti" prostornog uređenja) i o njenom konstituiranju po samom zakonu.[114] Ovo gledište ignorira pravila o stjecanju traj-

---

[110] Gavella, N., Josipović, T, op. cit., str. 14. Raspravljajući o spajanju zgrade i zemljišta, kao samostalnih zemljišnoknjižnih tijela, oni ističu: Mislimo pri tom na cijelu katastarsku česticu na kojoj je zgrada izgrađena, jer prema načelu jedinstvenosti nekretnine „pojedinačnu nekretninu čini zemljišna čestica uključujući sve što je s njom razmjerno trajno povezano na njezinoj površini ili ispod nje…" (čl. 9. st. 1. ZV-a). Vidjeti dvojbe kod Crnić, J., Žuvela, M., Pretvorba, privatizacija, denacionalizacija – pravni status neobuhvaćenih odnosno neprocijenjenih nekretnina, Informator, god. XXXIX., br. 4910-4911 od 28. i 31. ožujka 2001., str. 3.

[111] Čl. 12. ZID ZPS, NN 68/98., kojim je ukinut čl. 371. ZV-a i čl. 225. ZZK-a.

[112] Zakon o izvlaštenju (u daljnjem tekstu: ZI), NN 9/94., 112/00. i 114/01.

[113] Kupci stanova bili su zakonom oslobođeni obveze plaćanja naknade za zemljište, a ukoliko su platili tu naknadu u cjelini ili u dijelu, imali su pravo tražiti restituciju [čl. 11. i 14. ZID Zakona o prodaji stanova (u daljnjem tekstu: ZPS), NN 68/98.], kojim su ukinute odredbe čl. 371. ZV-a i čl. 225. Zakona o zemljišnim knjigama (NN 91/96.) prema kojima je plaćanje naknade za zemljište koja nije bila uračunata u cijenu stana bila pretpostavka za stjecanje prava vlasništva na nekretnini nastaloj spajanjem zemljišnoknjižnih tijela – zemljišta i zgrade ili pretvorbom trajnog prava korištenja u pravo vlasništva.

[114] Čl. 36. st. 2. i čl. 37. Zakona o nacionalizaciji… Čl. 12. st. 1. ZOVO-a. O objektu trajnog prava korištenja, promjeni oblika i površine građevinske čestice i njenoj nedjeljivosti šire: Simonetti, P., Pravo korištenja…, op. cit., str. 194.-196. i 199. i tamo navedeni pravni izvori i sudska praksa (iscrpno).

nog prava korištenja koja su bila na snazi kada je to pravo stečeno (suprotno načelu iz čl. 388. st. 2. ZV-a),[115] a upravo ono se pretvara u pravo vlasništva. Ustaljena sudska praksa potvrđuje da oblik i površinu građevinske čestice nisu mogli određivati ni mijenjati svojom slobodnom dispozicijom nositelji prava korištenja na građevinskom zemljištu u društvenom vlasništvu.[116] Naprotiv, površinu i oblik građevinske čestice kao i promjenu oblika i površine utvrđivalo je nadležno tijelo u skladu s provedbenim planom, odnosno drugim općim aktom prostornog uređenja ili propisanim uvjetima o površini i oblikovanju građevinskih čestica.[117] Prema tomu, građevinska čestica se bitno razlikuje od katastarske čestice čiji oblik i površinu mogu mijenjati vlasnici svojom slobodnom dispozicijom. ZZK koji propisujući opće pravilo identificira katastarsku česticu ili više katastarskih čestica sa zemljišnoknjižnim tijelom (čl. 19.), nema u vidu konstituiranje građevinske čestice na građevinskom zemljištu u društvenom vlasništvu po samom zakonu odnosno po drugom općem aktu prostornog uređenja u skladu sa zakonom po pravilima koja su važila prije njegova stupanja na snagu. ZZK propisuje da se zemljišnoknjižno tijelo može sastojati od jedne ili više katastarskih čestica koje se nalaze u istoj katastarskoj općini. Slično tomu i ZV određuje da pojedinačnu nekretninu čini zemljišna čestica (dakle, katastarska ili građevinska), ali da „više zemljišnih čestica upisanih u zemljišnoj knjizi u isti zemljišnoknjižni uložak, kao jedno zemljišnoknjižno tijelo čini jednu nekretninu“ (čl. 9. st. 1.). Pojedinačna nekretnina (zemljišnoknjižno tijelo), dakle bitno se razlikuje od građevinske čestice.[118] Površina zemljišta koje se spaja sa zgradom utvrđuje se odgovarajućim prostornim planom, odnosno po zakonskim pretpostavkama na temelju kojih nadležno tijelo utvrđuje oblik i veličinu građevinske čestice…(čl. 4. ZID ZPU).

3.9. Naknada za izvlaštenje preostalog dijela zemljišta

Vlasnik nekretnine koji je na preostalom dijelu zemljišta izvan granica novooblikovane građevinske čestice, dakle na neizgrađenom građevinskom zemljištu, stekao pravo vlasništva po drugoj pravnoj osnovi (čl. 359.-365. ZV-a) ili ako mu je pravo vlasništva vraćeno kao prijašnjem vlasniku - ovlašteniku prava na naknadu po Zakonu o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine (čl. 9., 16.-19.),[119], [120] u slučaju izvlašte-

---

[115] O teoriji stečenih prava, Perović, S., Ogled o stečenim pravima, Pravni život, Beograd, god. XXXIII., br. 1, 1984., isti: Pravda i stečena prava, u knjizi, Pravno filozofske rasprave, Beograd, 1995.

[116] Vidi sudsku praksu: VSH, U-3082/73. od 2. listopada 1974. (PSP 6/301); UpSH, Us-1707/80. od 16. srpnja 1980. (PSP 18/318); VSH, Gž-500/81. od 15. prosinca 1981. (PSP 20/44); UpSH, Us-3618/84. od 20. veljače 1985. (PSP 26/359), UpSH, Us-7364/85. od 16. srpnja 1986. (PSP 32/287); UpSH, Us-1467/86. od 23. srpnja 1986. (PSP 32/290), UpSH, Us-5752/86 od 18. veljače 1987. (PSP 34/271); UpSH, Us-2325/88 od 28. prosinca 1988. (41/195); UpSH, Us-1028/81 od 22. travnja 1981. (iz: Žuvela, M., ZOVO, 4. izd., Prilog II.j., sentenca br. 168); Pravno shvaćanje sjednice UpSH od 12. listopada 1982. (iz Žuvela, M., ZOVO, IV izd., Prilog II.j., sentenca br. 169).

[117] Vidi sudsku praksu: USH, Us-6837/85 od 5. lipnja 1986. (PSP 32/289); USH, Us-5792/88 od 15. veljače 1989. (PSP 42/176); VSH, Rev-794/88 od 8. studenoga 1988. (PSP 44/178); UpSH, Us-4520/86 od 10. prosinca 1986., (iz: Žuvela, M., ZOVO, IV izd., Prilog II.j., sentenca br. 192); UpSH, Us-5752/86 od 18. veljače 1987. (PSP 34/271); UpSH, Us-5141/85 od 27. ožujka 1986. (PSP 32/291).

[118] „Ukoliko na dan prijenosa građevinskog zemljišta u društveno vlasništvo nije bilo određeno koje zemljište prijašnjeg vlasnika odnosno korisnika služi redovnoj upotrebi zgrade, općinski organ uprave nadležan za imovinsko-pravne poslove na zahtjev zainteresirane osobe ili po službenoj dužnosti utvrdit će rješenjem koje zemljište služi redovnoj upotrebi zgrade u skladu s uvjetima uređenja prostora utvrđenim na način propisan posebnim zakonom.“ čl. 40 st. 3. ZGZ-a.

[119] NN 92/96., 33/99., 39/99. i 92/99., Ustavni sud: NN 42/99., 43/00., 131/00., 27/01., 34/01., 65/01.

[120] Simonetti, P., Naknada…, op. cit.; isti, Denacionalizacija..., op. cit.

nja toga zemljišta u interesu Republike Hrvatske imao bi pravo na naknadu za oduzeto zemljište, po odredbama Zakona o izvlaštenju (čl. 32.-42.). Sve ovo vrijedi i za vlasnike posebnih dijelova nekretnine (stanova) koji su po drugoj pravnoj osnovi stekli pravo vlasništva na preostalom dijelu zemljišta izvan granica oblikovane građevinske čestice. Pravo na naknadu za oduzeto zemljište imaju i oni vlasnici (suvlasnici) kojima se naknadno smanjuje već oblikovana građevinska čestica u skladu s „dokumentima prostornog uređenja".[121]

ZID ZPS (čl. 4.), naime ne isključuje vlasnikovo pravo na naknadu za oduzeto zemljište, niti bi ga mogao isključiti, jer bi takva odredba bila suprotna Ustavu RH koji propisuje da se vlasništvo može oduzeti po zakonu samo u interesu Republike Hrvatske i to uz naknadu tržišne vrijednosti (čl. 50. st. 1.). Prema čl. 10. Zakona o izvlaštenju olakšano je donošenje odluke za izvlaštenje prava vlasništva na građevinskom području koje obuhvaća provedbeni urbanistički plan (sada: detaljni plan uređenja, čl. 54. ZID ZPU-a). Smatra se da se ova odredba odnosi i na druge planove prostornog uređenja jer svi prostorni planovi moraju biti usuglašeni, ne samo međusobno, nego i sa strategijom i Programom prostornog uređenja Države (čl. 13. toč. 2. i čl. 30., odnosno 22. ZID ZPU-a), a strategiju i Program prostornog uređenja Države, koji se objavljuje u „Narodnim novinama", donosi Hrvatski sabor (čl. 17. st. 1. i st. 4.) po zakonskoj proceduri. S druge strane, u slučaju međusobne neusklađenosti dokumenata prostornog uređenja užeg područja s dokumentom prostornog uređenja šireg područja lokacijska se dozvola izdaje na temelju dokumenata prostornog uređenja šireg područja (čl. 26. st. 2. ZID ZPU-a), a lokacijskom dozvolom utvrđuje se „oblik i veličina građevinske čestice…" (čl. 28. st. 1. al. 1. ZID ZPU-a).

3.10. Vlasništvo Republike Hrvatske na neizgrađenom građevinskom zemljištu

U slučaju isključenja restitucije prava vlasništva na neizgrađeno građevinsko zemljište pravo vlasništva stječe Republika Hrvatska ako zakonom nije drukčije propisano (čl. 77.; čl. 52.-55. ZN-a). Odredbama iz čl. 52. do 55. Zakona o naknadi propisano je odstupanje od načela iz čl. 77. prema kome Republika Hrvatska stječe pravo vlasništva na „imovini" (posebno na nekretninama) koja je predmet naknade „glede kojih zahtjev nije podnesen ili je pravomoćno odbijen, ako zakonom nije drukčije propisano". Zakon nije izričito odstupio od gornjeg načela u odnosu na neizgrađeno građevinsko zemljište.

Predmnijevani vlasnik neizgrađenog građevinskog zemljišta nije, dakle jedinica lokalne samouprave (općina ili grad) koja po Ustavu Republike Hrvatske odlučuje „osobito o uređivanju prostora i urbanističkom planiranju, uređivanju naselja i stanovanja, o komunalnim djelatnostima…" (čl. 128. st. 2.).

Apsurdno je da je Republika Hrvatska predmnijevani vlasnik neizgrađenog građevinskog zemljišta i da njime raspolaže po svom nahođenju prisvajajući gradsku rentu u pravnom prometu, bez ikakve obveze ulaganja u gradsku infrastrukturu, čime se bitno smanjuju prihodi općina i gradova, odnosno trgovačkih društava i javnih poduzeća koje osniva lokalna samouprava radi obavljanja komunalnih djelatnosti, održavanja i izgradnje komunalne infrastrukture.[122]

---

[121] VSH, U-3082/73 od 2. listopada 1974. (PSP 6/301); UpSH, Us-1707/80 od 16. srpnja 1980. (PSP 18/318); VSH, Gž-500/81 od 15. prosinca 1981. (PSP 20/44); UpSH, Us-6077/87 od 24. studenoga 1988. (PSP 41/198).

[122] Čl. 3. i 4. ZKG.

S obzirom na to da se po interpretativnom pravilu iznimke usko tumače [123] bez obzira na gornje argumente teško je izvoditi zaključak da je vlasnik neizgrađenog građevinskog zemljišta koje je bilo u društvenom vlasništvu - jedinica lokalne samouprave ako zahtjev za naknadu nije podnesen ili je pravomoćno odbijen.

Iznimka ipak postoji u pogledu neizgrađenog građevinskog zemljišta koje je bilo zakonito deposedirano ili dobrovoljno prenijeto u posjed općini na kome nije stekla pravo vlasništva druga osoba iako je privedeno namjeni. Tako se, naime može shvatiti završetak odredbe iz čl. 77. ZV-a koji glasi: „ako zakonom nije drukčije propisano“ *(supra)*.

4. Zemljišnoknjižno sjedinjenje zemljišta i zgrade

4.1. Općenito

Zemljišnoknjižno sjedinjenje zemljišta i zgrade, po pravilu, dolazi nakon izvanknjižnog sjedinjenja te dvije nekretnine koje se uspostavlja po samom zakonu. Iznimka su zgrade u etažnom vlasništvu – do 1. siječnja 1997. koje se sjedinjuju s pripadajućim zemljištem po prestanku važenja Zakona o vlasništvu na dijelovima zgrada (čl.394.st.1.al.2. ZV-a) pa ima deklarativan značaj, a uspostavlja se prema prijelaznim odredbama Zakona o vlasništvu upisom u zemljišne knjige. Ako nekretnina nije upisana u zemljišnoj knjizi pravo vlasništva se stječe polaganjem kod nadležnog općinskog suda isprave „kojom dosadašnji vlasnik dopušta uknjižbu tuđeg vlasništva“. U tom slučaju se na „odgovarajući način primjenjuju pravila o stjecanju uknjižbom“ (čl.120.st.4. ZV-a). Isto vrijedi za stjecanje prava predbilježbom (čl.121.st.5. ZV-a). Pravila o stjecanju prava vlasništva i prava služnosti upisom u knjigu položenih ugovora nalaze se u prijelaznim odredbama ZSP RS (čl.327.st.4., 332.st.4. i 334. st.4. i 5.).

4.2. Zemljišnoknjižno sjedinjenje zemljišta i upisane zgrade

Pod pretpostavkom da je 1. siječnja 1997. u zemljišnoj knjizi bila upisana zgrada u „nečijem vlasništvu”, kao zemljišnoknjižno tijelo zasebno od zemljišta na kojem je izgrađena, „vlasnik zgrade steći će pravo vlasništva cijele nekretnine spajanjem svih tih zemljišnoknjižnih tijela u jedno uz upis prava vlasništva na spojenom tijelu u korist vlasnika zgrade“ (čl. 367. st. 1.). U slučaju kada je pravo vlasništva na zemljištu i zgradi stekao vlasnik zgrade po samom zakonu, izvanknjižno, prije stupanja na snagu Zakona o vlasništvu (1. siječnja 1997.) pravo vlasništva iz čl. 367. st. 1. ima značenje ‘’zemljišnoknjižno vlasništvo’’. Spajanje zemljišnoknjižnih tijela odredit će nadležni sud po zahtjevu vlasnika zgrade. U tom slučaju se pravo vlasništva na spojenom tijelu (nekretnini) upisuje u korist vlasnika postojeće zgrade *ex lege*. Upis u zemljišnu knjigu ima deklarativno značenje jer od 1. siječnja 1997. važi zakonsko načelo pravnog jedinstva nekretnine (*supra*), osim iznimaka određenih zakonom (čl.366.st.1. ZV-a).

Ukoliko je pravo vlasništva na zgradu, a slijedom toga i na zemljište, stečeno individualnim aktom, npr. u postupku pretvorbe društvenog poduzeća (čl.390.ZV-a), podnositelj zahtjeva za uknjižbu položit će odgovarajuće isprave o stjecanju prava vlasništva na zemljište i zgradu u skladu s prijelaznim odredbama Zakona o vlasništvu (čl.359.-365.).

---

[123] Blagojević, T. B., Tumačenje izuzetaka, Arhiv za pravne i društvene nauke, god. XXV., br. 5–6, 1939. (Beograd), str. 471.–475.

4.3. Zemljišnoknjižno sjedinjenje zemljišta i neupisane zgrade

Pod pretpostavkom da je 1. siječnja 1997. postojala zgrada „u nečijem vlasništvu" na zemljištu u društvenom vlasništvu, ali nije bila upisana u zemljišnu knjigu, iako je zemljište upisano, vlasnik zgrade stječe zemljišnoknjižno vlasništvo „na zemljišnoj čestici", točnije: na oblikovanoj građevinskoj čestici[124] na kojoj je izgrađena zgrada upisom zgrade uz uknjižbu prava vlasništva na cijelom zemljišnoknjižnom tijelu (čl. 368. st. 1.). Riječ je o trajnoj zgradi koja je izgrađena u skladu sa zakonom ili je njena izgradnja naknadno legalizirana pravomoćnim rješenjem nadležnog tijela (čl. 71. ZGZ-a),[125] jer se samo takva zgrada mogla upisati u zemljišnu knjigu.[126]

Samo vlasnik trajne zgrade izgrađene u skladu sa zakonom mogao je imati trajno pravo korištenja na građevinskoj čestici, odnosno na zemljištu koje pokriva zgrada i koje služi njenoj redovnoj uporabi (čl. 12. st. 1. ZOVO-a) [127]. Trajno pravo korištenja koje je pripadalo vlasniku trajne zgrade, izgrađene u skladu sa zakonom, od 8. listopada 1991. pretvaralo se u pravo vlasništva stjecanjem prava vlasništva na zgradu u društvenom vlasništvu, pretvorbom prava na zgradi u društvenom vlasništvu u pravo vlasništva na zgradu ili prijenosom zgrade, odnosno posebnih dijelova zgrade u privatno vlasništvo po drugoj pravnoj osnovi. Prema tomu, smatra se da je pravo vlasništva cijele nekretnine stečeno danom stjecanja prava vlasništva na zgradu, ali ne prije 8. listopada 1991. do kada je vrijedilo načelo pravnog razdvajanja zemljišta u društvenom vlasništvu i zgrade [128].

4.4. Zemljišnoknjižno sjedinjenje kada vlasnik zgrade ima upisano pravo korištenja zemljišta

U slučaju da je vlasnik neupisane zgrade u trenutku stupanja na snagu Zakona imao upisano pravo korištenja građevinskog zemljišta u društvenom vlasništvu, odnosno prvenstveno pravo korištenja, nadležni sud će na zahtjev vlasnika zgrade odrediti upis zgrade i prava vlasništva zemljišnoknjižnog tijela (nekretnine) „na temelju obavijesti nadležnog katastarskog tijela" (čl. 368. st. 2.). Obavijest „nadležnog katastarskog tijela" odnosi se na oblikovanje građevinske čestice odlukom nadležnog tijela u skladu s odredbama iz čl. 4. Zakona o izmjenama i dopunama Zakona o prostornom uređenju (supra) [129].

Budući da Zakon ne razlikuje, smatra se da pravo korištenja u ovom slučaju ima šire značenje (generički pojam) te obuhvaća kako privremeno pravo korištenja koje je pripadalo

---

[124] Koja je oblikovna ili koju će oblikovati (utvrditi oblik i površinu) nadležno tijelo u skladu s planom i dokumentima prostornog uređenja čl. 4. ZID Zakona o prodaji stanova, NN, br. 68/98. O pretpostavkama i postupku oblikovanja građevinske čestice vidi: Golubović-Munjaković, Lj., Oblikovanje građevinske parcele i utvrđivanje zemljišta potrebnog za redovnu upotrebu zgrade, Informator, god. XLIV, br. 4408, 1996.

[125] Vidi sudsku praksu: VSH, Rev-2618/82 i VSH, Gž-112/83 (PSP 24/31); Zaključak sjednice sudaca UpSH od 2. ožujka 1984. (PSP 24/572); UpSH, Us-2102/83 (PSP 24/574), Us-2111/83 (PSP 24/575); VSH, Gž-89/83 (PSP 25/36); USH, Us-1872/84 (PSP 25/402); USH, Us-2131/84 (PSP 25/411).

[126] Simonetti, P., Građanskopravni položaj građevinskog objekta izgrađenog bez odobrenja za građenje, Informator, god. XLI, br. 4055, 1993.

[127] Šire : Simonetti, P., u Knj. 1., Prava na građevinskom zemljištu (1945-2007), str.260.-263.

[128] Čl. 12. st. 1. ZOVO-a, odnosno čl. 36. i 37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta.

[129] NN 68/98.

prijašnjem vlasniku podruštvovljenog građevinskog zemljišta do deposediranja,[130] tako i pravo korištenja radi građenja,[131] kako neostvareno, tako i ostvareno prvenstveno pravo korištenja.[132] Dakle, i pod pretpostavkom da je na odnosnom zemljištu izgradio zgradu, prijašnji vlasnik čije privremeno pravo korištenja nije bilo izbrisano iz zemljišne knjige niti je bio zakonito deposediran, iako nije imao utvrđeno prvenstveno pravo korištenja, uspostavit će se pravno jedinstvo zemljišta i zgrade i na njegov zahtjev upisati u zemljišnu knjigu zgrada te pravo vlasništva na nekretnini koju čini zemljište i zgrada. Ovo pod pretpostavkom da je bila legalizirana izgradnja zgrade davanjem odobrenja za građenja tijekom ili nakon izgradnje,[133] jer se u pravnom smislu samo zgrada izgrađena u skladu sa zakonom smatra trajnom zgradom (ako ima trajnu namjenu), a samo trajne zgrade se spajaju sa zemljištem. Zgrade koje imaju privremenu namjenu nisu sastavni dio zemljišta (čl. 9. st. 3. ZV-a), pa njih ne odvaja od zemljišta u društvenom vlasništvu trajno pravo korištenja već sam zakon koji propisuje trajnu vezu kao pretpostavku pravnog jedinstva zemljišta i zgrade.

4.5. Zemljišnoknjižno sjedinjenje kada vlasnik zgrade nema upisano pravo korištenja zemljišta

Ukoliko u zemljišnoj knjizi nije upisano pravo korištenja ni utvrđeno prvenstveno pravo korištenja u korist vlasnika neupisane zgrade, zemljišnoknjižni mjesno nadležni sud će na zahtjev vlasnika zgrade odrediti upis zgrade i pravo vlasništva na cijelom zemljišnoknjižnom tijelu: zgradi i zemljištu koje pripada zgradi „na temelju ovršne odluke vlasti kojom je radi izgradnje zgrade dodijeljeno pravo korištenja, odnosno utvrđeno prvenstveno pravo korištenja njegovom nositelju i ugovora o međusobnim pravima i obvezama sklopljenim u skladu s uvjetima utvrđenim u toj odluci te obavijesti nadležnog katastarskog tijela da je na odnosnoj katastarskoj čestici izgrađena zgrada“ (čl. 368. st. 3. ZV-a) [134].

Pravo korištenja radi građenja, koje se izgradnjom zgrade pretvaralo u trajno pravo korištenja (čl. 12. st. 1. ZOVO–a),[135] upisivalo se u zemljišnu knjigu na temelju ugovora o međusobnim pravima i obvezama koji je stjecatelj zaključivao s općinom (čl.51.st.3. ZGZ-a). Ugovor se zaključivao na temelju rješenja „skupština općine… nakon provedenog postupka određenog ovim zakonom“ čl. 51. st. 1. ZGZ-a.[136] Rješenje o dodjeli neizgrađenog građevinskog zemljišta na korištenje radi građenja donosilo je nadležno tijelo skupštine općine nakon provedenog postupka natječaja ili se zemljište ustupalo na korištenje radi građenja

---

[130] Simonetti, P., Pravo korištenja…, op. cit., str. 55.-70.

[131] Ibid., str. 119.-164.

[132] Ibid., str. 52., 165.-181.

[133] Kosović-Marković, M., Pretpostavke za izdavanje građevne dozvole u svjetlu sudske prakse, ZPFR, vol. 18, br. 1, 1997., str. 245.–260.; Kosijer, M., Primjena Zakona o postupanju s objektima građenim protivno prostornim planovima, Informator, god. XLI, br. 4054, 1993.; Simonetti, P., Građanskopravni položaj..., op. cit.; Gavella, N., Zakon o vlasništvu i drugim stvarnim pravima – bitne novosti s osobitim osvrtom na stjecanje vanjskog priraštaja nekretnine, Godišnjak 4, Aktualnosti hrvatskog zakonodavstva i prakse, Organizator, 1997., str. 53.-54. (o vlasništvu privremenog objekta, kakav je i građevinski objekt izgrađen bez građevinske dozvole).

[134] Čl. 6. Zakona o izmjenama i dopunama Zakona o vlasništvu i drugim stvarnim pravima, NN 79/06. od 17. srpnja 2006. kojim je izmijenjen st. 3. čl. 368. tako što je ispušteno „rješenje o oduzimanju građevinskog zemljišta iz posjeda prijašnjeg vlasnika ili korisnika” kao pretpostavka za uknjižbu prava vlasništva na cijeloj nekretnini: zemljištu i zgradi.

[135] Simonetti, P., Pravo korištenja …, op. cit., str. 193.-207.

[136] Ibid,, str. 145.-163.

neposrednom pogodbom (čl. 47.–50.). Ovaj postupak provodio se nakon „oduzimanja građevinskog zemljišta iz posjeda prijašnjeg vlasnika ili korisnika“.[137] Dvojbe o pravnoj prirodi akta o dodjeli (akt poslovanja ili akt vlasti)[138] otklonio je ZGZ SRH[139], koji je stupio na snagu 8. siječnja 1981., propisujući da se protiv rješenja o dodjeli građevinskog zemljišta na korištenje kao i protiv rješenja o deposediranju prijašnjeg vlasnika, koje mu je prethodilo, „može pokrenuti upravni spor“ (čl. 53. st. 4. pročišćeni tekst ZGZ-a). Ako na dan stupanja na snagu ZV-a nije bilo upisano u zemljišne knjige pravo korištenja građevinskog zemljišta u korist vlasnika zgrade, za uknjižbu prava vlasništva na cijelom zemljišno knjižnom tijelu (zemljištu i zgradi) po ZV-u traži se:

- ovršna odluka vlasti „kojom je radi izgradnje dodijeljeno pravo korištenja“, odnosno utvrđeno prvenstveno pravo korištenja njegovom nositelju;
- ugovor o međusobnim pravima i obvezama koji je sklopljen u skladu s uvjetima utvrđenim u rješenju o dodjeli zemljišta na korištenje i
- obavijesti nadležnog katastarskog tijela da se na odnosnoj građevinskoj čestici nalazi zgrada (čl. 368. st. 3. ZV-a).

Utvrđeno prvenstveno pravo korištenja radi građenja stjecalo se pravomoćnim rješenjem nadležnog tijela.[140] Upis toga prava u zemljišnu knjigu imao je deklarativan značaj.

4.6. Zemljišnoknjižno sjedinjenje zemljišta i zgrade polaganjem tabularne isprave

U slučaju da zemljište uopće nije upisano u zemljišnu knjigu, vlasnik zgrade će uz prethodni postupak steći pravo vlasništva cijele nekretnine (zemljišnoknjižnog tijela), umjesto upisom u zemljišnu knjigu, polaganjem u sud isprave na temelju koje bi se inače mogao dopustiti upis prava vlasništva po prethodnim odredbama, a na to će se na odgovarajući način primijeniti opća odredba iz čl. 120. st. 4. ZV-a o stjecanju prava vlasništva polaganjem u sud odgovarajuće ovjerovljene isprave (čl. 368. st. 4. ZV-a).

4.7. Zemljišnoknjižno sjedinjenje zemljišta i neupisane zgrade izgrađene na zemljištu koje je stečeno temeljem osnaženog pravnog posla

Sve što je propisano u korist bivšeg vlasnika nacionaliziranog (podruštvovljenog) građevinskog zemljišta (supra) glede stjecanja prava vlasništva na zemljištu na kome je izgradio trajnu zgradu koja je legalizirana vrijedi i za osobe koje su pravo korištenja neizgrađenog građevinskog zemljišta (privremeno pravo korištenja, prvenstveno pravo korištenja: ostvareno ili neostvareno) stekle nasljeđivanjem ili temeljem pravnog posla (supra).[141] Ovo vrijedi i u slučaju kada je pravni posao bio ništav zbog tadašnjeg zakonskog ograničenja raspolaganja podruštvovljenim neizgrađenim građevinskim zemljištem (čl. 55. ZGZ-a), koje je bilo u posjedu prijašnjeg vlasnika ili njegovog sljednika,[142] jer su ti pravni poslovi osnaženi Zako-

---

[137] Ibid., str. 67.-70.

[138] Ibid., str. 149-153. i Knj. 1.

[139] Nakon odluke Ustavnog suda SRH, Ur. br. 38/78 od 11. svibnja 1978, NN 24/78.

[140] Šire o tome: Simonetti, P., Prava na građevinskom zemljištu (1945-2007), str.233.-238. (Knj.1.).

[141] Simonetti, P., Denacionalizacija…, op. cit., str. 207.-208.

[142] Simonetti, P., Pravo korištenja…, op. cit., str. 58.-62.; Bagić, S., Denacionalizacija…, op. cit., str. 327.-328.

nom „ukoliko nemaju drugih nedostataka koji ih čine ništavim ili pobojnim" (čl. 18. st. 1. ZN-a).[143]

No, ako je na temelju toga zabranjenog pravnog posla izvršen prijenos prava na neizgrađeno građevinsko zemljište, služba nadležna za obavljanje imovinskopravnih poslova u uredima državne uprave u županijama priznaje to pravo koje se pretvara u pravo vlasništva stjecatelja, a stjecatelj je dužan platiti porez na promet nekretnina u roku od 15 dana od primitka rješenja ako taj porez nije plaćen do stupanja na snagu ZN-a 1. siječnja 1997. (čl. 18. st. 2. i 3.). Ove odredbe se analogno primjenjuju i na ono zemljište na kome je stjecatelj u međuvremenu izgradio zgradu uz odobrenje za građenje (ili uz naknadno odobrenje – legalizacija), jer onaj koji je izgradio zgradu na tako stečenom zemljištu ne može imati manje prava od onoga koji nije izgradio nikakvu zgradu. Kada se na temelju zakona osnažuje ugovor o prijenosu prava korištenja na golom građevinskom zemljištu u društvenom vlasništvu, utoliko prije se osnažuje na zemljištu na kome je naknadno izgrađena zgrada, jer se legalizacijom zgrade isto pravo korištenja (pravo korištenja radi građenja) po samom zakonu pretvorilo u trajno pravo korištenja.[144]

4.8. Uspostavljanje pravnog jedinstva zemljišta i zgrade izgrađene bez pravne osnove (prava korištenja radi građenja) na građevinskom zemljištu u društvenom vlasništvu

Pod pretpostavkom da je neka osoba protupravno zauzela neizgrađeno građevinsko zemljište u društvenom vlasništvu, ZGZ je propisivao da će općinski organ uprave nadležan za imovinskopravne poslove odrediti rok u kome je uzurpant dužan predati zemljište u posjed općini (čl. 54. st. 1. ZGZ-a). Ako je osoba koja je protupravno zauzela zemljište izgradila ''objekt'', taj je ''objekt'' prelazio u društveno vlasništvo bez prava na naknadu (čl. 54. st. 2.). Ovu odredbu kao protivnu Ustavu RH ukinuo je 1992. Ustavni sud Republike Hrvatske[145]. Stoga se smatra da je vlasnik takve zgrade mogao tražiti naknadu ili restituciju prava vlasništva po odredbama Zakona o naknadi (čl.2. t.15. i čl. 22.-28. te 40.–43.), ako je zgrada bila prenesena u društveno vlasništvo rješenjem nadležnog tijela donesenog na temelju odredbe iz čl. 54. st. 3. ZGZ-a koja je također ukinuta istom odlukom Ustavnog suda RH. Ovo pod pretpostavkom da je gradnja legalizirana. Vlasnik nelegalizirane zgrade ne stječe pravo vlasništva na zemljište, jer samo zgrada izgrađena u skladu sa zakonom čini pravno jedinstvo sa zemljištem, koje je od zemljišta u društvenom vlasništvu pravno odvajalo trajno pravo korištenja (čl. 12. st. 1. ZOVO-a). Nelegalizirana zgrada ima pravni položaj privremene zgrade-sve do legalizacije, a privremene zgrade su po zakonu pravno odvojene od zemljišta (čl. 9. st. 3. ZV-a).

U slučaju kada su ispunjene zakonske pretpostavke za restituciju prava vlasništva prijašnjem vlasniku ili njegovom pravnom sljedniku[146] uspostavlja se pravno jedinstvo zemljišta i zgrade u korist graditelja, odnosno njegovog pravnog sljednika, pa i u korist osobe koja ima valjani pravni temelj za stjecanje prava vlasništva, bez obzira je li se u vrijeme sklapanja

---

[143] Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine, NN 92/96., 39/99., 42/99., 99/99., 40/00., 131/00., 27/01., 65/01., 11/02., 80/02. i 81/02. (ispr.).

[144] O konstituiranju trajnog prava korištenja povodom izgradnje zgrade bez pravne osnove vidi: Simonetti, P., Trajno pravo korištenja i njegova u pretvorba u pravo vlasništva, ZPFR, vol. 20, br. 2, 1999., str. 492.-502.; Petrović, D., Pravo svojine na bespravno podignutim objektima, Naša zakonitost, god. 38, br. 10-11, 1984., str. 1166.-1167.

[145] Odluka USRH br. U-14/87. od 30.studenog 1992., NN 44/92.

[146] Simonetti, P., Prava na građevinskom zemljištu (1945-2007), str.366.-386.

pravnog posla mogao izvršiti prijenos prava vlasništva, jer i ugovor o prodaji tuđe stvari obvezuje ugovaratelje, a samo ga kupac „koji nije znao niti je mogao znati da je stvar tuđa" može raskinuti „ako se uslijed toga ne može ostvariti svrha ugovora" (čl. 460. tadašnjeg Zakona o obveznim odnosima, sada čl.382. ZOO). [147] Takav ugovor obvezuje prodavatelja da pribavi pravo vlasništva, kako bi ga na temelju istog ugovora prenio na kupca.

U slučaju da je vlasnik („posjednik") objekta izgrađenog bez pravne osnove na građevinskom zemljištu u društvenom vlasništvu propustio rok za podnošenje zahtjeva za legalizaciju (čl. 72. ZGZ-a iz 1980.)[148], pa mu je objekt prenesen u društveno vlasništvo, mogao je nakon 2. svibnja 1990. tražiti poništenje toga rješenja (čl. 18. ZID ZGZ-a)[149]. U slučaju da je ovo rješenje poništeno također se uspostavlja pravno jedinstvo zemljišta i zgrade u korist vlasnika zgrade, analognom primjenom odredbe iz čl. 368. st. 3. ZV-a. Ova prava pripadaju i građanima koji su stekli objekt na osnovi osnaženog ugovora ili akta državnog organa[150]. Ista prava imale su i društvenopravne osobe koje su izgradile takav objekt i one koje su ga pribavile ''na osnovi ugovora ili akata državnog organa'', a koje su propustile dvogodišnji rok iz čl. 90. t. 2. ZGZ-a (čl. 19. ZID ZGZ-a). Pravo vlasništva takve nekretnine stekao je pravni sljednik društvenopravne osobe pretvorbom u postupku pretvorbe društvenog poduzeća ili pretvorbom prava društvenopravne osobe u pravo vlasništva njene pravne sljednice – vlasničkopravne osobe na temelju posebnog zakona (čl.390. ZV-a).

4.9. Stjecanje prava vlasništva na nekretnini pretvorbom prava upravljanja ili prava korištenja ili prava raspolaganja na zgradi

Odgovarajućom primjenom odredaba iz čl. 367. i 368. ZV-a pravo vlasništva cijele nekretnine stječe i vlasničkopravna osoba koja je stekla pravo vlasništva zgrade, pretvorbom prava upravljanja, prava korištenja ili prava raspolaganja (egzistentnog na dan stupanja na snagu ZV-a), po odredbama ZV-a ili drugog zakona (čl. 369. ZV-a), a ne društvenopravna osoba koja je imala pravo upravljanja, pravo korištenja ili pravo raspolaganja na zemljištu.[151] I u ovoj hipotezi, da bi se uspostavilo pravno jedinstvo zemljišta i zgrade, primjenjuje se inverzija pravila *superficies solo cedit.* U sustavu pravnog dualiteta zemljišta i zgrade, zgrada je glavna stvar, a zemljište – sporedna. Zato uspostavljanjem pravnog jedinstva nekretnine, vlasnik zgrade stječe pravo vlasništva na zemljište. Nakon uspostave pravnog jedinstva zemljišta i zgrade, zemljište je glavna stvar, a sve što je sa zemljištem spojeno njegov je priraštaj, unutrašnji (npr. plodovi zemlje) i vanjski: sve što je posijano, zasađeno ili izgrađeno i sve što se ubuduće trajno spoji sa zemljištem njegov je priraštaj *(accessorium*), jer je zemljište u sustavu pravnog jedinstva nekretnine bez iznimke glavna stvar (*res principale*). Zemljište u pravnom pogledu je i pravo građenja (čl. 280. st. 2. ZV-a), pa je zgrada, logično, pripadnost prava građenja kao da je ono zemljište (čl. 280. st. 3.) i time pravno odvojena od zemljišta.

---

[147] Simonetti, P., Rasprave iz stvarnog prava, Pravni fakultet Sveučilišta, Rijeka, 2001. – Pravni učinci pravnog posla o otuđenju tuđe nekretnine, str. 131.–139.

[148] Taj se rok određivao odlukom skupštine općine, a nije mogao biti kraći od šest mjeseci od stupanja na snagu te odluke (čl. 72. st. 2.). Nakon donošenja odluke nadležni organ uprave za imovinskopravne poslove pozivao je zainteresirane osobe da u propisanom roku podnesu zahtjev za davanje na korištenje građevinskog zemljišta na kojem je izgrađen objekt ili su izvedeni znatniji radovi na njegovoj izgradnji (čl. 72. st. 3.).

[149] NN 16/90. od 24. travnja 1990.

[150] Čl. 17. i 18. ZID ZGZ, NN 16/90.

[151] Hipoteza da je jedna društvenopravna osoba imala jedno od navedenih prava na zgradu, a druga (po pravilu općina) na zemljište.

5. Posebni dio nekretnine po hrvatskom pravu

Zakon o vlasništvu koji je uspostavio pravno jedinstvo zemljišta i zgrade utjecao je i na pravnu prirodu ustanove etažnog vlasništva, ugledajući se na analognu pravnu ustanovu u austrijskom pravu (Wohnungseigentumgesetz) [152]. Ovdje se u kratkim crtama skreće pažnja na tu novinu u hrvatskom pravu.

5.1. Pojam

Nasuprot ranijoj pravnoj ustanovi pravnog dualiteta nekretnina Zakon o vlasništvu slijedi načelo *superficies solo cedit* bez iznimke: zgrada je uvijek pripadnost zemljišta ili prava građenja kao da je ono zemljište. Zato ne postoji pravo vlasništva na zgradu, već na nekretninu i prema tome objekt prava vlasništva nije posebni dio zgrade, već posebni dio nekretnine, koju sačinjava zemljište i zgrada ili pravo građenja i zgrada, a takva nekretnina je nedjeljiv pravni monolit. Može se, doduše zgrada odvojiti od zemljišta pravom građenja, ali je tada zgrada pripadnost prava građenja kao da je ono zemljište (čl.280.st.3.ZV) od kojega se ne može pravno odvojiti (čl. 285. st. 3. ZV). Pravo vlasništva na posebni dio nekretnine proizlazi iz prava suvlasništva na nekretninu i od njega se ne može pravno odvojiti (čl. 69. ZV).

5.2. Objekt

U odnosu na objekt posebnog dijela nekretnine, ZV ima načelan stav: „Vlasništvo posebnoga dijela može biti uspostavljeno glede dijela suvlasničke nekretnine koji čini samostalnu uporabnu cjelinu, prikladnu za samostalno izvršavanje suvlasnikovih ovlasti, kao što je stan ili druga samostalna prostorija.“ (čl. 67. st. 1.).

5.2.1. Zakonska definicija stana

Zakonsku definiciju stana ne propisuje ZV, kao što je nije propisivao ni ZVDZ, već je propisuje ZNS.[153] Prema tom zakonu, stanom se smatra „skup prostorija namijenjenih za stanovanje s prijeko potrebnim prostorijama koje čine jednu zatvorenu građevinsku cjelinu i imaju zaseban ulaz“ (čl. 2. st. 1.). Slična je bila definicija stana u Zakonu o stambenim odnosima (supra).

5.2.2. Samostalna prostorija

„Među druge samostalne prostorije spadaju osobito samostalne poslovne prostorije, samostalne garaže ili jasno omeđena mjesta u zgradi namijenjena ostavljanju motornih vozila.“ (čl. 67. st. 2. ZV)tzv. „garažna mjesta“.

5.3. Zajednički dijelovi nekretnine

Zajednički dijelovi nekretnine služe nekretnini kao cjelini, ili im se namjena protivi isključivoj uporabi samo u korist određenoga posebnog dijela nekretnine (čl. 67. st. 6. ZV), kao npr. ulaz u zgradu, hodnici na istom katu, stubište koje služi svim dijelovima nekretnine

---

[152] Šire o pravnoj prirodi ustanove etažnog vlasništva u usporednom pravu i pravu SFRJ, Belaj, V., Stvarnopravni odnosi na stanu kao posebnom dijelu zgrade (dok. Rad), Osijek, 1992, str. 102.-120.; Planojević, N., Etažna svojina, op. cit. str. 153.-173; Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu, ZPFR, god. 15, 1994., str. 28.-35.

[153] Zakon o najmu stanova, NN 91/96.

itd. U sumnji se uzima da nesamostalni dio služi kao zajednički i da mu se namjena protivi isključivoj uporabi određenoga samostalnog posebnog dijela (čl. 67. st. 6. ZV)

Na zajedničkim dijelovima nekretnine, bilo da kao zajednički služe nekretnini u cjelini – svim posebnim dijelovima ili pojedinim posebnim dijelovima ili objektima dva ili više posebnih dijelova nekretnine ne može se uspostaviti pravo vlasništva, jer bi to proturječilo njihovoj esencijalnoj namjeni koja se opire „isključivoj uporabi samo u korist određenog posebnog dijela nekretnine“ (čl. 61. st. 6. ZV) kao na primjer zajednička ulazna vrata u zgradu, zajednički hodnik, zajedničko stubište i sl. Može se dio hodnika, koji ne služi zajedničkoj uporabi priključiti posebnom dijelu nekretnine, tj. stanu ili samostalnoj prostoriji, na najvišem katu dio tavana koji graniči s tim posebnim dijelom ili dio podruma koji graniči sa stanom ili samostalnom prostorijom u prizemlju.

5.4. Sporedni dijelovi na koje se može protegnuti pravo vlasništva posebnog dijela nekretnine po ZV-u

Od zajedničkih dijelova nekretnine ZV razlikuje sporedne dijelove nekretnine na koje se može, pod određenim zakonskim pretpostavkama, protegnuti pravo vlasništva posebnog dijela.

„Vlasništvo posebnog dijela nekretnine može se protezati i na sporedne dijelove, kao što su otvoreni balkoni, terase, podrumske ili tavanske prostorije, kućni vrtovi, mjesta za ostavljanje najviše do dva motorna vozila po pojedinom stanu ili drugoj samostalnoj prostoriji“ (čl. 67. st. 3. ZV).

Dvije su opće zakonske pretpostavke za protezanje prava vlasništva s posebnog dijela nekretnine na sporedne dijelove: jedna je objektivna, a druga subjektivna. Pravo vlasništva posebnog dijela nekretnine može se protegnuti na sporedni dio pod pretpostavkom da je jasno razgraničen od ostalih dijelova nekretnine te da je dostupan s međe nekretnine ili njenih zajedničkih dijelova ili iz onoga stana, odnosno samostalne prostorije čiji bi bio sporedni dio (čl. 67. st. 4.). Dakle, posebni dio nekretnine ne može biti fizički razdvojen drugim posebnim dijelom kao ni sporednim dijelovima na koje se proteglo pravo vlasništva s drugog posebnog dijela nekretnine. Subjektivna pretpostavka jest suglasnost vlasnika posebnih dijelova nekretnine kojima pripada određeni suvlasnički dio da se na njega kao sporedan dio protegne pravo vlasništva s određenog posebnog dijela nekretnine (čl. 41. st. 1. i 85. st. 1. ZV). Za ovu promjenu (protezanje prava vlasništva na sporedni dio) po pravilu je nužno i odobrenje nadležnog upravnog tijela.

5.5. Uspostavljanje prava vlasništva na posebne dijelove nekretnine

Pravo vlasništva na određeni dio nekretnine može se uspostaviti samo na suvlasničkom dijelu jer ono proizlazi iz prava suvlasništva cijele nekretnine i s njim je nedjeljivo povezano (čl.68.st.2. i 69.st.1. ZV-a). Suvlasnički dio iz kojeg proizlazi pravo vlasništva posebnog dijela po čl.68.st.1. ZV-a mora biti „barem toliko velik da odgovara odnosu korisne vrijednosti toga samostalnog dijela prema korisnoj vrijednosti svih stanova i ostalih prostorija cijele nekretnine (odgovarajući suvlasnički dio)“.

U slučaju nesuglasnosti suvlasnika cijele nekretnine da li je određeni suvlasnički dio odgovarajući da bi iz njega moglo proizaći i na njemu biti uspostavljeno vlasništvo posebnog dijela nekretnine, utvrđuje nadležni sud „ako ovim Zakonom nije drukčije određeno“ (čl.68. st.2.).

Samo suglasnošću volja svih suvlasnika cijele nekretnine može se s određenim suvlasničkim dijelom, bez obzira na njegovu veličinu, povezati pravo vlasništva određenog poseb-

nog dijela nekretnine jer to je njihovo dispozitivno pravo. Ova suglasnost suvlasnika proizvodi pravne učinke ako je izražena u pisanoj ispravi svih suvlasnika (čl.73.st.1. ZV-a). S druge strane „niti jedan suvlasnik ne može uskratiti svoj pristanak na uspostavu vlasništva posebnog dijela drugom suvlasniku koji ima odgovarajući suvlasnički dio, osim ako bi se uspostavom ovoga vlasništva posebnog dijela u korist suvlasnika ukinula ili ograničila prava koja njemu već pripadaju na temelju njegova prije uspostavljenog vlasništva posebnog dijela“ (čl.73.st.2. ZV).

Budući da se ničija suglasnost (volja) ne može valjano iznuditi, odredbu „ne može uskratiti svoj pristanak…“ iz čl.73.st.2. ZV-a, treba shvatiti tako da suvlasnik ne može uspješno uskratiti svoj pristanak jer u slučaju uskraćivanja drugi zainteresirani suvlasnik čiji je suvlasnički dio „barem toliko velik da odgovara odnosu vrijednosti toga samostalnog dijela prema korisnoj vrijednosti svih stanova i ostalih prostorija cijele nekretnine“ (čl.68.st.1.) može zahtijevati da sud uspostavi njegovo pravo vlasništva na određeni posebni dio nekretnine ako su za to ispunjene sve zakonske pretpostavke (čl.68.st.2. i 71.st.1.).

Vlasništvo posebnog dijela ne može se uspostaviti ni na temelju sudske odluke, a ni na temelju isprave o suglasnosti svih suvlasnika, „dok nadležno tijelo ne potvrdi da je određeni stan ili prostorija u određenoj zgradi i na određenoj zemljišnoj čestici samostalna uporabna cjelina“. Ova „potvrda“ mora sadržavati popis i opis posebnih dijelova nekretnine i da su izgrađeni u skladu s dozvolom nadležnog tijela“ (čl.73.st.3. ZV-a). Ovu potvrdu „može zamijeniti uporabna dozvola iz koje je razvidno da je zgrada izgrađena sukladno planu posebnih dijelova nekretnine, potvrđeno građevinskom dozvolom da bi ti posebni dijelovi predstavljali samostalnu uporabnu cjelinu“ (čl.73.st.4.). Vlasništvo posebnog dijela može se uspostaviti na temelju pravomoćne odluke nadležnog suda ili isprave o pravnom poslu suvlasnika (čl.73.st.5.).

Sporazum svih suvlasnika nekretnine o uspostavi posebnog dijela (dijelova) nekretnine proizvodi obveznopravne učinke ako je sačinjen u obliku pisane isprave (čl.73.st.1.). Na temelju takvog sporazuma ne može se tražiti uknjižba u zemljišnu knjigu, jer mu nedostaje forma tabularne isprave, ali se može tražiti tužbom izdavanje tabularne isprave od svakog ili svih ostalih suvlasnika koji je uskraćuju, da je izdaju u paricijskom roku, pa će u slučaju neispunjenja te obveze (određene sudskom odlukom) tabularnu ispravu zamijeniti sudska odluka.

Pravomoćna sudska odluka kao i sporazum svih suvlasnika u obliku tabularne isprave su materijalne pretpostavke za uknjižbu prava suvlasništva na cijelu nekretninu i prava vlasništva na posebne dijelove (čl.43. i 44. ZZK)[154].

6. Pravila povezivanja prava vlasništva posebnog dijela nekretnine s pravom suvlasništva nekretnine

6.1. Uspostavljanje pravnog jedinstva zemljišta i posebnog dijela zgrade

Zakon o vlasništvu na posebnim dijelovima zgrade, koji je razdvajao obiteljsku stambenu zgradu i od zemljišta u privatnom vlasništvu, a nakon 8. listopada 1991. godine i sve druge zgrade u etažnom vlasništvu koje su do 1. siječnja 1997. prešle iz društvenog u privatno vlasništvo, prestao je važiti 1. siječnja 1997., kada je stupio na snagu Zakon o vlasništvu (čl. 394. st. 1., podst. 2.) pa se od 1. siječnja 1997. po samom zakonu uspostavlja pravo suvlasniš-

[154] Josipović, T., Zemljišnoknjižno pravo, Informator, Zagreb, 2001., str.188.-190.

tva nekretnine, koja se sastoji od zemljišta i zgrade i pravo vlasništva na posebnim dijelovima nekretnine (do tada na posebnim dijelovima zgrade).

Pretvorba prava na zgradama i zemljištu u društvenom vlasništvu događa se od 1991. do 1. siječnja 1997. u postupku pretvorbe društvenih poduzeća ili po samom zakonu i nezavisno od novele čl. 12. st. 1. ZOVO-a (8. listopada 1991.), koja je u suštini izrazila načelo, da zgrada u privatnom vlasništvu, a slijedom toga ni zgrada na koju je pretvorbom stečeno pravo vlasništva, ne može stajati na zemljištu u društvenom vlasništvu, pa se pretvorbom prava na zgradi u društvenom vlasništvu u pravo vlasništva uspostavlja pravno jedinstvo zemljišta i zgrade, osim zgrada u etažnom vlasništvu koje su prema tadašnjem zakonu (do 1. siječnja 1997.) bile pravno odvojene i od zemljišta u privatnom vlasništvu.

Prema Zakonu o vlasništvu - vlasništvo na posebnom dijelu zgrade (etažno vlasništvo), a isto tako i pravo raspolaganja na posebnom dijelu zgrade u društvenom vlasništvu, stečeno po ranijim propisima, od 1. siječnja 1997. vlasništvo je posebnih dijelova nekretnine (čl. 370. st. 1.).

Vlasnik posebnog dijela zgrade od 1. siječnja 1997. postaje vlasnikom svoga posebnog dijela nekretnine, a nositelj prava raspolaganja (prava upravljanja ili prava korištenja) posebnog dijela zgrade postaje, također, vlasnikom posebnog dijela nekretnine (čl. 370. st. 2.). Vlasništvo posebnog dijela nekretnine neodvojivo je povezano s određenim suvlasničkim dijelom cijele nekretnine po odredbama iz st. 3. i 4. čl. 370. ZV.

Umjesto dosadašnjeg sudjelovanja u zajedničkom nedjeljivom vlasništvu zajedničkih dijelova obiteljske stambene zgrade s pravom suvlasništva na zemljištu u privatnom vlasništvu koje pripada zgradi, odnosno, trajnog prava korištenja zajedničkih dijelova višestambene zgrade u društvenom vlasništvu s pravom trajnog korištenja na zemljištu u društvenom vlasništvu, dosadašnjem vlasniku posebnog dijela zgrade (nekretnine) i onome koji ga je stekao pretvorbom prava raspolaganja ili otkupom stana u društvenom vlasništvu pripada odgovarajući suvlasnički dio cijele nekretnine (čl. 370. st. 3.) koju sačinjava zemljište i zgrada.

Veličina suvlasničkog dijela cijele nekretnine utvrđuje se primjenom pravila ZV o veličini odgovarajućeg suvlasničkog dijela nekretnine koji ovlašćuje vlasnika da ima u svome vlasništvu posebni dio zgrade, točnije posebni dio nekretnine (čl. 370. st. 4. ZV). Sve dok se po tim pravilima (čl. 74.-78. ZV-a)[155] ne utvrdi veličina suvlasničkih dijelova, smatra se da su dijelovi svih suvlasnika jednaki. Ali, svaki od suvlasnika nekretnine, pa makar i ne bio vlasnikom posebnog dijela zgrade, može zahtijevati utvrđivanje veličine suvlasničkih dijelova koji će sud među njima pravično podijeliti (čl. 370. st. 4.). Pravo na diobu pripada, dakle i svakom suvlasniku posebnog dijela zgrade, odnosno posebnog dijela nekretnine koji je samim tim i suvlasnik cijele nekretnine.

Osobe koje, doduše, nisu vlasnici posebnog dijela zgrade, ali su po prijašnjim propisima imale valjani pravni temelj[156] za stjecanje vlasništva posebnog dijela zgrade, ovlaštene su na tom temelju steći pravo vlasništva na taj posebni dio nekretnine (stan, odnosno drugi posebni dio zgrade povezan sa zemljištem) s odgovarajućim suvlasničkim dijelom cijele nekretnine, čija će se veličina utvrditi prema odredbama iz st. 4. čl. 370. (čl. 370. st. 5. ZV).

Vlasništvo posebnog dijela nekretnine povezanog s određenim suvlasničkim dijelom te nekretnine upisuje se u zemljišnoj knjizi uz odgovarajuću primjenu odredaba Zakona o vlasništvu o uspostavi vlasništva na posebnom dijelu. Do tada već provedeni upisi prava raspolaganja (upravljanja ili korištenja) na posebnom dijelu zgrade u društvenom vlasništvu sma-

---

[155] Vidi izmjenu čl. 74. st. 2. podst. 5. u čl. 2. Zakona o izmjenama i dopunama Zakona o vlasništvu… NN 79/06. od 17. srpnja 2006.

[156] Čl.1.st.3. ZPZZ. Pravni posao, odluku suda ili drugog nadležnog tijela (čl. 20. ZOVO-a).

traju se upisima prava vlasništva posebnog dijela nekretnine povezanoga sa suvlasničkim dijelom te nekretnine, koji je određen po odredbama na koje upućuje st. 4. čl. 370. (čl. 370. st. 6.). To znači da se pretvorbom prava raspolaganja na posebni dio zgrade u pravo vlasništva, kao i pretvorba prava trajnog korištenja na zajedničke dijelove zgrade i na zemljište koje pripada zgradi u pravo suvlasništva, dogodila izvanknjižno po samom zakonu, ili u postupku pretvorbe društvenih poduzeća. Pravo vlasništva na stan kao nekretnine koje se sastoji od zemljišta i zgrade u etažnom vlasništvu kako je naprijed navedeno, uspostavljeno je prestankom važenja dotadašnjeg Zakona o vlasništvu na posebnim dijelovima zgrade i stupanja na snagu ZV-a 1. siječnja 1997.

6.2. Obveza vlasnika kupljenog stana u plaćanju naknade za stjecanje suvlasničkog dijela zemljišta

6.2.1. O obvezi plaćanja naknade za zemljište

Vlasnik koji je posebni dio nekretnine stekao ugovorom o prodaji stana upisom u zemljišne knjige po odredbama Zakona o prodaji stanova u društvenom vlasništvu na kojima postoji stanarsko pravo (čl. 23. st. 1.), nakon što je na temelju odredbe čl. 370. st. 3. ZV stekao i pravo suvlasništva zemljišta (cijele nekretnine), bio je obvezan da vrijednost time postignute koristi naknadi „dotadašnjem vlasniku zemljišta" (čl. 371. st. 1.).[157] Obveza ove naknade sastoji se u plaćanju onolikog iznosa novca u onim rokovima i na onaj način koliko, kada i kako bi kupac stana bio dužan platiti cijenu zemljišta da je bila uračunata u cijenu stana sukladno odredbama Zakona o prodaji stanova… S tim da rokovi počinju teći od 1. siječnja 1997. Sve to se pobliže određuje Pravilnikom Ministarstva prostornog uređenja, graditeljstva i stanovanja (čl. 371. st. 2. ZV).

Tijek roka zastarijevanja obveze naknade iz st. 1. i 2. čl. 371. nije mogao početi teći prije stupanja na snagu ZV (čl. 371. st. 3.), tj. 1. siječnja 1997.

Kupac koji je do 1. siječnja 1997., stekao pravo vlasništva stana uknjižbom u zemljišnu knjigu ili polaganjem ugovora kod nadležnog suda - upisom u knjigu deponiranih ugovora,[158] dana 1. siječnja 1997. stekao je, po samom Zakonu odgovarajući suvlasnički dio cijele nekretnine - zemljišta i zgrade (čl. 370. st. 3. ZV). Zbog toga upis prava suvlasništva nekretnine i prava vlasništva posebnog dijela nekretnine ima samo deklarativan značaj. Pravo vlasništva na posebni dio nekretnine neodvojivo je povezano s pravom suvlasništva na cijelu nekretninu (čl. 66. st. 1. i 270. st. 2. ZV). Prema tomu, uskraćivanje upisa u zemljišnu knjigu, ukoliko uz prijedlog za upis nije priložen dokaz da je stjecatelj prava vlasništva posebnog dijela nekretnine (kupac stana) platio naknadu za zemljište dosadašnjem vlasniku prema cijeni utvrđenoj sukladno čl. 370. st. 2. ZV (čl. 225. Zakona o zemljišnim knjigama),[159] bilo je relevantno samo s gledišta publiciteta stečenog prava, koji se postiže upisom prava u zemljišne knjige s reperkusijama zaštite povjerenja u istinitost i potpunost zemljišne knjige (čl. 122.-124. ZV).

---

[157] Po Zakonu o prodaji stanova na kojima postoji stanarsko pravo (NN 27/91., skraćeno: ZPS) do prve novele (ZID ZPS, NN 33/92.) od 12. lipnja 1992. godine s prodajom stana prodavao se i odgovarajući dio zemljišta. Svrha novele bila je vjerojatno zadržavanje prava vlasništva izgrađenog građevinskog zemljišta u imovini gradova i općina uz konstituiranje prava građenja vlasnika (suvlasnika) zgrade (nekretnine) dok ona postoji, ali je ta intervencija zakonodavca stigla prekasno, jer je već Zakonom o preuzimanju ZOVO-a pretvoreno pravo korištenja građevinskog zemljišta u pravo vlasništva vlasnika zgrada (čl. 9.) dana 8. listopada 1991.

[158] Vidi: Pravilnik o ustrojavanju i vođenju knjige položenih ugovora (NN 42/91. i 16/94.)

[159] NN 91/96.

6.2.2. Prestanak zakonskog djelovanja propisa o obvezi plaćanja naknade za stjecanje suvlasničkog dijela zemljišta i zahtjev za vraćanje plaćenog iznosa

Stupanjem na snagu ZID ZPS[160] (dana 20. svibnja 1998.) prestale su važiti odredbe iz čl. 371. ZV i 225. ZZK (čl. 12.). Kupci stanova, dakle zakonom su oslobođeni obveze plaćanja cijene zemljišta, koju su dugovali po odredbama iz čl. 371. ZV te nisu dužni priložiti dokaz o plaćenoj cijeni uz zahtjev za uknjižbu prava suvlasništva nekretnine i prava vlasništva posebnog dijela (stana) kako je bilo propisano u čl. 225. ZZK.

Vlasnicima stanova koji su zajedno sa stanom kupili pripadajući dio zemljišta prema odredbama Zakona o prodaji stanova na kojima postoji stanarsko pravo[161], a nisu u roku zatražili povrat novca, poslije novele od 12. lipnja 1992.[162] vratit će se na njihov zahtjev iz Državnog proračuna dio novca koji su platili za taj dio zemljišta i to u dva obroka tijekom 1999. Tekst odredbe „dio novca koji su platili za taj dio zemljišta" kada se poveže s odredbom iz čl. 12. ZID ZPS o ukidanju obveze plaćanja cijene zemljišta, mora se shvatiti u značenju – plaćeni iznos. Odnosno, pravo vraćanja plaćenog iznosa koji po pravilu predstavlja dio cijene koju je kupac stana bio dužan platiti za stan. Zahtjev za povrat novca podnosi se Ministarstvu financija u roku od 60 dana od dana stupanja na snagu ZID ZPS, tj. od 20. svibnja 1998. (čl. 11. i čl. 14. ZID ZPS). Ovaj je rok prekluzivan (čl. 370. Zakona o obveznim odnosima), jer zahtjevi koji budu podnijeti po proteku toga roka neće se uzimati u obzir.

6.3. Posebni dijelovi nastali prenamjenom, nadogradnjom, „prigradnjom"[163] ili dogradnjom zgrade u društvenom vlasništvu uz odobrenje nadležne vlasti

Posebni dijelovi zgrade (stanovi ili samostalne prostorije) mogli su nastati i prenamjenom zajedničkih prostorija u višestambenoj zgradi (npr. tavana ili podruma, odnosno njihovih dijelova).

Tko je do 1. siječnja 1997. odobrenjem koje je davala nadležna vlast u granicama svoje ovlasti na takvo imovinskopravno raspolaganje, o svome trošku proveo takvu prenamjenu zajedničkih prostorija u zgradi u društvenom vlasništvu pretvorivši ih u stan ili drugu samostalnu prostoriju, stekao je time na temelju i u okvirima toga odobrenja pravo vlasništva prenamijenjenih prostorija kao posebnog dijela nekretnine, zajedno s odgovarajućim suvlasničkim dijelom cijele nekretnine (zemljišta i zgrade) u smislu pravila iz čl. 370. (čl. 372. st. 1. ZV) [164].

Gornje pravilo primjenjuje se na odgovarajući način i na posebne dijelove zgrade (nekretnine) nastale:

– nadogradnjom,
– dogradnjom i
– „prigradnjom" nekretnine do 1. siječnja 1997. na temelju valjanog odobrenja o svom trošku (čl. 372. st. 2. ZV).

---

[160] Zakon o izmjenama i dopunama Zakona o prodaji stanova (NN 68/98.).

[161] NN 27/91.

[162] NN 33/92.

[163] Prema Rječniku hrvatskog jezika (Anić), izd.Novi liber, Zagreb, 1991.: prigraditi= dograditi, dozidati, dodati gradnjom. „Prigradnja" u ovom slučaju ima uže značenje od nadogradnje ili dogradnje. Nadogradnja i dogradnja odnose se na samostalne dijelove nekretnine, a prigradnja samo na dograđene ili nadograđene dijelove koji nemaju samostalnu pravnu egzistenciju, kao npr. balkon, terasa, nadstrešnica, stubište itd. ili na proširenje postojećih samostalnih dijelova tj.prigradnja posebnog dijela nekretnine.

[164] VSRH Rev 1103/2004-2, od 15.12.2004., IOVSRH, br. 1/2005,14.

Odredbu: „o svom trošku" treba shvatiti šire, odnosi se i na slučaj kada je netko treći snosio troškove građenja za graditelja po nekoj građanskopravnoj osnovi (kompenzacija međusobnih potraživanja, darovanja itd.).

6.4. Stjecanje prava vlasništva pregradnjom, dogradnjom ili nadogradnjom tuđe zgrade

Uslijed ulaganja ''znatnih'' društvenih sredstava u rekonstrukciju i adaptaciju privatnog objekta, tako da prvobitni objekt u pretežnom dijelu prestaje postojati, po shvaćanju sudske prakse '', ne može se isključiti izmjena stvarnopravnih odnosa" [165].

Prema ranijoj sudskoj praksi savjesni (pošteni) graditelj stjecao je pravo vlasništva i pregradnjom tuđe zgrade u privatnom vlasništvu, ako bi uslijed toga s gledišta pravnog prometa nastala nova stvar (nekretnina), pod istim pretpostavkama pod kojima je stjecao pravo vlasništva građenjem na tuđem zemljištu (§ 418. OGZ-a; od 1. rujna 1980. – čl. 24. st. 1. i 26. st. 1. ZOVO-a), [166] tj. ako vlasnik koji je znao za građenje nije se tomu odmah usprotivio.[167]

Pošteni graditelj stjecao je pravo vlasništva na posebni dio zgrade, dogradnjom ili nadogradnjom i bez pravnog osnova ako je vlasnik zgrade znao za građenje i nije se tomu usprotivio (analogno čl. 24. st. 1. ZOVO-a).[168]

Prema načelnom stavu Zajedničke sjednice najviših sudova od 23. listopada 1990., dogradnjom, nadogradnjom, ili adaptacijom tuđeg, ili suvlasničkog građevinskog objekta (zgrade) savjesni graditelj stjecao je pravo vlasništva na posebnom dijelu zgrade samo pod pretpostavkom da je vlasnik zgrade znao za gradnju i nije se tomu protivio (shodno čl. 24. st. 1. Zakona o osnovnim vlasničkopravnim odnosima).[169]

Pod istim pretpostavkama stjecala je pravo raspolaganja društvenopravna osoba na poseban dio zgrade. U tom slučaju su po sili zakona zajednički dijelovi zgrade i građevinska čestica prelazili u društveno vlasništvo (čl. 2. st. 2. i čl. 5. st. 1. Zakona o vlasništvu nad dijelovima zgrada).

6.5. Stjecanje prava vlasništva dogradnjom ili nadogradnjom posebnog dijela zgrade na tuđoj zgradi

Po pravilima imovinskog prava, zgrada podignuta na tuđem zemljištu bez pravnog osnova priraštaj je zemljišta, vlasništvo vlasnika zemljišta (*superficies solo cedit)*. Od ovoga načela postoji samo jedna iznimka u odnosu na zemljište. Pošteni graditelj stječe pravo vla-

---

[165] VSH Gzz 71/84 od 16. listopada 1985., PSP 29/18.

[166] Odluka Okružnog suda u Rijeci, GŽ-153/73., od 20. prosinca 1973., PSP-'NZ' 5/39.; odluka Vrhovnog suda Hrvatske, Gž-2775/76., od 31. kolovoza 1976., PSP-'NZ', 10/57. i odluka Vrhovnog suda Jugoslavije Gz-57/68., od 26. studenog 1968., Bilten sudske prakse, Vrhovnog suda Jugoslavije, br. 25/1969., str. 11.

[167] Šire, P. Simonetti, Građenje na tuđem zemljištu, Svjetlost, Sarajevo, 1982., str. 213.-215.

[168] Vidi: Načelni stav 1/90. od 23. listopada 1990., XLIII. Zajedničke sjednice Saveznog suda i vrhovnih sudova (PSP-47); VSRH, Gzz 19/1993. od 23. rujna 1993. i VSRH, Rev 1675/1993. od 23. rujna 1993., VSRH IO, 6/1994., br. 8.; VSH, Rev-750/90. od 22. kolovoza 1990. PSP-52.; VSH, Rev-1533/89. od 28. studenog 1990. PSP-51.; VSH, Rev-1902/86 od 10. rujna 1987. PSP-37.; VSH, Rev-207/82 od 20. travnja 1982. PSP-21.; VSH, Rev-633/88 od 22. studenog 1988. PSP-44.; VSH, Rev-257/87 od 25. lipnja 1987. PSP-37. i VSH, Rev-2598/86 od 02. lipnja 1987. PSP-36.

[169] Načelni stav Zajedničke sjednice Saveznog suda, Vrhovnog vojnog suda, vrhovnih sudova republika i autonomnih pokrajina od 23. listopada 1990. (PSP 47/17.) i u Biltenu sudske prakse VS BiH br.1/1991, sentenca br.114, str.55.

sništva na zemljište i zgradu, ako je vlasnik zemljišta znao za građenje, a nije ga odmah zabranio (§ 418. OGZ-a[170]).

U sudskoj praksi izraženo je stajalište da je po Zakonu o nadogradnji iz 1956.[171], koji je upućivao na pravila imovinskog prava (čl. 17.), pošteni graditelj stjecao pravo vlasništva na nadograđeni posebni dio zgrade (stan) u društvenom vlasništvu, ako se „organ upravljanja" zgradom, nije usprotivio nadogradnji (analogna primjena pravila iz § 418. OGZ-a).[172]

U slučaju izgradnje zgrade na zemljištu u privatnom vlasništvu, ovu iznimku poznavao je i ZOSPO[173] koji je propisivao: „Osoba koja može biti nosilac prava vlasništva, a koja izgradi zgradu i drugu građevinu (građevinski objekt) na zemljištu na koje drugi ima pravo vlasništva (graditelj), stječe pravo vlasništva i na zemljište na kojem je izgrađen građevinski objekt, a i na zemljište koje je neophodno za redovnu upotrebu toga građevinskog objekta, ako nije znala niti je mogla znati da gradi na tuđem zemljištu, a vlasnik zemljišta je znao za gradnju i nije se odmah usprotivio" (čl. 24. st. 1.).

Sudska praksa je po analogiji proširila primjenu gornjeg pravila i na dogradnju i nadogradnju posebnog dijela zgrade. Na posljednjoj zajedničkoj sjednici Saveznog suda, Vrhovnog vojnog suda i vrhovnih sudova socijalističkih republika i autonomnih pokrajina, 23. listopada 1990. usvojeno je Načelno mišljenje u ovom tekstu:

„Dogradnjom, nadogradnjom ili adaptacijom tuđe ili suvlasničke građevine ne stječe se pravo vlasništva, ako zakonom ili ugovorom nije drukčije određeno.

Iznimno, dogradnjom i nadogradnjom posebnog dijela zgrade, savjestan graditelj stječe pravo vlasništva na poseban dio zgrade samo ako je vlasnik zgrade znao za gradnju i nije se tome protivio (čl. 24. st. 1. Zakona o osnovnim vlasničkopravnim odnosima)".[174]

Zakon o vlasništvu koji *pro futuro* isključuje mogućnost stjecanja prava vlasništva dogradnjom, nadogradnjom, preuređenjem i ulaganjem, ako nije što drugo odredio vlasnik dograđene, nadograđene, odnosno prigrađene nekretnine (čl. 156.), generalno je uvažio stečena prava propisujući:

„Stupanjem na snagu ovog zakona ne dira se u postojeće odnose vlasnika, odnosno suvlasnika stvari, s jedne, te osoba koje su na valjanom pravnom temelju i na valjan način stekle prava glede tih stvari, s druge strane" (čl. 389. st. 1.)

Prema tomu, Zakon o vlasništvu uvažava i pravo vlasništva na posebni dio zgrade koji je stekao savjesni graditelj dogradnjom ili nadogradnjom tuđe zgrade do njegova stupanja na snagu (1. siječnja 1997.).

Zahtjev za utvrđenje da je dogradnjom, nadogradnjom, prigradnjom ili adaptacijom tuđe ili suvlasničke zgrade stečeno pravo vlasništva po pravilima ZOVO-a[175] ne zastarijeva

---

[170] §§ 418. OGZ-a glasi: „Nasuprot, ako je tko gradio od svoje građe na tuđem zemljištu, bez znanja i protiv volje vlasnika, zgrada pripada vlasniku zemljišta. Pošteni gradilac može iskati naknadu troškova potrebnih (u izvorniku „nothwendigen"=nužnih) i korisnih; a s gradiocem nepoštenim postupa se kao s onim, koji bez naloga obavlja tuđe poslove. Ako je vlasnik zemljišta znao za građenje, pa ga nije odmah zabranio, gradiocu poštenomu; ne može on iskati za zemljište nego općenu cijenu."

[171] NN 55/56., 46/61., i 40/64.

[172] VSH Rev-1205/86. od 5. studenog 1986., PSP-'NZ', 33/25.

[173] Zakon o osnovnim vlasničkopravnim odnosima (Sl. list SFRJ 6/80., i 36/90.) koji je stupio na snagu 1. rujna 1980.

[174] Žuvela[5], str. 564. br. 120. i u: Informator, god. XXXIX, br. 38/86 od 5. lipnja 1991.

[175] Odgovarajuća primjena odredbe iz čl.43.st.3. ZOVO-a.

pa se može podnijeti i danas[176]. Stjecanje prava vlasništva i drugih stvarnih prava do stupanja na snagu ZV-a prosuđuje prema pravilima koja su se primjenjivala u trenutku stjecanja (čl. 388. st. 2. ZV-a).

6.6. Upis prava vlasništva posebnog dijela nekretnine stečenog prenamjenom, nadogradnjom, „prigradnjom" ili dogradnjom

Ako je do 1. siječnja 1997. provedena prenamjena, nadogradnja, pregradnja ili dogradnja u skladu s gornjim pravilima nadležni sud će na zahtjev zainteresirane osobe odrediti upis u zemljišnu knjigu prava vlasništva posebnog dijela nekretnine uspostavljenog na odgovarajućem suvlasničkom dijelu cijele nekretnine (zemljišta i zgrade) na temelju ovršne sudske odluke kojom je utvrđeno da je stečeno pravo vlasništva posebnog dijela nekretnine te takve odluke kojom je utvrđena veličina suvlasničkog dijela, odnosno na temelju isprave svih suvlasnika cijele nekretnine kojom oni priznaju stjecanje prava vlasništva posebnog dijela nekretnine i sporazumno određuju veličinu odgovarajućih suvlasničkih dijelova na kojima se to vlasništvo osniva (čl. 372. st. 3.).[177]

Uknjižba prava vlasništva na posebni dio nekretnine stečen prenamjenom, nadogradnjom, pregradnjom, ili dogradnjom uknjižit će se na temelju pravomoćne i ovršne presude kojom je to pravo utvrđeno, ili pravno valjane isprave o sporazumu (nagodbi) zaključenog između stjecatelja i vlasnika nekretnine kojim se utvrđuje veličina suvlasničkih dijelova.

Zakon o vlasništvu dopušta upis prava vlasništva posebnog dijela nekretnine na temelju ovršne sudske odluke kojom je utvrđeno da je to pravo stečeno po gornjim pravilima. U tom se slučaju presudom utvrđuje da je pravo vlasništva stečeno izvanknjižno, na temelju samog zakona, kada su za ovo ispunjene sve zakonske pretpostavke. Pravomoćna presuda, dakle samo deklarira, na autoritativan način, da je pravo vlasništva stečeno na temelju samog zakona. Ako su pri tomu protekli prekluzivni rokovi, unutar kojih se mogu izjaviti redovni i izvanredni pravni lijekovi protiv presude, judikat pravomoćne presude nitko ne može više osporavati.

6.6.1. Stjecanje prava vlasništva s povjerenjem u zemljišne knjige

Unatoč tomu vlasnik, koji ima takvu presudu, nije zaštićen prema trećem koji je s pouzdanjem u zemljišnu knjigu u dobroj vjeri stekao pravo vlasništva. Ovo zbog toga što stjecatelj (u ovom slučaju treći) „upisom stječe nekretninu kao od njezina vlasnika, ako je postupajući s povjerenjem u zemljišne knjige u dobroj vjeri stekne od osobe koja je bila upisana kao vlasnik te nekretnine, premda to nije bila, pod uvjetom" da „mu upis ne bude izbrisan zbog nevaljanosti" (čl. 123. st. 1. ZV).[178] Stjecatelj je bio u dobroj vjeri ako u trenutku sklapanja pravnog posla, a ni u trenutku kad je zahtijevao upis nije znao niti je s obzirom na okolnosti imao dovoljno razloga posumnjati u to da stvar pripada otuđivatelju (čl. 122. st. 2. ZV-a).

---

[176] Vlasničku tužbu sadrži i zahtjev za utvrđenje prava vlasništva ako tužilac nije uknjižen kao vlasnik odnosne nekretnine, a vlasnička tužba ne zastarijeva, ako zakonom nije određeno što drugo (čl.161.st.2. ZV-a).

[177] Vidi čl. 388. st. 2. ZV-a koji glasi: „Stjecanje, promjena, pravni učinci i prestanak stvarnih prava do stupanja na snagu ovog zakona prosuđuju se po pravilima koja su se primjenjivala u trenutku stjecanja, promjene i prestanka prava i njihovih pravnih učinaka."

[178] Čl. 123. st. 2. glasi: „Brisanje upisa iz stavka 1. ovog članka, može se zahtijevati zbog neistinosti, nevaljanosti prednikova upisa tužbom za brisanje dok ne proteknu tri godine od kada je bio zatražen prednikov upis; ali onaj tko je o neistinitom prednikovu upisu bio uredno obaviješten, može zbog neistinosti prednikova upisa zahtijevati brisanje upisa samo ako je u roku za žalbu zatražio zabilježbu da je taj upis sporan i odmah, a najkasnije u roku od 60 dana od isteka rok za žalbu, podnio tužbu protiv onih koji su osporenim upisom stekli pravo ili su na temelju njega ishodili daljnje upise u zemljišnu knjigu."

6.6.2. Zabilježba spora

Izvanknjižni vlasnik može se zaštititi prema svakom trećem stjecatelju nekretnine tako što će istovremeno ili nakon što podnese tužbu radi utvrđenja da je stekao pravo vlasništva (čl. 187. Zakona o parničnom postupku), ili kada pokrene postupak „pred drugim nadležnim tijelom" o čijem ishodu „ovisi knjižno pravo", podnijeti prijedlog zemljišnoknjižnom sudu za zabilježbu spora (čl. 81. st. 1. i 2. ZZK). U tom slučaju pravomoćna će presuda kojom je usvojen tužbeni zahtjev djelovati protiv onih osoba „koje su stekle knjižna prava pošto je prijedlog za uknjižbu spora stigao zemljišnoknjižnom sudu" (čl. 81. st. 2. ZZK). „Dosuđeno pravo dobiva ono mjesto u prvenstvenom redu koje mu je bilo osigurano zabilježbom spora" (čl. 81. st. 3. ZZK). Pretpostavka da je izvanknjižni stjecatelj podnio prijedlog nadležnom sudu za zabilježbu spora istog dana kada je podnio tužbu za utvrđenje, ili pokrenuo postupak kod drugog nadležnog tijela, ili nakon toga npr. 12. veljače 2009. u 13 sati i da je treći istog dana u 14 sati podnio zahtjev za uknjižbu (prijenos) prava vlasništva koje je podnositelj tužbe osporio, a da se postupak pred sudom ili drugim nadležnim organom dovrši pravomoćnom odlukom kojom se utvrđuje da mu pripada osporeno pravo, on će dobiti prvo mjesto u prvenstvenom redu te ishoditi brisanje uknjižbe potonjeg stjecatelja i uknjižiti svoje pravo vlasništva. Tko, dakle ishodi uknjižbu prava vlasništva protiv zemljišnoknjižnog vlasnika po prijedlogu koji je podnesen sudu nakon što je podnijet zahtjev za zabilježbu spora, stječe pravo vlasništva pod raskidnim uvjetom. Ako osporeno pravo pripadne podnositelju zahtjeva za zabilježbu spora pravomoćnom odlukom suda ili drugog nadležnog tijela, to će se pravo uknjižiti uz prethodno brisanje uvjetno stečenog prava vlasništva trećeg.

6.6.3. Suspenzija načela stjecanja prava vlasništva s povjerenjem u zemljišne knjige

Pravilo o zaštiti povjerenja u zemljišnu knjigu ne primjenjuje se do 1. siječnja 2010. punih deset godina od dana stupanja na snagu Zakona o vlasništvu, koji ga uređuje, ako se njime stječe nekretnina na kojoj je bilo upisano društveno vlasništvo, a nije brisano prije 1. siječnja 1997. (čl. 388. st. 5. ZV) bez obzira što je prije toga prestalo izvanknjižno pretvorbom ili po drugoj pravnoj osnovi, ali je brisano nakon 1. siječnja 1997. ili uopće nije brisano do danas. Suspenzija do 1. siječnja 2007. odnosi se samo na nekretnine u katastarskim općinama za koje je otvorena EOP zemljišna knjiga, kao i na nekretnine koje su prema posebnim odredbama Zakona o zemljišnim knjigama unesene u Bazu zemljišnih podataka [179].

Suspenzija ovog pravila štiti stjecatelje prava vlasništva (i drugih stvarnih prava) koje potječe od nekadašnjeg prava upravljanja, prava korištenja ili prava raspolaganja. *Ratio legis* ove suspenzije je što je u pogledu nekretnina u društvenom vlasništvu postojao još mnogo veći raskorak između zemljišnoknjižnog i izvanknjižnog pravnog stanja, nego u pogledu nekretnina u privatnom vlasništvu. Najveći je raskorak na poljoprivrednom zemljištu, šumama i šumskom zemljištu jer je na te nekretnine po samom zakonu stekla pravo vlasništva Republika Hrvatska[180], a ne pravni sljednici društvenopravnih osoba koje su na tim nekretninama imale pravo upravljanja, pravo korištenja ili pravo raspolaganja, ali je taj raskorak lakše uočiti i dokazati. Daleko su zamršeniji pravni odnosi ovog pravnog raskoraka na građevinskom zemljištu, a još više na zgradama i posebnim dijelovima zgrada (nekretnina).

---

[179] Čl. 3.Zakona o izmjenama i dopunama Zakona o vlasništvu…, NN 141/06.

[180] Na šumama i šumskom zemljištu 16.listopada 1990. (član 6. Zakona o izmjenama i dopunama Zakona o šumama, NN 41/90) i na poljoprivrednom zemljištu 23.srpnja 1991. (čl.3.st.1. Zakona o poljoprivrednom zemljištu, NN 34/91).

Ovom se suspenzijom, dakle štite sve osobe: pravne i fizičke (ove druge u pogledu prava na građevinskom zemljištu u društvenom vlasništvu), a ne samo privilegirane osobe iz čl. 159. st. 4. ZV-a protiv kojih se stječe pravo vlasništva dosjelošću protekom dvostrukog vremena.

Zakon o stvarnim pravima Republike Srpske je suspendirao primjenu načela zaštite povjerenja u zemljišne knjige (čl.55. i 56.) za tri godine od stupanja na snagu (čl.346.st.3.). Tako i Nacrt ZSP FBiH (čl.55., 56. i 363.st.3.).

6.7. Pripatci posebnog dijela nastali prenamjenom, nadogradnjom, „prigradnjom" ili dogradnjom

Osobi koja je do 1. siječnja 1997., na temelju odobrenja koje je nadležna vlast dala, u granicama svoje ovlasti na takvo imovinsko raspolaganje, o svom trošku provela prenamjenu zajedničkih prostorija u zgradi u društvenom vlasništvu „u dio koji bi služio njegovom posebnom dijelu nekretnine" (npr. proširenje stana ili posebne prostorije na tavan ili podrum, odnosno na dio tavana ili podruma) njegovo se pravo vlasništva posebnog dijela protegnulo na taj dio „kao pripadak", osim u slučaju ako po odredbama ZV ne može biti pripadak toga posebnog dijela (čl. 373. st. 1.). Ova se odredba na odgovarajući način primjenjuje i na nadogradnju, dogradnju ili „prigradnju" nekretnine izvedenu do 1. siječnja 1997. na temelju valjanog odobrenja nadležne vlasti i o svom trošku (čl. 373. st. 2. ZV).

6.8. Pravni učinci dogradnje, nadogradnje, preuređenja ili ulaganja u tuđu zgradu po Zakonu o vlasništvu

Poslije 1. siječnja 1997. Zakonom je isključeno stjecanje prava vlasništva dogradnjom, nadogradnjom ili preuređenjem zgrade, odnosno prostorija u suvlasničkim zajedničkim ili tuđim zgradama kao i „njihovom prigradnjom, ugradnjom ili ulaganjem u njih… ako nije što drugo odredio vlasnik dograđene, nadograđene, odnosno prigrađene nekretnine" (čl. 156. st. 1. ZV).[181] U tom slučaju načelo *superficies solo cedit* važi bez iznimke. Ni savjestan graditelj, dakle ne može takvim zahvatom steći pravo vlasništva, ne samo na tuđoj zgradi, nego ni na zgradi na koju ima pravo suvlasništva. Suvlasnik građenjem stječe samo pravo suvlasništva srazmjerno svome dijelu na dograđeni, nadograđeni dio zgrade ili na preuređenu zgradu ili prigrađene dijelove, ako ono što je izgrađeno ne bude uklonjeno po zahtjevu ostalih suvlasnika. Zakon o vlasništvu u čl. 156. st. 2. propisuje: „Pripada li pravo na naknadu onomu tko je dogradio, nadogradio ili preuredio zgradu, odnosno prostoriju iz st. 1. ovoga članka (u suvlasničkim, zajedničkim ili tuđim zgradama), ili je ulagao u takvu zgradu ili prostoriju, određuju pravila obveznog prava".

Zakonom je, dakle u ovom slučaju isključena inverzija načela *superficies solo cedit* koju ZV dopušta u slučaju građenja na tuđem zemljištu ili na tuđem pravu gađenja, ako je graditelj bio pošten, a vlasnik zemljišta koji je znao za građenje „nije bez odgode zabranio daljnju gradnju" (čl. 153. i 157.).[182] „Dogradnjom, nadogradnjom ili preuređenjem (adaptacijom) zgrada, odnosno prostorija u suvlasničkim, zajedničkim ili tuđim zgradama, kao i njihovom pregradnjom, ugradnjom ili ulaganjem u njih, ne može se steći pravo vlasništva" ni po ZSP RS, „ako vlasnik (suvlasnici, zajedničari) dograđene, nadograđene, odnosno pregrađene nepokretnosti nije drukčije odredio" (čl.61.st.1.). Investitor ovih radova „ima pravo na naknadu po pravilima obligacionog prava" (čl.61.st.2.). Tako i po čl.61. Nacrta ZSP FBiH.

---

[181] Gavella i dr., Stvarno pravo, str. 398.-399.

[182] Gavella i dr., Stvarno pravo, str. 394.-395.

§3 Prikaz pravnih ustanova o uspostavljanju prava vlasništva i pravnog jedinstva zemljišta i zgrada u Federaciji Bosne i Hercegovine i Republici Srpskoj

1. Pravno razdvajanje zemljišta i zgrade

U FNRJ/SFRJ, odnosno NR BiH/SR BiH zgrade su bile pravno odvojene od zemljišta u društvenom vlasništvu trajnim pravom korištenja na zemljištu. Ovo načelo nije imalo iznimke[183]. Zgrade u etažnom vlasništvu (uglavnom obiteljske stambene zgrade), bile su pravno odvojene čak i od zemljišta u privatnom vlasništvu, jer se pravo suvlasništva na zemljištu nije protezalo na zgradu: na zajedničkim dijelovima zgrade vlasnici posebnih dijelova imali su zajedničko pravo vlasništva. Prema tome posebni dijelovi zgrade su glavne stvari, a zajednički dijelovi zgrade i zemljište njihove pripadnosti. Obrnuto u sustavu pravnog jedinstva zemljišta i zgrade, pravo vlasništva na posebne dijelove proizlazi iz prava suvlasništva na nekretninu koju čini zemljište i zgrada ili pravo građenja i zgrada.[184]

2. Uspostavljanje pravnog jedinstva zemljišta i zgrade

2.1. Uspostavljanje pravnog jedinstva zemljišta i zgrade u Federaciji Bosne i Hercegovine

U Federaciji Bosne i Hercegovine uspostavljeno je pravno jedinstvo zemljišta i zgrade u etažnom vlasništvu na zemljištu u privatnom vlasništvu 10.10.1995. stupanjem na snagu Zakona o osnovnim vlasničkopravnim odnosima[185] (čl.7.). Isto načelo potvrđuje i sadašnji Zakon o vlasničkopravnim odnosima Federacije BiH[186] (čl.12.). Ovo se, dakako, odnosi samo na zgrade u etažnom vlasništvu na zemljištu u privatnom vlasništvu. Zakonom o osnovnim vlasničkopravnim odnosima F BiH iz 1998. propisano je da vlasnici posebnih dijelova zgrade imaju nedjeljivo vlasništvo na zajedničkim dijelovima zgrade koji služe posebnim dijelovima i zajedničko pravo vlasništva, a ne pravo suvlasništva (idealni dio) kao po ZOSPO-u, na zemljištu na kome je zgrada i koje služi za njenu redovnu upotrebu (čl.22. st.1.). Time je bila derogirana odredba iz čl.6.st.2. Zakona o svojini na dijelovima zgrada[187]. ZOSPO je, međutim, bez te izmjene bio na snazi (primjenjivao se) u Republici Srpskoj do 1.7.2009.[188]

---

[183] P.Simonetti, Prava na građevinskom zemljištu (1945-2007), str.259-282.

[184] Simonetti, P., Prava na nekretninama (1945-2007), str.86-96.

[185] Sl.list R BiH, 37/95.

[186] Sl.novine F BiH, 6/98, 29/03.

[187] Sl.list SRBiH 35/77 koji je propisivao: Ako je zgrada u etažnoj svojini podignuta na zemljištu u svojini građana ili građanskopravnih lica, svaki etažni vlasnik ima svojinu na idealnom dijelu građevinske parcele srazmjerno vrijednosti svog posebnog dijela prema ukupnoj vrijednosti cijele zgrade (čl.6.st.2.).

[188] Prestao se primjenjivati 1.7.2009. kad je počela primjena Zakona o stvarnim pravima, Sl.glasnik RS 124/2008., čl.355.st.1.toč.b). i čl.357.

2.2. Uspostavljanje pravnog jedinstva zgrade i zemljišta u društvenom/državnom vlasništvu u Federaciji Bosne i Hercegovine u Republici Srpskoj

2.2.1 Zakoni o građevinskom zemljištu oba entiteta iz 2003.

Na građevinskom zemljištu u društvenom/državnom vlasništvu,[189] pravno jedinstvo zemljišta i zgrade u oba entiteta BiH uspostavljeno je 2003. pod istovjetnim zakonskim pretpostavkama po Zakonu o građevinskom zemljištu FBiH[190](čl.39-41) i Zakonu o građevinskom zemljištu RS[191] (čl.39.-41.) u pogledu zgrada koje su na dan njihova stupanja na snagu bile u privatnom vlasništvu, kao i onih zgrada koje su nakon toga prešle iz društvenog/državnog u privatno vlasništvo privatizacijom, na temelju pravnog posla ili po samom zakonu[192]. Iznimka su zgrade iz prijelaznih odredbi čl.87-92. Iako zakoni nisu izričiti (čl.39.st.1.), podrazumijeva se da je zgrada izgrađena u skladu sa zakonom, jer zgrada koja nije izgrađena u skladu sa zakonom do legalizacije nije trajna, a samo trajne zgrade se po zakonu spajaju sa zemljištem u skladu s pravilima građanskog prava (§§ 294 i 297 OGZ-a)[193]. Bespravnom izgradnjom na građevinskom zemljištu u društvenom vlasništvu nije se moglo steći ni trajno pravo korištenja: ono se stjecalo samo aktom legalizacije bespravne izgradnje[194]. U slučaju legalizacije zgrada stječe svojstvo trajnosti, a trajnu zgradu od zemljišta u društvenom/državnom vlasništvu odvaja trajno pravo korištenja bez obzira da li je zgrada u privatnom ili društvenom vlasništvu.

2.2.2. Zakon o građevinskom zemljištu Republike Srpske iz 2006.

Pravo vlasništva stečeno po čl.39. ZGZ-a iz 2003., upisat će se u zemljišnim knjigama po prijedlogu vlasnika zgrade (čl.42.st.1. ZGZ iz 2006.). Površinu zemljišta na koje stječe vlasništvo (suvlasništvo) vlasnik (suvlasnik) zgrade ili posebnih dijelova ako nije utvrđena regulacionim planom, utvrđuje organ nadležan za imovinskopravne poslove nakon pribavljanja mišljenja organa uprave za poslove urbanizma (čl.42.st.2.). Ovo mišljenje nadležni organ ne može uskratiti jer je to njegova zakonska obveza.

ZGZ RS iz 2006. (čl.47.st.1.) izričito propisuje da u slučaju kada je na građevinskom zemljištu u državnom vlasništvu do njegova stupanja na snagu (1.12.2006.) izgrađena zgrada

- bez prava korištenja radi građenja, odnosno
- bez odobrenja za građenje, ako se može naknadno izdati, skupština jedinice lokalne samouprave utvrdit će pravo vlasništva u korist graditelja, odnosno njegovog pravnog sljednika, uz obvezu plaćanja naknade „za prodato zemljište po tržišnoj vrijednosti građevinskog zemljišta, troškove uređenja građevinskog zemljišta i naknade za prirodne pogodnosti tog zemljišta (renta)“.

---

[189] U Republici Bosni i Hercegovini, odnosno u budućoj Federaciji Bosne i Hercegovine, 1992. nekretnine u društvenom vlasništvu proglašene su državnim vlasništvom, ali su zadržana prava uspostavljena, pa tako i prava na građevinskom zemljištu. Štoviše, ta su se prava jednako uspostavljala do istovjetnih zakona o građevinskom zemljištu u oba entiteta.

[190] Sl.novine FBiH25/03.

[191] Sl.glasnik RS 86/03.

[192] Šire o tomu: Simonetti, P., Prava na građevinskom zemljištu (1945-2007), str.417.-464.; isti, Reintegracija načela pravnog jedinstva nekretnine u Bosni i Hercegovini, Pravna riječ, God.III br.2/2006. (Banja Luka).

[193] Austrijski Općи građanski zakonik primjenjivao se u BiH do 6.4.1941. kao pozitivni propis, a od 1945. njegove se odredbe primjenjuju kao pravna pravila na temelju čl.4. Zakona o nevažnosti pravnih propisa donijetih do 6.4.1941. i za vrijeme neprijateljske okupacije, prečišćeni tekst, Sl.list FNRJ, 86/46.

[194] Simonetti, P., Prava na građevinskom zemljištu (1945-2007), str.266-267.

Pravno jedinstvo zemljišta i zgrade ne može se uspostaviti prije konačnog rješenja o naknadnom odobrenju za građenje (legalizaciji). Prema slovu zakona i graditelj koji je imao pravo korištenja radi građenja, ali je gradio bez građevinske dozvole, dužan je platiti naknadu „za prodato zemljište po tržišnoj cijeni". Ovo nije u skladu s odredbama iz čl.39-41. ZGZ-a iz 2003., po kome vlasnik zgrade nije bio dužan platiti naknadu za zemljište u slučaju uspostave pravnog jedinstva zemljišta i zgrade. Kako ovu naknadu nije dužan platiti vlasnik zgrade ni po ZPS RS (čl.330.-335.) može se očekivati da će ova obveza otpasti Zakonom o izmjenama i dopunama ZGZ-a koji bi se morao donijeti do 1.10.2009. kako nalaže čl.355.st.3.ZPS RS. Ukoliko obveze plaćanja naknade za zemljište ne bude oslobođen nositelj prava korištenja radi građenja koji je izgradio zgradu bez odobrenja za građenje, tada će se postaviti pitanje smanjenja njegove obveze u visini iznosa plaćenog za stjecanje prava korištenja radi građenja. U svakom slučaju obveze plaćanja naknade za zemljište oslobođen je prijašnji vlasnik zemljišta kao i njegov pravni sljednik koji je izgradio zgradu bez utvrđenja da mu pripada pravo korištenja radi građenja, a koja je kasnije legalizirana, ako bi se njemu vratilo pravo vlasništva na to zemljište i da nije izgradio zgradu (čl.46. ZGZ-a).

2.3. Uspostavljanje pravnog jedinstva zemljišta i zgrade po prijelaznim odredbama ZPS RS

Zgrade koje su ostale u društvenom/državnom vlasništvu do 4.1.2009.godine kada je stupio na snagu ZSP RS, toga dana su, u načelu, prešle u vlasništvo osoba privatnog i javnog prava (čl.18. i 22.ZPS RS) zajedno s pripadajućim zemljištem. To je smisao čl.330. st.1. ZSP-a. [195] Pri tomu treba razlikovati državno vlasništvo u koje je preimenovano društveno vlasništvo od prava vlasništva koje ima Republika Srpska kao osoba (lice) javnog prava po ZSP RS (čl.22.).

Prijelazne odredbe ZSP RS koje se citiraju u ovom radu, ako se apstrahiraju jezične razlike podudaraju se s prijelaznim odredbama nacrta Zakona o stvarnim pravima Federacije Bosne i Hercegovine (čl.338.-360.)[196].

2.3.1. Uspostava prava vlasništva spajanjem trajne zgrade sa zemljištem inverzijom načela superficies solo cedit

Samo trajne zgrade koje su izgrađene u skladu sa zakonom spajaju se sa zemljištem.

Sve do legalizacije zgrada se smatra privremenom iako je po namjeni trajna, jer se može svakodobno ukloniti na temelju pravomoćnog i ovršnog (izvršnog) rješenja nadležnog organa, pa se kao privremena ne može pravno spojiti sa zemljištem. U tom slučaju važe opće odredbe građanskog prava o priraštaju po kojima vlasnik glavne stvari ima pravo vlasništva na razmjerno trajno spojenoj stvari (čl.9.).

---

[195] Čl.330. glasi: „Ovim Zakonom uspostavlja se pravno jedinstvo zemljišta i zgrade ako na osnovu posebnog zakona nije uspostavljeno (st.1.). Vlasnik zgrade stiče pravo svojine na građevinskom zemljištu u društvenoj, odnosno državnoj svojini koje pripada zgradi. (st.2.)" Prema čl.331.: „Ako do stupanja na snagu ovog zakona nije uspostavljeno trajno jedinstvo zemljišta i zgrade po odredbama posebnog zakona, vlasnik zgrade stiče pravo svojine na zemljištu ispod zgrade i na onu površinu koja je po regulacionom planu ili planu parcelacije namijenjena da služi za redovnu upotrebu zgrade (st.1.). Ako regulacionim planom ili planom parcelacije nije uređena površina zemljišta koje je potrebno za redovnu upotrebu zgrade, tu površinu utvrđuje nadležni organ uprave za imovinskopravne poslove uz prethodno mišljenje opštinskog organa uprave nadležnog za poslove urbanizma (st.2.). Na zemljištu iz st.1. ovog člana neće se uspostaviti pravno jedinstvo zemljišta i zgrade prije okončanja postupka revizije u skladu sa Zakonom o građevinskom zemljištu Republike Srpske" (st.3.)

[196] Razlika u numeraciji članaka posljedica je izostavljanja iz Nacrta ustanove zemljišnog duga (čl.186.-197.).

Iako je po pravilima građanskog prava (§§ 294 i 297 OGZ-a) i po ZSP RS (čl.14.st.1. i 2.)[197] zemljište glavna stvar, pa vlasniku zemljišta pripada pravo vlasništva na trajnoj, odnosno razmjerno trajnoj zgradi (*superficies solo cedit*), pravno jedinstvo zgrade i zemljišta u društvenom/državnom vlasništvu uspostavlja se inverzijom načela *superficies solo cedit* po kome vlasnik zgrade stječe pravo vlasništva zemljišta na komu je zgrada i koje služi za njenu redovnu upotrebu jer je u sustavu pravnog dualiteta zemljišta i zgrade – zgrada glavna stvar.

2.3.2. Specifične odredbe o pravnom sjedinjenju zemljišta i zgrade

Specifične odredbe sjedinjenja zemljišta i zgrade koje nisu upisane u zemljišnu knjigu, a 4.1.2009. bile su u društvenom/državnom vlasništvu izložiti će se u nastavku. Zakonom su obuhvaćene moguće hipoteze kako slijedi.

2.3.3. Pravno sjedinjenje zemljišta i neupisane zgrade

Pod pretpostavkom da zgrada izgrađena na zemljištu u društvenom/državnom vlasništvu nije upisana u zemljišnoj knjizi, a upisano je zemljište na komu je zgrada izgrađena, vlasnik zgrade koji do 4.1.2009. nije stekao pravo vlasništva na zemljištu koje pripada zgradi, stječe ga 4.1.2009. po odredbama iz čl.331. (čl.332.st.1.)

2.3.4. Pravno sjedinjenje zgrade i zemljišta u društvenom/državnom vlasništvu na komu vlasnik zgrade ima upisano zakonom priznato pravo korištenja

Pod pretpostavkom da vlasnik zgrade izrađene na zemljištu u društvenom/državnom vlasništvu ima upisano „privremeno pravo korištenja, pravo korišćenja radi građenja, prvenstveno pravo korišćenja radi građenja ili trajno pravo korišćenja“, koja su mu pripadala po samom zakonu, na njegov zahtjev, nadležni organ će „odrediti upis prava svojine u zemljišnoj knjizi u njegovu korist na cijeloj nepokretnosti“(čl.322.st.2.). Ovdje nije riječ o trajnom pravu korištenja po ZGZ-u SR BiH iz 1986. (čl.40.-43.) jer se to pravo stjecalo izvanknjižno izgradnjom zgrada na građevinskom zemljištu u društvenom vlasništvu u skladu sa zakonom (čl.57.ZGZ-a i čl.12.st.1.ZOSPO-a), kao i u trenutku prelaska izgrađenog građevinskog zemljišta u društveno vlasništvo jer je na građevinskom zemljištu u društvenom vlasništvu zgrada bila uvijek pravno odvojena od zemljišta trajnim pravom korištenja[198]. Trajno pravo korištenja se upisivalo u zemljišnu knjigu s upisom prava vlasništva ili prava raspolaganja na zgradu. Riječ je o pravu na neizgrađenom građevinskom zemljištu koje je upisano u ranijim vremenima kada se i pravo korištenja radi građenja nazivalo „trajno pravo korištenja“.[199] Tako je npr. Zakon o prometu zemljišta i zgrada[200] propisivao da narodni odbor kotara (sreza) može dati pojedincu građevinsko zemljište u društvenom vlasništvu na trajno korištenje radi građenja (čl.43.) tj. pravo korištenja radi građenja po terminologiji ZGZ-a iz 1986.[201]

---

[197] Šire o tomu: Simonetti, P., Prava na nekretninama (1945.-2007.), str.46.-56.

[198] Vidi pozitivnopravni izraz toga načela u čl.37. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta i čl.70.st.1. ZGZ-a. Šire o tomu: Simonetti, P., Pravo korištenja na građevinskom zemljištu u društvenom vlasništvu, Informator, Zagreb, str.201.-207.; isti: Prava na građevinskom zemljištu (1945-2007), str.210.-232.

[199] Vidi čl.43. Zakona o prometu zemljišta i zgrada, Sl.list FNRJ 26/54., kasnije se isto pravo nazivalo prosto „pravo korištenja” (čl.37. Zakona o prometu zemljišta i zgrada, preč.tekst, Sl.list SFRJ 43/65, 57/65 i 17/67).

[200] Sl.list FNRJ 26/54.

[201] Šire: Simonetti, P., Prava na građevinskom zemljištu (1945-2007) , str. 57.-68.

2.3.5. Sjedinjenje zgrade i zemljišta na komu nije upisano pravo korištenja vlasnika zgrade

Ako na zemljištu u društvenom vlasništvu postoji zgrada, a vlasnik zgrade nema upisano pravo korištenja na zemljištu, nadležni sud će na njegov zahtjev „odrediti upis prava svojine na nepokretnosti" koja se sastoji od zgrade i zemljišta iz čl.331.st.1. „ako ispunjava uslove propisane posebnim zakonom". Ova odredba ima načelno značenje pa se odnosi i na ostale hipoteze uspostavljanja pravnog jedinstva zemljišta i zgrade. Riječ je o trajnoj zgradi koja je izgrađena uz građevinsku dozvolu za koju je nakon izgradnje pribavljena uporabna dozvola kojom se potvrđuje da je zgrada izgrađena u skladu s građevinskom dozvolom. To se odnosi i na trajnu zgradu koja je izgrađena bez građevinske dozvole ako je nadležni organ naknadno legalizirao njenu izgradnju pravomoćnim rješenjem[202]. Sve to pod uvjetom da je odgovarajućim prostornim planom ili odlukom nadležnog tijela oblikovana građevinska čestica.

2.3.6. Sjedinjenje zgrade i zemljišta koje nisu upisane u zemljišnu knjigu

Pod pretpostavkom da je do 4.1.2009. na zemljištu u društvenom/državnom vlasništvu izgrađena zgrada, „ali zemljište na kome je izgrađena nije upisano u zemljišnu knjigu" vlasnik zgrade stječe pravo vlasništva na nekretninu koja se sastoji od zgrade i zemljišta koje pripada zgradi (čl.331.) „po odredbama o sticanju prava na nepokretnosti koje nisu upisane u zemljišne knjige" (čl.332.st.4.). U tom slučaju primijenit će se pravila o polaganju ugovora (tabularne isprave) u knjigu položenih ugovora (čl.327.st.4. i 334.st.4.).

2.3.7. Pravno sjedinjenje u slučaju kada pravo upravljanja, korištenja ili raspolaganja na zemljištu ima jedna osoba, a druga ima pravo upravljanja, korištenja ili raspolaganja na zgradu

Pod pretpostavkom da je dana 4.1.2009. jedna osoba imala pravo upravljanja, korištenja ili raspolaganja na zgradu, a drugoj je pripadalo neko od ovih prava na zemljište, pravo vlasništva na nekretnini upisat će se po odredbama čl.332. u korist vlasnika zgrade tj.osobe u čiju korist se to pravo pretvorilo u pravo vlasništva nakon legalizacije izgradnje (čl.333.).

2.3.8. Pravno odvajanje trajne zgrade i zemljišta primjenom ustanova prava građenja i koncesije

Trajne zgrade po ZSP-u su pravno odvojene od zemljišta u nečijem vlasništvu primjenom ustanove prava građenja (čl.14.st.3 i čl.286. ZSP RS). Ali u tom slučaju zgrada pripada bezuvjetno nositelju prava građenja, jer nema prava koje bi moglo razdvojiti zgradu od prava građenja (čl.291.st.3. ZSP RS).

Od zemljišta koje je po namjeni opće ili javno dobro, trajne zgrade su odvojene koncesijom kao posve samostalne nekretnine dok koncesija traje (čl.7.st.4. ZSP).

U prvom slučaju zgrada je vlasništvo nosioca prava građenja, a u drugom – imatelja koncesije. Nositelj prava građenja može svakodobno slobodno raspolagati zgradom na pravu građenja, a nositelj koncesije samo ako stjecatelj ispunjava uvjete za koncesiju, odnosno uz suglasnost koncedenta, bilo da je ta suglasnost dana pod određenim uvjetima, u koncesiji odnosno ugovoru o zakupu (anticipirana) ili se daje naknadno, izmjenom i dopunom koncesije, odnosno preinakom (novacijom) ugovora u skladu sa zakonskim režimom koncesije.[203]

---

[202] Vidi Uredbu o legalizaciji bespravno izgrađenih objekata, Sl.glasnik RS 55/2005.

[203] Simonetti, P., Prava na nekretninama (1945-2007), str.97-105.

3. Uspostavljanje pravnog jedinstva nekretnine i njenih posebnih dijelova u Republici Srpskoj

3.1. Uspostavljanje pravnog jedinstva zgrade sa zemljištem u privatnom vlasništvu

Po pravilima građanskog prava, trajne zgrade su sastavni dio zemljišta, vlasništvo vlasnika zemljišta (§§ 294 i 297 OGZ-a). Naprijed je konstatirano da su u FNRJ/SFRJ i NR BiH/ SR BiH, zgrade u etažnom vlasništvu (praktički obiteljske zgrade,) bile pravno odvojene od zemljišta u privatnom vlasništvu po saveznom Zakonu o vlasništvu na dijelovima zgrada[204] i po potonjem Zakonu o svojini na dijelovima zgrada SR BiH[205] [206], a taj se pravni dualitet zadržao u RS do 1.7.2009. kada je prestala primjena Zakona o svojini na dijelovima zgrada (čl.355.st.1.t.b. ZSP RS).

Savezni Zakon o vlasništvu na dijelovima zgrada (čl.5.st.3. i 6.st.2.) kao i potonji republički Zakon o svojini na dijelovima zgrada (čl.4.st.3. i čl.6.st.2.) propisivao je da vlasnik posebnog dijela zgrade (stana ili poslovne prostorije) ima pravo suvlasništva na zemljištu i zajedničko pravo vlasništva na zajedničkim dijelovima zgrade. Pravo suvlasništva na zemljištu, dakle, se ne proteže na zgradu, čiji su zajednički dijelovi u zajedničkom vlasništvu, a zajedničko vlasništvo na tim dijelovima se ne proteže na posebne dijelove koji su u isključivom vlasništvu. Postoji zapravo više nekretnine: jedna je zemljište, druga zgrada i još onoliko nekretnina koliko ima samostalnih dijelova zgrade, s različitim oblicima prava vlasništva na samostalnim dijelovima: suvlasništvo, zajedničko vlasništvo, samovlasništvo. Nasuprot tome, prema ZSP-u „svojina na posebnom dijelu nepokretnosti“ (etažno vlasništvo) „proizlazi i ostaje neodvojivo povezana s odgovarajućim suvlasničkim dijelom (idealnim dijelom) nepokretnosti na kojoj je uspostavljeno vlasništvo posebnog dijela te se može samo zajedno s njim prenijeti i opteretiti“ (čl.80.st.1. ZSP).

3.1.1.Pravo vlasništva posebnog dijela nekretnine

Dok je u sustavu pravnog dualiteta zemljišta i zgrade pravo suvlasništva na građevinskoj čestici u privatnom vlasništvu proizlazilo iz prava vlasništva na posebnom dijelu zgrade; u sustavu pravnog jedinstva zemljišta i zgrade (njemački i austrijski pravni model koji slijedi hrvatsko pravo kao i ZSP RS) pravo vlasništva na posebni dio zgrade proizlazi iz prava suvlasništva - suvlasničkog dijela „cijele nekretnine“. U sustavu pravnog dualiteta, vlasnici posebnih dijelova imali su zajedničko pravo vlasništva na zajedničkim dijelovima obiteljskih stambenih zgrada, odnosno zajedničko pravo korištenja na zajedničkim dijelovima višestambenih zgrada u društvenom vlasništvu, po ZSP-u suvlasnici nekretnine koja se sastoji od zemljišta i zgrade ili od prava građenja i zgrade imaju pravo vlasništva na posebne dijelove zgrade. Pravo vlasništva na posebni dio nekretnine neodvojivo je povezan sa suvlasničkim dijelom cijele nekretnine (čl.80. i 334.st.2.).[207] [208]

---

[204] Sl.list FNRJ 16. i 48/1959.

[205] Sl.list SR BiH 35/77, 38/78 i 22/84

[206] Simonetti, P., Prava na nekretninama (1945-2007), str.89-96.

[207] Vidi čl.81. ZSP RS.

[208] Šire o tomu: Simonetti, P., Pravna priroda etažnog vlasništva u nacionalnom i komparativnom pravu, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, god.15, 1994., str.25.-35.; isti: Pravo građenja, str.271.-280. i O pravnoj prirodi etažnog vlasništva u usporednom pravu: Planojević, N., Etažna svojina, Kragujevac, 1997., str.153.-182; Belaj, V., Stvarnopravni odnosi na stanu kao posebnom dijelu zgrade (doktorski rad), Pravni fakultet u Osijeku, 1992. Drukčije u zemljama romanske tradicije gdje su posebni dijelvoi zgrade pravno odvojeni od zgrade u suvlasništvu vlasnika posebnih dijelova: Basile, M., Regime condominiale ed esigenze abitative (L´evoluzione dell´regime condominiale nei maggiori paesi dell´occidente europeo), Giuffrè, Milano, 1979., p.p.87.-155.

3.2. Uspostavljanje prava vlasništva nekretnine i posebnih dijelova zgrade

3.2.1. Opća napomena

Ako se isključe obiteljske stambene zgrade, sve ostale zgrade, osim manjih poslovnih zgrada, bile su u društvenom vlasništvu, a zgrade u društvenom vlasništvu nisu mogle stajati na zemljištu u privatnom vlasništvu (argument iz čl.36. Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta). Zgrada u društvenom vlasništvu uvijek je na zemljištu u društvenom vlasništvu pravno odvojena trajnim pravom korištenja. Ovo pravilo nema iznimke.

Prema tomu, višestambene zgrade (s preko dva stana ili tri manja stana) koje su prisilno ili na temelju pravnog posla ili po drugom osnovu prenesene u društveno vlasništvo(prije nacionalizacije), ostale su u društvenom vlasništvu čak i u slučaju kad su nakon nacionalizacije (26.12.1958.) svi posebni dijelovi izuzeti iz nacionalizacije. U skladu s ovim provodila se uknjižba u zemljišnu knjigu[209]. Vlasnici posebnih dijelova imali su trajno pravo korištenja na zemljište koje pripada zgradi i na zajedničke dijelove zgrade [210].

Višestambene zgrade koje su prenesene u društveno vlasništvo, kao i one koje su kasnije izgrađene, nisu mogle stajati na zemljištu u privatnom vlasništvu, one su bez iznimke bile uvijek na zemljištu u društvenom vlasništvu. U višestambenoj zgradi, dakle, mogli su svi posebni dijelovi biti u privatnom vlasništvu ili samo neki, a drugi u društvenom vlasništvu (koegzistencija privatnog i društvenog vlasništva) ili su svi posebni dijelovi bili u društvenom vlasništvu. Na posebnim dijelovima u društvenom vlasništvu imale su pravo raspolaganja društvenopravne osobe.[211] Veći dio posebnih dijelova u društvenom vlasništvu prenesen je u privatno vlasništvo na temelju ugovora o otkupu stanova, a značajan broj zgrada, posebno poslovnih, prenesen je u privatno vlasništvo u postupku privatizacije društvenih poduzeća ili na temelju pravnog posla izvan tog postupka. Na tim zgradama u etažnom vlasništvu uspostavljeno je pravno jedinstvo zemljišta i zgrada u RS dana 1.7.2009. kada je prestao važiti Zakon o svojini na dijelovima zgrada i počela primjena ZSP (čl.355. st.1.t.b i čl.357.).

3.2.2. Uspostavljanje pravnog jedinstva nekretnine i njenih posebnih dijelova po prijelaznim odredbama ZSP RS

Kako je naprijed izloženo, pravno jedinstvo zgrade u privatnom vlasništvu na zemljištu u društvenom vlasništvu uspostavljeno je po pravilima ZGZ-a iz 2003. pretvorbom trajnog prava korištenja u pravo vlasništva na zemljištu koje pripada zgradi (čl.39.-41.).

Na onim zgradama koje su kao cjeline ostale u društvenom/državnom vlasništvu do stupanja na snagu ZSP-a (4.1.2009.) uspostavlja se pravno jedinstvo nekretnine po prijelaznim odredbama toga zakona (čl.334.). Pravo vlasništva kao i pravo raspolaganja na posebnom dijelu zgrade „postaje svojina posebnog dijela nepokretnosti“ (čl.334.)[212], a nekretninu čini pravno jedinstvo zemljišta i zgrade.

---

[209] Čl.5.st.2. Uputstva o zemljišnoknjižnim upisima, nacionaliziranih najamnih zgrada i građevinskog zemljišta, Sl.list FNRJ 49/59.

[210] Čl.5st.1. i 2. i čl.6.st.1. saveznog Zakona o vlasništvu na dijelovima zgrade.

[211] Čl.1.-7. Zakona o vlasništvu na dijelovima zgrada.

[212] Čl.334.st.1. glasi: „Svojina na posebnom dijelu zgrade (etažna svojina), kao i pravo raspolaganja na posebnom dijelu zgrade u društvenoj, odnosno državnoj svojini, koji do stupanja na snagu ovog zakona nije pretvoreno u pravo svojine, stupanjem na snagu ovog zakona postaje svojina posebnog dijela nepokretnosti po odredbama ovog zakona”.

Vlasništvo posebnog dijela nekretnine se neodvojivo povezuje s određenim suvlasničkim dijelom cijele nekretnine, koju čine zgrada i zemljište, bez obzira da li je zgrada prešla u privatno vlasništvo danom stupanja na snagu ZSP-a (4.1.2009.) ili nakon toga, na što upućuje završni dio čl.334.st.2. koji glasi: „na koje su do stupanja na snagu ovog zakona imali zajedničku svojinu vlasnici posebnih dijelova zgrade".

3.2.3. Uknjižba posebnog dijela nekretnine

Uknjižba posebnog dijela nekretnine u zemljišnu knjigu provodi se „uz odgovarajuću primjenu odredba ovog Zakona za uspostavljanje prava svojine na posebnom dijelu nepokretnosti" (čl.334.st.3.). Dakle, pravo vlasništva na posebnom dijelu nekretnine uspostavlja se po pravilima iz čl.81.-89. ZSP-a RS koja se podudaraju s pravilima o uspostavi vlasništva posebnog dijela iz čl.71.-78. ZV-a RH *(supra)*.

3.2.4. Dosadašnji upisi prava na posebnom dijelu zgrade

Zakon propisuje da se „već provedeni upisi prava svojine na posebnom dijelu zgrade, odnosno upisi prava raspolaganja na posebnom dijelu zgrade u državnoj svojini, smatraju upisima prava svojine posebnog dijela nepokretnosti" (čl.334.st.3.). To znači da će se suvlasnički dijelovi cijele nekretnine naknadno utvrditi i upisati u zemljišnu knjigu. S tim upisom će se uskladiti pravo vlasništva na posebne dijelove nekretnine i pravo suvlasništva na cijeloj nekretnini.

3.2.5. Upisi u knjigu položenih ugovora

U slučaju da nekretnina koja se sastoji od zemljišta i zgrade, nije upisana u zemljišnu knjigu, upis prava vlasništva posebnog dijela nekretnine, kao i prava suvlasništva na cijeloj nekretnini, provodi se polaganjem „isprave za sticanje svojine" po pravilima iz čl.85. ZSP-a (čl.334.st.5.).

Čl.334.st.4. glasi: „Ukoliko se knjiga položenih ugovora ne vodi kod zemljišnoknjižne kancelarije, nadležni organ koji vodi tu knjigu dužan je u roku od šest mjeseci od stupanja na snagu ovoga Zakona dostaviti izvornike položenih ugovora zemljišnoknjižnoj kancelariji nadležnog suda". Ovaj rok je protekao 4.7.2009.

3.2.6. Troškovi upisa prava vlasništva na posebnim dijelovima zgrade

U načelu troškove upisa prava vlasništva na posebnim dijelovima zgrade (čitaj: nekretnine) snose vlasnici posebnih dijelova. ZSP RS propisuje: „Troškove upisa prava svojine na posebnim dijelovima zgrade snose etažni vlasnici srazmjerno vrijednosti (korisna površina) stana ili druge samostalne prostorije u odnosu na cijelu zgradu" (čl.334.st.6.).

Imajući u vidu značajan broj siromašnih vlasnika posebnih dijelova zgrada (stanova) točnije posebnih dijelova nekretnina koji nemaju mogućnosti snošenja troškova upisa u zemljišnu knjigu, Zakon propisuje: „Vlada Republike Srpske će donijeti podzakonski akt koji će utvrditi uslove pod kojima Republika Srpska snosi troškove upisa etažne svojine u zemljišne knjige" (čl.334.st.7.).

3.2.7. „Pravo preče kupovine" (prvokupa) suvlasnika posebnog dijela nekretnine, suvlasnika nedjeljive nekretnine i suvlasnika „porodične" stambene zgrade

ZSP RS uređuje jednu specifičnu pravnu ustanovu, kakvu ne poznaje hrvatski ZV- pravo „preče kupovine" (prvokupa) „etažne svojine" (čl.90.). ZSP RS propisuje da pravo „preče kupovine" imaju „suvlasnici etažne svojine" (čl.90.st.1.). Ova odredba nije sasvim točna jer pravo prvokupa imaju suvlasnici:

– posebnog dijela nekretnine;
– nedjeljive zgrade (koja se ne može podijeloiti na posebne samostalne dijelove); i
– „porodične zgrade“ (čl.90.st.2. i 7.).

Osim toga, u sustavu pravnog jedinstva zemljišta i zgrade uvijek je riječ o nekretnini koja se sastoji od zemljišta i zgrade, odnosno posebnog dijela zgrade koji proizlazi iz prava suvlasništva na etažno podijeljenoj nekrentini koju čine zgrada i zemljište.

„Porodična zgrada“ po pravilu je sintagma za „porodičnu stambenu zgradu“, koja se koristila u pravnim izvorima bivše FNRJ/SFRJ u sustavu koji je ograničavao pravo vlasništva i na zgrade.

Pravo suvlasništva na posebnom dijelu zgrade, na nedjeljivoj zgradi i na „porodičnoj zgradi“ po pravilu se uspostavljao po samom zakonu – nasljeđivanjem ili stjecanjem zajedničkim radom u bračnoj zajednici. Ustanova prava prvokupa ograničava, u izvjesnoj mjeri, načelo slobode raspolaganja radi zaštite nekih drugih vrijednosti. *Ratio legis* ove pravne ustanove je da se realizacijom prava prvokupa smanji broj suvlasnika ili da se svede na jednog vlasnika nekretnine koja je u suvlasništvu. Bez ove ustanove, naime, prijeti opasnost da suvlasnički dio pribavi treća osoba, na temelju kupoprodaje, koja dolazi na mjesto dosadašnjeg suvlasnika, a može još više komplicirati već ionako komplicirane pravne odnose. Zato je opravdano ograničenje načela slobode raspolaganja pravom prvokupa suvlasnika ovih nekretnina, odnosno samostalnih dijelova nekretnina.

Suvlasnik koji prodaje svoj suvlasnički dio:

– u posebnom dijelu nekretnine;
– u nedjeljivoj zgradi (nekretnini);
– u „porodičnoj zgradi“;

mora učiniti ponudu u „pisanoj formi“ ostalim suvlasnicima. Ponuda sadrži „zemljišnoknjižne ili katastarske oznake nepokretnosti ili posebnog dijela nepokretnosti“ koji se prodaje (čl.90.st.3.)

Ponuđeni suvlasnici mogu u roku od 60 dana od prijema ponude obavijestiti „ponuđača u pisanoj formi o prihvatanju ponude“.

„Pisana forma“ je esencijalni sastojak „ponude“ i „prihvata“. To znači da ponuda i prihvat pravno ne postoje ako nisu dani u pisanoj formi.

Ako ponuđeni ne obavijesti „u pisanoj formi“ ponuđača u roku od 60 dana od prijema ponude o prihvatanju ponude, ponuđač može „prodati svoj dio“ drugoj osobi, ali ne po nižoj cijeni ili povoljnijim uvjetima (st.4.).

Imatelji prava prvokupa mogu tražiti „od suda da ugovor proglasi ništavim i da oni kupe dio pod istim uslovima“ ako im nije učinjena ponuda u skladu sa zakonom ili ako je suvlasnik prodao svoj dio „po povoljnijim uslovima trećem licu“ (st.5.).

Tradicionalno je sankcija zbog povrede prava prvokupa pobojnost (rušljivost) ugovora, a rok za poništenje najčešće 6 mjeseci. Tako i po važećem Zakonu o obveznim odnosima – ZOO (čl.532.st.1.). Podizanje sankcije na stupanj ništavosti ugovora bez vremenskog ograničenja zahtjeva (tužbe) za proglašenje ništavim ugovora po službenoj dužnosti (čl.109. i 110. ZOO) nije u skladu s interesima koji se štite ustanovom prava prvokupa.

Zato će se u praksi ova pravila, vjerojatno, interpretirati u skladu sa supsidijarnim pravilima o zakonskom prvokupu koji upućuju na odgovarajuću primjenu pravila o prodaji s pravom prvokupa (čl.533.st.4.).

Prema tim pravilima ako je kupac prenio stvar u vlasništvo trećeg ne obavještavajući prodavatelja (imatelja prava prvokupa) iako je trećemu to bilo poznato ili mu nije moglo

ostati nepoznato „da prodavac ima pravo preče kupovine“, prodavatelj može u roku od 6 mjeseci „računajući od dana kad je saznao za ovaj prijenos zahtijevati da se prijenos poništi i da se njemu ustupi pod istim uvjetima“ (čl.532.st.1.). U slučaju netočne obavijesti o uvjetima prodaje, kad je trećemu to bilo poznato ili mu nije moglo ostati nepoznato, rok od 6 mjeseci počinje teći od dana kada je prodavatelj saznao za točne uvjete ugovora. „Pravo preče kupovine prestaje u svakom slučaju po proteku 5 godina od prijenosa svojine stvari na trećeg“ (čl.532.st.3.).

Pravo vlasništva na nekretnini prenosi se na temelju pravnog posla upisom u zemljišnu knjigu. Čini se da je u ovom slučaju prikladnija interpretacija „predaja posjeda“ (koju ima u vidu ZOO) umjesto prijenosa prava vlasništva upisom u zemljišnu knjigu, jer se zemljišnoknjižni prijenos prava vlasništva na nekretnini može otegnuti u nedogled.

Ukoliko se drukčije ne sporazumiju, suvlasnicima pripada pravo „preče kupovine“ srazmjerno učešću svih suvlasničkih dijelova na cijeloj nepokretnosti (st.6.).

3.3. Posebni dijelovi nastali prenamjenom, nadziđivanjem, pregradnjom ili dogradnjom

3.3.1. Opća napomena

Uvjeti, način i postupak stjecanja prava vlasništva prenamjenom, nadziđivanjem, pregradnjom ili dogradnjom zgrada u društvenom vlasništvu i pretvaranja zajedničkih prostorija u stanove bili su propisani posebnim Zakonom[213]. Pretvaranje zajedničkih prostorija u stanove, „u smislu toga Zakona, smatra se pretvaranje potkrovlja, perionica, sušionica, podrumskih prostorija, terasa i drugih zajedničkih dijelova i prostorija u zgradi u jedan ili više stanova“ (čl.4.). Nadziđivanjem smatra se „izgradnja jednog ili više stanova na zgradi tako da sa postojećom zgradom čine cjelinu“ (čl.3.).

> „Odobrenje“ (točnije konstituiranje prava) pretvaranja zajedničkih prostorija u stanove, kao i za nadziđivanje i dogradnju zgrade u društvenom vlasništvu davao je nadležni organ pod uvjetima, na način i u postupku koji je bio propisan Zakonom.

Sintagma *pretvaranje zajedničkih prostorija* iz posebnog zakona obuhvaća pojmove *prenamjena* i *pregradnja* iz ZSP-a (čl.335.). Uz nadziđivanje ZSP navodi i dogradnju zgrade u društvenom vlasništvu kao način stjecanja prava vlasništva na dograđeni, posebni dio zgrade.

3.3.2. Originarno stjecanje prava na posebnom dijelu nekretnine

Pravo vlasništva prenamijenjenih prostorija stekla je ona osoba koja je do 4.1.2009. uz odobrenje nadležnog organa o svom trošku u zgradi u društvenom vlasništvu provela prenamjenu zajedničkih prostorija „u stan ili drugu samostalnu prostoriju“. Osoba koja je do 4.1.2009. na taj način stekla pravo vlasništva na posebni dio zgrade – dana 4.1.2009. postala je suvlasnica cijele nekretnine koja se sastoji od zemljišta i zgrade srazmjerno vrijednosti svoga posebnog dijela prema cijeloj nekretnini (čl.335.st.1.). Pravo vlasništva na posebni dio nekretnine neodvojivo se povezuje sa suvlasničkim dijelom i samo zajedno s njim se može otuđiti, naslijediti i opteretiti (čl.80. ZSP RS).

---

[213] Zakon o nadziđivanju i pretvaranju zajedničkih prostorija u stanove u zgradama u društvenoj svojini, Sl.list SR BiH 32/87.

3.3.3. Pravo vlasništva (suvlasništva) stečeno prenamjenom, nadziđivanjem, dogradnjom ili pregradnjom

„Lice“ koje je do 4.1.2009. „na osnovu odobrenja nadležnog organa o svom trošku sprovelo prenamjenu zajedničkih prostorija u zgradi u državnoj svojini u stan ili drugu samostalnu prostoriju steklo je time pravo svojine prenamijenjene prostorije kao posebnog dijela nepokretnosti, zajedno s odgovarajućim suvlasničkim dijelom cijele nepokretnosti“ (čl.335. st.1.).

Osoba koja je uz odobrenje nadležnog organa i o svom trošku do 4.1.2009. izgradila posebni dio zgrade nadziđivanjem, dogradnjom ili pregradnjom[214], dana 4.1.2009. postala je suvlasnica cijele nekretnine i vlasnica posebnog dijela te nekretnine koji je neraskidivo povezan sa suvlasničkim dijelom (čl.335.st.2. se poziva na pravila iz st.1.).

U tom slučaju nadležni sud će „na zahtjev zainteresovanog lica odrediti upis u zemljišnoj knjizi prava svojine na posebnom dijelu nepokretnosti“ koja se sastoji od zemljišta i zgrade (čl.80.st.3. i čl.331.) na osnovu sudske odluke „kojom se priznaje sticanje svojine posebnog dijela nepokretnosti“ ili sporazuma svih suvlasnika te nekretnine kojim se „određuje veličina odgovarajućeg suvlasničkog dijela“ (čl.335.st.3.).

3.4. Stjecanje prava vlasništva na pripatku posebnog dijela koji je nastao prenamjenom, nadziđivanjem, pregradnjom ili dogradnjom

Objekt prava vlasništva posebnog dijela nekretnine koji je nastao do 4.1.2009. prenamjenom zajedničkih prostorija u društvenom/državnom vlasništvu o trošku vlasnika posebnog dijela i uz odobrenje nadležnog organa proteže se i na onaj dio nekretnine koji bi služio samo njegovom posebnom dijelu nekretnine ako po odredbama ZSP-a „može biti pripadak tog posebnog dijela“ (čl.336.st.1.). Isto vrijedi i za nesamostalni dio izgrađen do 4.1.2009.: nadziđivanjem, dogradnjom ili pregradnjom zgrade-nekretnine (čl.336.st.2.).

3.5. Stvarne služnosti na građevinskom zemljištu

Stvarne služnosti na građevinskom zemljištu i na zgradama koje su podignute na tom zemljištu ustanovljavaju se „odlukom suda u vanparničnom postupku u skladu sa regulacionim planom ili planom parcelacije“ (čl.343.st.1.).

Analognom primjenom iz čl.188. ZSP RS stvarne služnosti stječu se i na osnovu pravnog posla koji je sklopljen u skladu s „regulacionim planom i planom parcelacije“.

Do donošenja „regulacionog plana ili plana parcelacije“, „stvarne službenosti ustanovljava sud u vanparničnom postupku po prethodno pribavljenom mišljenju organa nadležnog za poslove urbanizma i prostornog uređenja“ (čl.343.st.2.).

Nadležni organ ne može uskratiti davanja mišljenja sudu o ustanovljavanju stvarnih služnosti kao ni o veličini i obliku građevinske čestice jer ga zakon na to ovlašćuje i obvezuje.

---

[214] Prema Rječniku hrvatskog jezika (V.Anić), Novi liber, Zagreb, 1991.; pregradnja – odvojiti pregradom ili na drugi način izgraditi, preurediti, adaptirati (kuću, stan). U Nacrtu ZSP FBiH u naslovu člana 352. kao i u čl.353.st.2., uz „pregradnja” koristi se izraz „prigradnja”. Prema istom Rječniku glagol prigraditi ima značenje: dograditi, dozidati, dodati gradnju. Prema tomu, izraz prigraditi treba zamijeniti izrazom pregraditi da bi se izbjeglo ponavljanje, jer već imamo dograditi, i popunilo prazninu koju pokriva izraz pregraditi, pregradnja. To je učinjeno u ZSP RS. Prigraditi, međutim, može se nekretnina ili njen posebni dio, npr.terasa, nadstrešnica, stepenište, uređaji za grijanje, itd.

§4 Kritika uspostave prava vlasništva na građevinskom zemljištu u društvenom/državnom vlasništvu u korist vlasnika zgrade. Alternativno rješenje

1. Stjecatelji prava vlasništva (suvlasništva) zemljišta

Pretvorbom trajnog prava korištenja na građevinskom zemljištu u društvenom vlasništvu u pravo vlasništva, dosadašnji je vlasnik zgrade postao vlasnik zemljišta koje pripada zgradi, a vlasnici posebnih dijelova zgrade – suvlasnici. Zemljište i zgrada postaju jedinstvena nekretnina u vlasništvu vlasnika (suvlasnika) zgrade, odnosno suvlasništvo vlasnika posebnih dijelova nekretnine.

Pretvorbom trajnog prava korištenje u pravo vlasništva ili spajanjem zemljišnoknjižnih tijela - vlasništvo zemljišta stekli su svi vlasnici zgrada (posebnih dijelova zgrada) koje su bile izgrađene nakon podruštvovljenja građevinskog zemljišta, upravo kao i oni čije su zgrade bile izgrađene prije podruštvovljenja zemljišta, ako su na njima zadržali pravo vlasništva ili im je oduzeto pravo vlasništva vraćeno u postupku denacionalizacije (restitucije). Jednako su stekli pravo vlasništva oni koji su bili vlasnici zgrada (posebnih dijelova zgrada), kao i oni koji su to pravo stekli neposrednom pretvorbom društvenih poduzeća, nositelja prava upravljanja, prava korištenja ili prava raspolaganja na zgradi ili neposrednom pretvorbom tih prava, kao i oni koji su kao nositelji stanarskog prava otkupili stanove ili stekli pravo vlasništva zgrade (posebnog dijela zgrade) građenjem, odnosno po bilo kojoj drugoj pravnoj osnovi, na temelju pravnog posla, odluke nadležnog tijela, nasljeđivanjem ili po samom zakonu.[215]

Postupak spajanja zgrade i zemljišta u društvenom/državnom vlasništvu, pretvorbom trajnog prava korištenja u pravo vlasništva (suvlasništva) nekretnine u Republici Srpskoj zaokružen je Zakonom o stvarnim pravima, a u Federaciji Bosne i Hercegovine bit će zaokružen po gotovo istovjetnim pravilima ZSP FBiH – sudeći prema Nacrtu ZSP (čl.347.-353.).

2. Negativne pravne i gospodarske posljedice pretvaranja trajnog prava korištenja u pravo vlasništva

Samo mali postotak stjecatelja prava vlasništva spada u krug bivših vlasnika zemljišta ili njihovih pravnih sljednika kojima se moralo vratiti njihovo pravo ili platiti odgovarajuća naknada u postupku denacionalizacije[216],[217]. Ogromna je većina pravnih osoba, i po pravilu sve fizičke osobe, stekla pravo vlasništva zgrade ili posebnog dijela zgrade pretvorbom društvenih poduzeća po simboličnoj cijeni, a najčešće su stjecali pravo vlasništva zemljišta bez naknade – neposrednom pretvorbom, spajanjem zemljišnoknjižnih tijela ili otkupom sta-

---

[215] Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva vlasnika zgrade, ZPFR, vol. 20/2, 1999.; isti: Rasprave iz stvarnog prava, Pravni fakultet Sveučilišta, Rijeka, 2001., str. 179.-201.

[216] Čl. 9. st. 1. Zakona o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine.

[217] Simonetti, P., Denacionalizacija, str. 115. – 180.

na.[218] Tako je besplatno definitivno otuđeno veliko narodno bogatstvo, a stjecatelji prava vlasništva na građevinskom zemljištu pribavili su bez naknade izvor stalno rastuće vrijednosti (građevinsko zemljište) zahvaljujući položaju nekretnine i permanentnoj inkorporaciji tuđeg kapitala u komunalnu infrastrukturu i u druge komponente koje utječu na rast cijene građevinskog zemljišta, bez ikakvog vlastitog ulaganja i rizika vlasnika građevinskih čestica.

Oni koji su otkupili stanove u više – manje amortiziranoj zgradi za zakonsku cijenu (nekoliko postotaka tržišne cijene), koja se nakon toga uklanja voljom vlasnika ili odlukom o izvlaštenju u javnom interesu radi izgradnje druge odgovarajuće zgrade ili građevine u skladu s detaljnim planom uređenja, ili drugim aktom urbanističke regulative, pravno raspolažu s vrlo vrijednim zemljištem, ili u slučaju izvlaštenja dobivaju naknadu u visini tržišne vrijednosti zemljišta. Pogotovu su se obogatili oni koji su otkupili i komercijalizirali stan u maloj zgradi s nekoliko stanova, ili stan u vili, koja je u pravilu, izgrađena na atraktivnoj lokaciji i relativno velikoj zemljišnoj čestici (nacionaliziranoj ili ekspropriranoj) na koju su stekli pravo vlasništva bez ikakve naknade.

Nisu stekli pravo vlasništva na građevinsko zemljište, bez naknade, samo oni koji su otkupili stanove u društvenom vlasništvu, nego i sve društvenopravne osobe koje su se po zakonu pretvorile u vlasničkopravne subjekte – vlasnike zemljišta i zgrada na kome su imale pravo korištenja. Tako su stekla pravo vlasništva na goleme komplekse zemljišta trgovačka društva nastala pretvorbom društvenih poduzeća ili u postupku privatizacije državnih poduzeća, najčešće uz simboličnu naknadu, a sve druge pravne osobe pravne sljednice društvenopravnih osoba – bez ikakve naknade (neposredna pretvorba).

Nasuprot tomu, prijašnji vlasnici zemljišta prema dosadašnjem Zakonu o naknadi[219] RH nemaju pravo ni na kakvu naknadu, jer ZN, koji je stupio na snagu 1. siječnja 1997. ne predviđa pravo na naknadu za izgrađeno građevinsko zemljište (čl. 15.)[220], osim u slučaju kada zemljište pripada oduzetom poduzeću (čl. 45.-47. ZN-a).[221] Šire tumačenje Zakona o naknadi, prema komu prijašnji vlasnik ima pravo na naknadu i za izgrađeno građevinsko zemljište,[222] poslije brisanja propisa o obvezi plaćanja naknade za zemljište u slučaju otkupa stana[223] gubi i posljednji oslonac. Brisani čl. 371. st. 1. propisivao je da je kupac stana dužan platiti „vrijednost time postignute koristi dotadašnjem vlasniku zemljišta", „ako u cijenu sta-

---

[218] Čl. 12. ZID ZPS, NN 68/98., koji je stupio na snagu 20. svibnja 1998., ukinut je čl. 371. ZV-a i čl. 225. ZZK. Kupci stanova oslobođeni su, naime obveze plaćanja naknade za zemljište, a imali su pravo tražiti restituciju plaćenog iznosa iz državnog proračuna.

[219] Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine, NN 92/96, 92/99, 80/02, ispr. 81/02.

[220] Čl. 15. t. propisuje da se na temelju „ovoga Zakona priznaje (se) pravo na naknadu za… neizgrađeno građevinsko zemljište".

[221] Simonetti, P., Naknada…, op. cit., str. 6.-9. Zemljište koje je pripadalo oduzetom poduzeću u postupku pretvorbe (privatizacije) uračunato u vrijednost kapitala društvenog poduzeća koja je plaćena otkupom dionica ili udjela članova novoosnovanog trgovačkog društva, a prijašnji vlasnik oduzetog poduzeća na ime naknade u postupku denacionalizacije dobio je naknadu u dionicama ili udjelima trgovačkog društva kao univerzalnog sljednika društvenog poduzeća ili iz portfelja Hrvatskog fonda za privatizaciju (čl. 45.-47. ZN-a). Vidi: Jelinić, S., Naknada za oduzetu gospodarsku imovinu, ZPFR, vol. 18, br. 1, 1997., str. 44.-46. (Naknada za oduzeta poduzeća).

[222] Bagić, S., Šeparović, M., Žuvela, M., op. cit., str. 46.-47.

[223] Stupanjem na snagu Zakona o izmjenama i dopunama Zakona o prodaji stanova, NN 68/1998., dana 20. svibnja 1998. ukinute su odredbe iz čl. 371. ZV-a i čl. 225. ZZK-a (čl. 12.). Šire o tome Simonetti, P., Trajno pravo korištenja i njegova pretvorba u pravo vlasništva vlasnika zgrade, ZPFR, vol. 20. br. 2., 1999., str. 519.-521.

na nije bila uračunata cijena zemljišta". Očekivala se izmjena Zakona o naknadi kojom će se ukloniti diskriminacija prijašnjih vlasnika zemljišta – ovlaštenika prava na naknadu za izgrađeno građevinsko zemljište odgovarajućom naknadom, ali na teret državnog proračuna, odnosno poreznih obveznika.[224] Vlada je, međutim povukla taj prijedlog iz zakonske (parlamentarne) procedure.[225]

Tako su vlasnici zgrada (posebnih dijelova zgrada) postali po zakonu vlasnici (suvlasnici) zemljišta najčešće bez naknade, a prijašnji vlasnici toga zemljišta, osim spomenute iznimke, nemaju nikakvo pravo na naknadu za izgrađeno zemljište; u odnosu na njih su se produžili učinci nacionalizacije. Istovremeno gradovi i općine izgubili su dragocjeno zemljište, stalni izvori prihoda u vidu stalno rastuće gradske rente, a mogli su ga zadržati u vlasništvu da se trajno pravo korištenja pretvorilo u pravo građenja koje bi trajalo dok postoji zgrada (kao što je trajalo i trajno pravo korištenja koje su imali), a da se pri tomu ne naruši načelo pravnog jedinstva nekretnine – zgrade i prava građenja. [226] Za izgrađeno zemljište, koje bi ostalo u vlasništvu gradova i općina, moglo se propisati da će se prijašnjim vlasnicima naknada platiti u vrijednosnim papirima, slično kao što je to sada propisano glede naknade za neizgrađeno građevinsko zemljište kada se ne vraća prijašnjim vlasnicima (čl. 19. st. 2. ZN-a).[227]

Iznimku čine trgovačka društva koja su nastala pretvorbom društvenih poduzeća. Ovlaštenik prava na naknadu za oduzeto poduzeće – vrijednost oduzetih nekretnina (čl. 45. st. 1. i 2. ZN-a), uključujući i za izgrađeno građevinsko zemljište, po sadašnjem zakonu „ostvaruje pravo na naknadu u dionicama ili udjelima društva iz portfelja Hrvatskog fonda za privatizaciju" (čl. 47. st. 2. ZN-a), koje su, doduše, najčešće obezvrijeđene. Zato su trgovačka društva stekla pravo vlasništva na vrijednim površinama građevinskog zemljišta koje su jeftino kupili njihovi osnivači u postupku pretvorbe (privatizacije) najčešće prezaduženih društvenih poduzeća koja su često završavala u stečaju. To je bila najgora posljedica pretvorbe društvenog vlasništva, a mogla se izbjeći pretvaranjem prava korištenja u pravo građenja, pa bi nositelj prava građenja, vlasnik zgrade, plaćao periodičnu rentu prijašnjem vlasniku zemlji-

---

[224] Konačni Prijedlog Nacrta Zakona o izmjenama i dopunama Zakona o naknadi… (br. 286, Klasa: 943-01/01-01/01; Urbr. 61-01-14 od 30. studenoga 2001.) koji ukidajući riječ „neizgrađeno" u čl. 15. t. 1. ZN-a (čl. 10.) priznaje pravo na naknadu i za izgrađeno građevinsko zemljište u obliku državnih obveznica, na teret proračuna. Time se prevaljuje plaćanje naknade za građevinsko zemljište na porezne obveznike.

[225] Vidi pismo Predsjednika Hrvatskog Sabora, klasa: 943-01/01-01/02, od 27. lipnja 2002. kojim o tome obavještava zastupnike Hrvatskog sabora i predsjednike radnih tijela Sabora.

[226] Zgrada je pripadnost prava građenja kao da je ono zemljište (čl. 280. st. 3. ZV-a, čl.286.st.3. ZSP RS).

[227] Stvarnopravni zakonik Republike Slovenije, Uradni list 87/02. od 18. listopada 2002., propisuje da u slučaju kada vlasnik zgrade i vlasnik zemljišta nisu ista osoba, vlasnik zgrade po samom zakonu stječe pravo građenja na zemljištu koje traje dok postoji zgrada (čl. 271. st. 2.). U Republici Sloveniji do stupanja na snagu Stanovanjskog zakona, Uradni list 18/91. (19. listopada 1991.) bio je na snazi Zakon o pogojih za prodajo stanovanjskih hiš in stanovanj v družbeni lastnini, Uradni list SRS 38/86., koji je propisivao pretpostavke za prodaju stambenih zgrada i stanova u društvenom vlasništvu građanima i građanskopravnim osobama, u skladu s propisima o prometu nekretnina (čl. 1. st. 1. i 2.). Budući da su zgrade i stanovi u društvenom vlasništvu bili bez iznimke na zemljištu u društvenom vlasništvu, a da je zemljište u društvenom vlasništvu bilo apsolutno neotuđivo, stjecatelji prava vlasništva na kupljene zgrade i stanove stjecali su trajno pravo korištenja na zemljište koje je od zemljišta pravno razdvajalo zgradu kao posve samostalnu nekrentinu. Vlasnici tih stanova i zgrada, dakle nisu stekli pravo vlasništva na zemljište koje pripada zgradi, kao u Republici Hrvatskoj, već su stekli pravo građenja koje ih ovlašćuje da na tom zemljištu imaju vlastitu zgradu ili stan u svome vlasništvu, jer pravo građenja traje dok postoji zgrada. U Sloveniji je bio na snazi austrijski Zakon o pravu građenja od 26. travnja 1912. do 6. travnja 1941.

šta ili jedinici lokalne samouprave, koja bi na taj način imala osiguran trajni izvor sredstava za održavanje, modernizaciju i proširenje komunalne infrastrukture. Ovako stalno rastuća renta pripada trgovačkom društvu konstituiranom u postupku pretvorbe ili njegovom pravnom sljedniku koji ne sudjeluju neposredno u snošenju troškova za komunalnu infrastrukturu, a ubire plodove ovih ulaganja u vidu gradske rente.

U skladu s načelom restitucije prava vlasništva zgrade, u postupku denacionalizacije, samo se trajno pravo korištenja koje je razdvajalo nenacionaliziranu zgradu od nacionaliziranog zemljišta prijašnjih vlasnika zemljišta (točnije: ovlaštenika prava na naknadu) načelno moglo pretvoriti u pravo vlasništva (restitucija), tj. u ono pravo koje im je bilo oduzeto nacionalizacijom ili po drugoj pravnoj osnovi prenijeto u društveno vlasništvo protiv njihove volje.

Sada su gradovi i općine suočeni sa stotinama tisuća novih vlasnika zemljišta, koji nisu bili vlasnici toga zemljišta u trenutku prisilnog prijenosa u društveno vlasništvo, a stekli su ga po pravilu bez naknade ili uz simboličnu naknadu. Oni se objektivno opiru uspostavljanju primjerenog pravnog režima na građevinskom zemljištu,[228] npr. komasacijom građevinskog zemljišta, da bi u tržišnoj konjukturi prigrabili što veću dobit (rentu), slobodno raspolažući građevinskim zemljištem po tržišnim cijenama. Radi provedbe plana prostornog uređenja, izgradnje zgrada i drugih građevina od interesa za Republiku Hrvatsku, morat će se provoditi postupak izvlaštenja te plaćati novim vlasnicima zemljišta naknada po tržišnoj cijeni, iako su zemljište pribavili besplatno, jer im ga je darovala država. Ovo predstavlja veliku prepreku za ostvarivanje planova prostornog uređenja zemljišta, a bitno utječe na povećanje troškova izgradnje, tj. cijene stanova i poslovnih prostora. Tako se produbljuje jaz između rentijera - vlasnika zemljišta i nevlasnika, s negativnim posljedicama na cijelo gospodarstvo. Prekinut je kružni tok gradske rente, koja se sada slijeva u imovinu novih vlasnika zemljišta umjesto u imovinu (fondove) onih javnopravnih osoba koje su po zakonu dužne obnavljati, modernizirati i proširivati komunalnu infrastrukturu. Ovaj gubitak mora se nadoknaditi naplatom većih naknada i doprinosa u različitim vidovima od građana,[229], [230] jer bez toga nema dovoljno sredstava za funkcioniranje komunalnih djelatnosti, za građenje objekata i uređaja komunalne *infra*strukture; da bi novi vlasnici, kojima je zemljište darovano, nesmetano ubirali stalno rastuću gradsku rentu kroz visoku cijenu nekretnina, zakupnina ili najamnina bez rizika, tj. ulaganja. Naravno, nikakve koristi nemaju vlasnici stanova u višestambenim, velikim zgradama koji u njima stanuju bez mogućnosti da ih komercijaliziraju u različitim vidovima (prodajom, zamjenom ili davanjem u najam) jer su im faktično jedini krov nad glavom, a nalaze se u zgradama koje se u doglednoj budućnosti neće ukloniti (čime bi stekli mogućnost komercijalizacije zemljišta) niti izvlastiti uz naknadu tržišne vrijednosti. Naprotiv, i vlasnici takvih stanova (a oni čine ogromnu većinu) kroz različite komunalne naknade i doprinose za uređenje građevinskog zemljišta itd. moraju namirivati značajna sredstva za komunalnu *infra*strukturu i za funkcioniranje komunalnih službi (čl. 19.-25. ZKG).[231] Bilo je, dakle i u njihovu interesu pretvaranja trajnog prava korištenja u pravo građenja uz obvezu plaćanja minimalne mje-

---

[228] Simonetti, P., O pravnom režimu građevinskog zemljišta, ZPFR, vol. 17, br. 1, 1996., str. 1.-5.

[229] Čl. 15.-25. Zakona o komunalnom gospodarstvu (ZKG), NN 35/95., 70/97., 128/99., 57/00. i 129/00., 59/01, 26/03 (pročišćeni tekst), 82/04, 178/04, 38/09.; čl.62.-75. ZGZ FBiH, Sl.novine 25/03; čl.21.-33. ZGZ RS, Sl.glasnik RS 112/06.

[230] Sarvan, D., Primjena Zakona o komunalnom gospodarstvu – praksa Upravnog suda Hrvatske, Informator, Male stranice, god. IL, br. 4929. i 4933 od 2. i 16. lipnja 2001.; ista: Postoji li pravna osnova za naplatu troškova pripreme građevinskog zemljišta za izgradnju od strane jedinica lokalne samouprave, Informator, god. XLV, br. 4545, 1997.

[231] Vidi ZKG RH, ZGZ FBiH (čl.62.-75.) i ZGZ RS (čl.21.-33).

sečne rente, koja bi se slijevala u komunalne fondove. Time bi gradovi i općine bili u stanju osiguravati nužna sredstva za komunalnu infrastrukturu. Raspolažući „oslobođenim" površinama zemljišta nakon rušenja zgrada, osnivanjem prava građenja, gradovi i općine prikupljali bi značajan dio novčanih sredstava u vidu periodične naknade za pravo građenja radi ispunjavanja svojih zakonskih obveza u pogledu uređivanja urbanog prostora, za *infra*strukturu itd. Tako bi se stvarale mogućnosti za smanjivanjem zakonskih tereta koje sada snose mnogobrojni građani, kako bi se prikupila nužna sredstva za komunalnu infrastrukturu.[232]

Najviše su pogođeni beskućnici koji visokom najamninom (stanarinom) kompenziraju visoke izdatke najmodavaca za komunalne naknade i doprinose. Pogođeni su i oni koji smognu pribavljanje stambenog kredita za kupovinu ili za izgradnju stana koji uz cijenu stana plaćaju i visoku cijenu zemljišta odjednom, umjesto male periodične naknade za pravo građenja.

3. Alternativno zakonsko rješenje

Bilo je, dakle moguće primjerenije zakonsko rješenje, da se trajno pravo korištenja pretvorilo u pravo građenja koje bi trajalo dok postoji zgrada do kada je po zakonu trajalo trajno pravo korištenja[233] (čl. 12. st. 1. ZOVO-a). Trajno pravo korištenja bilo je ograničeno trajanjem zgrade, koju je odvajalo od građevinskog zemljišta u društvenom vlasništvu pa ne može biti ekvivalent prava vlasništva nego prava građenja koje bi s gledišta ZV-a bilo vremenski ograničeno raskidnim uvjetom – do uklanjanja zgrade.[234] U tom slučaju pravo vlasništva na zemljištu imali bi ovlaštenici prava na denacionalizaciju, odnosno gradovi i općine, kao pravni sljednici ranijih općina,[235] koje su imale pravo upravljanja i raspolaganja građevinskim zemljištem u društvenom vlasništvu, [236] nakon uklanjanja zgrade[237]. Tako je pravo korištenja građevinskog zemljišta u „narodnom vlasništvu" na području novih njemačkih pokrajina (bivša Demokratska Republika Njemačka) pretvoreno u nasljedno pravo građenja (Erbbaurecht), koje je uređeno Uredbom (sa zakonskom snagom) o nasljednom pravu građenja od 15. siječnja 1919. Vlasnik zgrade može, po njemačkom pravu, kupiti izgrađeno zemljište, ali po tržišnoj cijeni, ali po tržišnoj cijeni umanjenoj za 50%.[238] Po našem su pravu,

---

[232] Zbog preopsežnosti u ovom radu izostavljen je završni tekst, objavljen na hrvatskom jeziku u ZPFR, vol. 23., br. 1, 2002., koji se odnosi na pravni režim uporabe građevinskog zemljišta i na mogućnosti povećanja površine zemljišta u vlasništvu gradova i općina *de lege ferenda*.

[233] Vidi: Simonetti, P., Reprivatizacija građevinskog zemljišta ili preobražaj prava korištenja, Zakonitost, god. 46, br. 2, 1992., str. 403.-421.; isti, Vlasničkopravni režim građevinskog zemljišta u Republici Hrvatskoj - preobražaj prava korištenja u pravo građenja, Informator, god. XXXIX, 3921-3922/91. od 5. listopada 1991.

[234] Čl. 292. st. 1. ZV-a propisuje da pravo građenja prestaje ispunjenjem raskidnog uvjeta.

[235] Čl. 67. i 87. Zakona o lokalnoj samoupravi i upravi, NN 90/92., 117/93.

[236] Vidi ZGZ, NN 48/88. (pročišćeni tekst), 16/90., 53/90. – US RH 44/92. koji je bio na snazi do 1. siječnja 1997. (čl. 394. st. 2. ZV-a).

[237] Simonetti, P., Pravo korištenja… op. cit. str. 203. – 207.

[238] U novim njemačkim pokrajinama (područje bivše DR Njemačke) po Zakonu o pročišćenju stvarnih prava (Sachenrechtsbereinigungsgesetz) vlasnici zgrada, koji su imali pravo korištenja na zemljištu u narodnom vlasništvu, imali su pravo izbora: tražiti osnivanje nasljednog prava građenja (Erbbaurecht) ili kupiti zemljište po tržišnim cijenama koje su se smanjivale do 50%. Šire: Karl-Friedrich Thöne, Raffael Knauber, Boden - und Gebäudeeigentum in den neuen Bundesländern, Verlag Kommunikationsforum GmbH Recht Wirtschaft Steuern, Köln, 1994., str. 116.-118.

međutim povlašteni oni koji su na temelju stanarskog prava otkupili stanove u vilama i manjim stambenim zgradama, kao i oni koji su po simboličnim cijenama kupili stanove u ruševnim zgradama u gradskim jezgrama, jer su besplatno stekli površine vrlo skupog zemljišta koje mogu prodati ili na drugi način komercijalizirati. Još najviše su povlašteni pravni sljednici društvenih poduzeća koji su uz često simboličnu naknadu, najčešće plaćenu društvenim sredstvima (bankovnim kreditom), stekli goleme površine građevinskog zemljišta. Pogotovo su povlaštene one pravne osobe koje su na temelju samoga zakona bez ikakve naknade stekle pravo vlasništva na izgrađenom zemljištu na kome su njihove prednice – društvenopravne osobe imale pravo korištenja koje bi trajalo dok na njemu postoji zgrada.

Da je trajno pravo korištenja pretvoreno u pravo građenja vlasnika (suvlasnika) zgrade ili posebnih dijelova zgrade, moglo se pravo vlasništva na zemljište vratiti prijašnjem vlasniku, odnosno ovlašteniku prava na denacionalizaciju, na preostalom građevinskom zemljištu jedinice lokalne samouprave, kao pravne sljednice socijalističkih općina, imale bi pravo vlasništva i pravo na periodičnu naknadu koju plaća svakodobni nositelj prava građenja vlasniku zemljišta dok to pravo traje. S obzirom da je pravo korištenja trajalo dok je postojala zgrada – i pravo građenja bi prestalo uklanjanjem zgrade.

§5 Upravljanje i raspolaganje građevinskim zemljištem u državnom vlasništvu i u vlasništvu jedinica lokalne samouprave u Republici Hrvatskoj i Bosni i Hercegovini de lege lata i de lege ferenda

1. Građevinsko zemljište u državnom vlasništvu i u vlasništvu gradova i općina (jedinica lokalne samouprave)

Budući da je neizgrađeno građevinsko zemljište, koje je bilo u društvenom vlasništvu, kojim su upravljale i raspolagale općine, dijelom vraćeno prijašnjim vlasnicima, odnosno njihovim pravnim sljednicima, a dijelom postalo vlasništvo države ili drugih osoba, sadašnje jedinice lokalne samouprave: gradovi i općine vlasnici su malih površina toga zemljišta pogotovo zbog restitucije u sudskom postupku zbog pogrešnog tumačenja odredbi ZV-a.[239] U Bosni i Hercegovini neizgrađeno građevinsko zemljište na komu nije uspostavljeno privatno pravo vlasništva je u državnom vlasništvu, ali njime upravljaju i raspolažu jedinice lokalne samouprave.[240] Jedinice lokalne samouprave raspolažu samo onim izgrađenim građevinskim zemljištem na komu se nalaze zgrade u njihovom vlasništvu *(supra)*.

Lokalna samouprava u Republici Hrvatskoj i u Bosni i Hercegovini na početku 21. stoljeća nalaze se pred sličnim problemima pred kojima su stajale lokalne vlasti razvijenih europskih država krajem 19. stoljeća kada su općine ili gradovi počeli otkupljivati neizgrađe-

---

[239] Opsežno o tomu: Simonetti, P., Prava na građevinskom zemljištu (1945.-2007.), izd. Pravni fakultet Sveučilišta u Rijeci, 2008., str.331.-465.

[240] Uspostavljanje prava vlasništva na nekretninama i na građevinskom zemljištu u Federaciji Bosne i Hercegovine i Republici Srpskoj, u: Zbornik Aktuelna pitanja građanskog zakonodavstva u Bosni i Hercegovini, izd. Udruženje sudija Republike Srpske, Banja Luka, 2009.

no zemljište[241] ili stjecati ga izvlaštenjem[242] radi prostornog uređenja, kao i radi izgradnje socijalnih stanova, osnivajući pravo građenja ili srodna prava u korist graditelja (investitora) ili građevinskih poduzetnika (trgovačkih društava, zadruga, fondova i dr.) koji grade socijalne ustanove za tržište. Ovo je putokaz za jedinice lokalne samouprave u Republici Hrvatskoj i u Bosni i Hercegovini.

2. Racionalno raspolaganje građevinskim zemljištem u vlasništvu gradova i općina

2.1. Raspolaganje građevinskim zemljištem u vlasništvu jedinica lokalne samouprave u Republici Hrvatskoj

Nasuprot dugogodišnjoj praksi dobro uređenih gradova centralne i sjeverne Europe koji su otkupili velike površine neizgrađenog građevinskog zemljišta, naši gradovi i općine, kako se vidi iz mnoštva natječaja koji se objavljuju u dnevnim listovima, prodaju i ono malo površina neizgrađenog građevinskog zemljišta u svom vlasništvu, umjesto da osnivaju pravo građenja, a zadrže pravo vlasništva i time doprinosu pojeftinjenju izgradnje stambenih i drugih zgrada te osiguraju stalno dotjecanje gradske rente u „fondove" namijenjene za komunalnu infrastrukturu,[243] u vidu plaćanja mjesečne naknade za pravo građenja u visini prosječne zakupnine (čl. 281. st. 2. i čl.287.st.2. ZV) ako nije što drugo ugovoreno.[244], [245] I u onim rijetkim slučajevima kad osnivaju pravo građenja, neki gradovi ugovaraju obvezu isplate zemljišne rente unaprijed, npr. za 99 godina odjednom koja često završava u nekom obliku prora-

---

[241] Historija čovječanstva, op. cit., str. 336. Zemljište su otkupljivali i gradovi nekih vaneuropskih zemalja kao npr. u Turskoj i nekim zemljama Latinske Amerike.

[242] Messineo, F., Manuale di diritto civile o commerciale, nona ed., Giuffrè, Milano, 1965., Vol. 2, str. 345. U Italiji je 30. studenoga 1919. godine donijet Zakon o eksproprijaciji građevinskog zemljišta radi izgradnje tzv. „narodnih kuća" (case popolari), za školske objekte 1922., a za stambene zgrade poljoprivrednih radnika godine 1960. Podaci iz djela: De Martino, Commentario del Codice civile diretto di Scialoja/Branca, 4. izd.., Zanichelli, 1976, str. 163., fus br. 4 gdje se navodi da su još 1885. za Napoli, a 1907. za Rim donijeti prvi propisi o eksproprijaciji radi planiranja prostora u općem interesu. U SR Njemačkoj je 3. kolovoza 1953. godine donijet poseban Zakon o pribavljanju građevinskog zemljišta (vidi: Ring, J., Staudinger, Kommentar zum BGB, III Band, II Auflage, 1956. (Erbbaurecht) str. 890.). O pribavljanju građevinskog zemljišta otkupom ili eksproprijacijom, vidi: Mihaljević, G., Finansiranje uređenja gradskog zemljišta, Savremena administracija, Beograd, 1978., str. 55.-57; Blagojević, B., Eksproprijacija, pravo na stan i stambena izgradnja, Anali Pravnog fakulteta u Beogradu, god. IX., br. 4., 1961.

[243] Tj. u imovinu javnih trgovačkih društava koja se brinu za održavanje, rekonstrukciju, modernizaciju, proširenje i izgradnju komunalne infrastrukture.

[244] Šire: Simonetti, P., Pretpostavke, funkcije i priroda prava građenja, ZPF Sveučilišta u Rijeci, vol. 19, br. 2, 1998.; isti: Osnivanje prava građenja, ZPF Sveučilišta u Rijeci, vol. 20, br. 2 1999.

[245] Tako je, npr. u Novom listu od 10. svibnja 2001. objavljen natječaj grada Rijeke o prodaji građevinskog zemljišta u površini od 15.001, 25 m^2 u k.o. Plase (Rijeka) s ukupnom početnom kupoprodajnom cijenom zemljišta: 5.262.551, 01 DEM, a pravo građenja se osniva na k.č. br. 71/6 k.o. Kozala (Rijeka) na površini od cca 8,00 m^2 (osam) radi postavljanja spomen, ploče. (Ispada kao ismijavanje ustanove prava građenja). U Glasu Istre je u studenome i prosincu 2001. u više navrata pisano o prodaji oko milijun m^2 zemljišta općine Vodnjan na morskoj obali nasuprot Brijuna za cijenu od oko 7,500.000 eura koje je za samo nekoliko mjeseci prostornim planom županijske skupštine pretvoreno u građevinsko zemljište pa sada vrijedi oko jedne milijarde i petsto milijuna eura (HTV, Kontraplan od 8. svibnja 2007.).

čunske potrošnje ili neprofitabilne investicije[246]. Time se lišavaju i buduća pokoljenja prava ubiranja gradske rente na odnosnom zemljištu koja bi se trebala koristiti za izgradnju i održavanje komunalne infrastrukture. Ima, međutim i pozitivnih primjera. U središtu Opatije osniva se pravo građenja za podzemnu garažu (339 parkirnih mjesta) i poslovne prostorije na dvije etaže koje će donositi gradu 1,6 milijuna kuna godišnje naknade, a grad će nakon trideset godina steći pravo vlasništva na garažu.[247]

2.2. Pravo upravljanja i raspolaganja jedinica lokalne samouprave građevinskim zemljištem u državnom vlasništvu u Bosni i Hercegovini

Gradskim građevinskim zemljištem u državnom vlasništvu u Federaciji Bosne i Hercegovine upravljaju i raspolažu općine (čl.6.ZGZ iz 2003.), odnosno općine i gradovi (jedinice lokalne samouprave) u Republici Srpskoj (čl.7.ZGZ iz 2006.). U FBiH općinsko vijeće „dodjeljuje neizgrađeno građevinsko zemljište radi izgradnje građevina uz pravičnu naknadu" (čl.44.). U RS „fizičko i pravno lice koje je investitor izgradnje" na gradskom građevinskom zemljištu dužno je platiti i naknadu za troškove uređenja zemljišta i naknadu iz osnova prirodnih pogodnosti zemljišta i pogodnosti već izgrađene komunalne infrastrukture, a koje nisu rezultat ulaganja vlasnika nekretnine (čl.21.st.1.). Skupština općine lokalne samouprave obvezna je propisati plaćanje naknade za trajno korištenje zemljišta i za neizgrađeno građevinsko zemljište (trajnu rentu), a ova naknada se utvrđuje odlukom kojom se određuju osnovi i mjerila na osnovu kojih se utvrđuje visina naknade (čl.30.st.1.). Obaveza plaćanja naknade iz čl.21. i 30. ZGZ-a, jedinice lokalne samouprave mogu propisati za korištenje i „ostalog građevinskog zemljišta" (čl.39.). Sličan sustav plaćanja naknade za gradsko građevinsko zemljište postoji i u FBiH (čl.62.-75. ZGZ-a). ZGZ FBiH propisuje obvezu plaćanja naknade za dodijeljeno gradsko građevinsko zemljište, naknadu za uređenje gradskog građevinskog zemljišta i naknadu za korištenje gradskog građevinskog zemljišta (čl.63.st.1.). Obvezu plaćanja ove naknade općinsko vijeće može uvesti za: korištenje ostalog građevinskog zemljišta na kojem postoji pravo vlasništva; uređenje ostalog građevinskog zemljišta na kojem postoji pravo vlasništva. Odlukom općinskog vijeća može se obuhvatiti samo građevinsko zemljište iz čl.65.st.2. ovog Zakona i neizgrađeno građevinsko zemljište obuhvaćeno programom uređenja građevinskog zemljišta (čl.83.st.1 i 2.).

Ovaj model nije moguć nakon uspostavljanja prava vlasništva u Federaciji Bosne i Hercegovine i Republici Srpskoj, jer ograničava ovlaštenja vlasnika da raspolaže svojom nekretninom, a bio je moguć do početka primjene ZSP-a RS jer je od 1992. godine državno vlasništvo, u suštini, bilo samo drugo ime za društveno vlasništvo. Ovo je postalo još očiglednije od stupanja na snagu ZGS RS iz 2006. koji ovlašćuje skupštinu jedinice lokalne samouprave da prodaje ili daje u zamjenu neizgrađeno građevinsko zemljište u državnom vlasništvu radi izgradnje trajnih zgrada (čl.15.) ili da ga jedinica lokalne samouprave može davati u zakup (čl.20.); da upravlja i raspolaže gradskim građevinskim zemljištem „u državnoj svojini" na način koji je propisan zakonom (*ex imperio)*, a ne na način koji bi određivala kao vlasnik zemljišta.

Pravo otuđenja neizgrađenog građevinskog zemljišta imaju čak i „pravni subjekti koji su nosioci prava raspolaganja na građevinskom zemljištu u državnoj svojini" (čl.19.). To pra-

---

[246] Tako se na trećem (ponovljenom) natječaju nudi pravo građenja na 99 godina za cijenu 528 EUR po četvornom metru (prvobitna cijena 791,56 EUR) na lokaciji „Viktor Benčić" preko puta željezničkog kolodvora u Rijeci (Novi list od 16. svibnja 2007., str. 12.). Slično tomu osnovano je pravo građenja na lokaciji Gomila u neposrednoj blizini hotela Bonavia u središtu Rijeke također na 99 godina.

[247] Novi list od 28. veljače 2007.

vo imaju i pravni sljednici prava upravljanja ili prava korištenja (čl.45.st.1.). Prema prijelaznim odredbama ZSP RS pravo upravljanja, korištenja ili raspolaganja, kao osnovno pravo na stvarima u društvenom/državnom vlasništvu koje do stupanja na snagu ovoga Zakona nije postalo vlasništvo druge osobe, njegovim stupanjem na snagu „pretvara se u pravo svojine njegovog dosadašnjeg nosioca odnosno njegovog pravnog sljednika“ (čl.324.st.1.). Ovo se odnosi i na neizgrađeno građevinsko zemljište, iako je pretvorba prava korištenja, kao tipičnog prava na građevinskom zemljištu posebno propisana (čl.325.). U ovom slučaju riječ je o pravu raspolaganja koje su imale društvenopravne osobe na neizgrađenom zemljištu prije nego što je ono ušlo u granice gradskog područja, odnosno gradskog građevinskog zemljišta, ili je nastalo od prava korištenja po odredbama iz čl.45.st.1. ZGZ-a RS iz 2006.

Zadržavanje preostalog građevinskog zemljišta u državnom vlasništvu odnosno u vlasništvu jedinica lokalne samouprave i povećanje površina u vlasništvu jedinica lokalne samouprave otkupom pa i eksproprijacijom, ako su za ovo ispunjene zakonske pretpostavke, umjesto otuđenja zemljišta – i osnivanje prava građenja, odnosno davanja u koncesiju i zakup toga zemljišta, nameće se kao nužno rješenje za racionalno gospodarenje ovim nezamjenjivim zajedničkim dobrom svih građana u jedinici lokalne samouprave.

3. Pravni režim uporabe građevinskog zemljišta nakon uspostave prava vlasništva de lege lata i de lege ferenda

3.1. Općenito

Uspostavom prava vlasništva na građevinskom zemljištu u RH i BiH otvorena su sva ona pitanja koja su bila aktualna u razvijenim europskim zemljama na pragu 20. stoljeća i ona koja su kasnije aktualizirana sve većim zahvatima u čovjekovoj sredini, npr. pitanje održivog razvoja i zaštite okoliša koje ima planetarni značaj. Na ta pitanja mora se odgovoriti uspostavom adekvatnog pravnog režima na građevinskom zemljištu.

U skladu s modernim ustavnim načelom - pravo vlasništva obvezuje da se koristi za opće dobro (čl. 48. st. 2. Ustava RH). Morao bi se uspostaviti takav pravni režim uporabe građevinskog zemljišta jedinica lokalne samouprave koji bi omogućavao realizaciju programa prostornog uređenja, posebice prostornog planiranja, usmjeravanja gradske rente u komunalnu infrastrukturu i besplatno pribavljanje građevinskih čestica za građenje, uz male periodične naknade, osnivanjem prava građenja na građevinskom zemljištu[248].

Suvremeni pravni režimi uporabe građevinskog zemljišta imaju tri bitne sastavnice:

- sustav prostornog uređenja, a njegov bitni sastojak je prostorni plan (planovi) koji određuje način uporabe prostora, posebno građevinskog zemljišta uz održiv razvoj i zaštitu integralnih vrijednosti prostora, izdvojenih dijelova prirode i kulturnih spomenika te osiguravanje boljih uvjeta života i usuglašavanje interesa korisnika prostora;
- sustav usmjeravanja gradske rente u izgradnju i modernizaciju gradske infrastrukture te pripreme zemljišta za izgradnju;[249]

---

[248] Čl.280.-296. ZV-a, čl.286.-302. ZSP RS, čl.300.-316. nacrta ZPS FBiH.

[249] S gledišta ranijeg sustava o tome: Krstin, M., op. cit., str. 208.-239.; Jovančević, M., Gradska renta kao faktor pri rješavanju bazičnih problema komunalne infrastrukture (doktorska disertacija), Beograd, 1982., str. 214.– 234., 298. i dalje.

– sustav prava na građevinskom zemljištu, koji omogućava nevlasnicima zemljišta da, uz malu periodičnu naknadu, koriste tuđe zemljište radi izgradnje zgrada za sebe ili za tržište jer svi imaju pravo stanovati i privređivati na Zemlji radi zadovoljavanja svojih potreba[250]. Ovaj sustav oslobađa dio kapitala za ulaganje u proizvodne i uslužne djelatnosti i u druge profitabilne pothvate koji otvaraju nova radna mjesta, umjesto u kupovinu zemljišta.

3.2. Pretpostavke za adekvatan pravni režim građevinskog zemljišta u Republici Hrvatskoj i Bosni i Hercegovini

Adekvatni pravni režim građevinskog zemljišta u Republici Hrvatskoj i u Bosni i Hercegovini može se izgraditi na podlozi iskustava lokalne samouprave razvijenih zemalja kontinentalne Europe, osobito Austrije, Njemačke, Nizozemske, Danske, Švedske i drugih sjeverno-europskih zemalja, dobro uređenih gradova s dugom tradicijom lokalne samouprave od Beča do Stockholma, a uzimajući u obzir domaće specifičnosti, posebno težak socijalni (stambeni) položaj velikog broja građana naše zemlje.

Pretpostavka za adekvatni pravni režim na građevinskom zemljištu jest da je građevinsko zemljište pretežno u vlasništvu općine ili grada, odnosno kako zagovara funkcionalizam, posljednja koherentna urbanistička teorija, u cijelosti pod kontrolom države, jer „privatni interes mora biti podređen kolektivnome", kako je rečeno u Atenskoj povelji.[251]

U Republici Hrvatskoj, umjesto zadržavanja građevinskog zemljišta u vlasništvu jedinica lokalne samouprave, odnosno u državnom vlasništvu u Bosni i Hercegovini uz odgovarajuću naknadu prijašnjim vlasnicima, uspostavljeno je pravo vlasništva individualnih vlasnika, pa sada postoje desetine tisuća vlasnika sitnih zemljišnih čestica, koji se opiru uspostavljanju adekvatnog pravnog režima na građevinskom zemljištu da bi u pravnom prometu prigrabili što veću dobit slobodno raspolažući građevinskim zemljištem po tržišnim cijenama, a bez odgovarajućeg utjecaja i kontrole države, odnosno općina i gradova. Iluzorno je očekivati kako će sitni vlasnici zemljišta osnivati pravo građenja da bi ubirali malu mjesečnu naknadu za zemljište. Radije će se odlučiti da prodaju građevinsko zemljište po visokim cijenama. Time se poskupljuje izgradnja stambenih i drugih zgrada, stanova i poslovnih prostora za cijenu zemljišta koja se ne plaća kada se osniva pravo građenja. Tako u sve teži položaj dolazi veliki dio stanovništva bez vlastitog stana, bilo da se mora zaduživati za kupovinu stana ili da plaća sve veću najamninu za korištenje stana. Poduzetnici koji nisu u stanju podnijeti visoke troškove gradnje, prisiljeni su plaćati sve veću zakupninu za poslovne prostore koju kompenziraju povećanjem cijena svojih proizvoda i usluga čime smanjuju svoju konkurentnu sposobnost.

3.3. Prepreke za izvlaštenje građevinskog zemljišta

Danas je za provođenje prostornog uređenja, posebno za parcelaciju građevinskog zemljišta prema detaljnom planu uređenja, nužno provoditi postupak izvlaštenja, a izvlašteniku plaćati naknadu u visini tržišne cijene koju mu jamči Ustav RH (čl. 52. st. 1.), odnosno zakoni o eksproprijaciji u FBiH i RS[252]. To zbog nedostatka sredstava plaćanja naknade predstavlja veliku prepreku za izvlaštenje, a visoka cijena zemljišta bitno utječe na pove-

---

[250] Supek, R., Grad po mjeri čovjeka, op. cit., str. 106. i dalje.

[251] Citat i parafraza iz knjige: Supek, R., Grad po mjeri čovjeka, op. cit., str. 117.

[252] Čl.2. ZE FBiH, Sl.novine FBiH 70/07 i čl.2. ZE RS, Sl.glasnik RS 112/06.

ćanje troškova izgradnje i cijenu stana odnosno poslovnog prostora. Tako se produbljuju socijalne razlike između rentijera (individualnih vlasnika gradskih nekretnina) i onih koji nemaju svoj stan, s negativnim posljedicama na gospodarstvo zbog povećanja cijene poslovnog prostora. S druge strane, izvlaštenje se može provesti samo ako se po zakonu utvrdi da je u interesu Republike Hrvatske[253], odnosno u općem interesu u Bosni i Hercegovini[254] U naknadu za izvlaštenje uračunava se gradska renta, jer sve što je inkorporirano u zemljište po građanskom pravu pripada vlasniku zemljišta pa tako i inkorporirani kapital u komunalnoj infrastrukturi koji je uložio grad ili općina, tj. građani, tijekom desetljeća i stotina godina.

3.4. Ograničenje individualnog prisvajanja gradske rente de lege ferenda

U okolnostima kada su druge osobe, posebno RH, a ne općine i gradovi vlasnici pretežnog dijela građevinskog zemljišta, neizbježna je rasprava o oporezivanju gradske rente koja se prisvaja u pravnom prometu i o njenom usmjeravanju u gradsku infrastrukturu[255], posredno i u izgradnju socijalnih stanova[256]. Ovo podrazumijeva i raspravu o dometu spomenute ustavne odredbe o naknadi izvlašteniku i oporezivanju te naknade. U okviru ustavnog načela socijalne pravde, kao jedne od najviših vrednota ustavnog poretka Republike Hrvatske (čl. 3. Ustava) i obveze sudjelovanja u podmirenju javnih troškova u skladu sa svojim gospodarskim mogućnostima (čl. 51. Ustava) te dužnosti vlasnika građevinskog zemljišta da svoje pravo koriste doprinošenju općem dobru (čl. 48. st. 2. Ustava), nužno je propisati primjerena zakonska rješenja za postizanje tih ciljeva. Analogna rješenja odnose se i na Bosnu i Hercegovinu.

Budući da su se Republika Hrvatska i entiteti Bosne i Hercegovine načelno opredijelili za potpunu denacionalizaciju i pretvorbu prava korištenja u pravo vlasništva na građevinskom zemljištu, uspostavljanjem prava vlasništva na ogroman broj zemljišnih čestica građevinskog zemljišta, nužno je zakonom ograničiti individualno prisvajanje gradske rente, tuđeg kapitala, koji u pravnom prometu prisvajaju vlasnici zemljišta „parazitski“, bez ikakva ulaganja i poduzetničkog rizika. Ovo se može postići adekvatnim oporezivanjem gradske rente koja je prisvojena u pravnom prometu [257].

Cijene stanova i poslovnih prostora, najamnine i zakupnine, rapidno rastu isključivo zbog povećanja cijena građevinskog zemljišta, bez ikakva ulaganja i rizika vlasnika zemljišta (stanova i poslovnih prostora). Visoke zakupnine kompenziraju se povećanjem cijena proizvoda i usluga što ugrožava materijalnu egzistenciju ionako sve brojnijeg siromašnog stanovništva, pogotovo onih koji su prisiljeni plaćati pored toga i visoku najamninu za stan od svoje bijedne zarade ili male mirovine.

---

[253] Čl. 6. Zakona o izvlaštenju, NN 9/94, 35/94, 114/01, 79/06.

[254] Čl.1. ZE FBiH i čl.1. ZE RS.

[255] Mihaljević, G., op. cit.; Montana, M., Novi prilozi stvaranju gradske rente, ZPFR, vol. 17., br. 1., 1996., str. 81.–102.; Konjhodžić, H., Oporezivanje gradske rente, ZPFR, vol. 17., br. 1., 1996., str. 103.-110.

[256] Nažalost o tome nije bilo govora na znanstvenom skupu Promjene u sustavu javnih dohodaka koji se održao 27. ožujka 2003. u organizaciji Hrvatske akademije znanosti i umjetnosti, Zbornik radova pod istim naslovom u izdanju HAZU, Zagreb, 2003.

[257] Žunić Kovačević, N., Trebaju li nam promjene u nekim aspektima oporezivanja (nepokretne) imovine, ZPFR, vol. 28, br. 1, 2007., str. 493. – 509.

3.5. Povećanje zemljišta u vlasništvu gradova i općina i zabrana otuđenja de lege ferenda

S obzirom na gore izloženo, buduće uređenje prava vlasništva na građevinskom zemljištu u skladu s ustavnim položajem gradova i općina[258] trebalo bi se zasnivati na sljedećim načelima:

1. propisati predmnjevu prava vlasništva na građevinskom zemljištu u korist općina i gradova (jedinica lokalnesamouprave) umjesto u korist države;
2. zakonom prenijeti pravo vlasništva RH i entiteta BiH na građevinskom zemljištu u vlasništvo općina i gradova;
3. zabraniti otuđenje i založno opterećenje građevinskog zemljišta u vlasništvu općina i gradova, koje su ga stekle besplatno po samom zakonu prijenosom prava vlasništva od Republike Hrvatske, odnosno entiteta BiH ili pretvorbom društvenog vlasništva;
4. stimulirati osnivanje prava građenja, dugogodišnji zakup i koncesije na zemljištu u vlasništvu jedinica lokalne samouprave.

U vezi s tim treba propisati pravo prvokupa građevinskog zemljišta u korist jedinica lokalne samouprave.

3.6. Predmnijeva prava vlasništva na građevinskom zemljištu u korist općina i gradova umjesto u korist Republike Hrvatske

Nije u skladu s Ustavom da se predmnjeva prava vlasništva na nekretninama propisana u korist Republike Hrvatske proteže i na građevinsko zemljište. U tom slučaju gradsku rentu prisvaja država, a ne jedinica lokalne samouprave (općina, grad) koja je po Ustavu RH dužna brinuti se o uređivanju prostora, o urbanističkom planiranju, o uređivanju naselja i stanovanja i o komunalnim djelatnostima (čl. 128. st. 2.). U skladu s Ustavom bilo bi da se pod pretpostavkama iz čl. 362. st. 3. ZV-a zakonom propiše predmnjeva prava vlasništva u korist općina i gradova na neizgrađenom građevinskom zemljištu koje bi bilo u društvenom vlasništvu. Bilo bi, također u skladu s Ustavom zakonsko pravilo po kome bi napuštena nekretnina, neizgrađeno i izgrađeno građevinsko zemljište, prelazila u vlasništvo općine ili grada pod pretpostavkama iz čl. 123. st. 2. i 3. ZV-a. Poželjne su izmjene i dopune čl. 77. Zakona o naknadi… tako što bi jedinica lokalne samouprave (općina ili grad) stjecala pravo vlasništva na građevinsko zemljište za koje nije blagovremeno podnesen zahtjev za naknadu (restituciju) ili je takav zahtjev pravomoćno odbijen, ako pravo vlasništva nisu stekle druge osobe.

---

[258] Ustav Republike Srpske propisuje da „Opština preko svojih organa u skladu sa zakonom:
1. donosi program razvoja, urbanistički plan, budžet i završni račun;
2. uređuje i obezbjeđuje obavljanje komunalnih djelatnosti;
3. uređuje i obezbjeđuje korišćenje gradskog građevinskog zemljišta i poslovnog prostora;
4. stara se o izgradnji i korišćenju lokalnih puteva, ulica i drugih javnih objekata od opštinskog značenja…" (čl.102.).

Prema Ustavu Federacije Bosne i Hercegovine „u općini se ostvaruje lokalna samouprava" (VI čl.1.), a zakonom se utvrđuje nadležnost općina, pored ostalog i one nadležnosti koje su u RS utvrđene u čl.102.st.1.-4. Ustava.

Prema Ustavu Republike Hrvatske „pravo na lokalnu samoupravu obuhvaća pravo odlučivanja o potrebama i interesima građana lokalnog značenja, a osobito uređivanje prostora i urbanističkom planiranju, uređivanju naselja i stanovanja, o komunalnim djelatnostima… i unaprijeđenju prirodnog okoliša" (čl.128.st.2.).

3.7. Prijenos prava vlasništva građevinskog zemljišta na jedinice lokalne samouprave

Zbog gore izloženog nužno je zakonom prenijeti izgrađeno i neizgrađeno građevinsko zemljište u državnom vlasništvu u vlasništvo općina i gradova, uz zabranu otuđenja i da se, na izgrađenom građevinskom zemljištu, po samom zakonu, konstituira pravo građenja u korist države i entiteta BiH pa i drugih javnopravnih osoba koje bi od zemljišta odvajalo zgradu u njihovom vlasništvu sve do rušenja ili uklanjanja zgrade.

Na neizgrađenom građevinskom zemljištu RH stjecala bi pravo građenja (čl. 280.-296. ZV-a), po pravu prvenstva, uz obvezu plaćanja naknade vlasniku, općini ili gradu u iznosu prosječne zakupnine za takvo zemljište, ako nije drugačije određeno (čl. 281. st. 2. ZV-a). Od tržišne naknade za pravo građenja može se odstupiti pravnim poslom između Republike Hrvatske i jedinica lokalne samouprave pod pretpostavkama iz Zakona o vlasništvu (čl. 391. st. 2. ZV).

3.7.1. Uspostavljanje prava vlasništva jedinice lokalne samouprave na gradskom građevinskom zemljištu u entitetima Bosne i Hercegovine

U entitetima Bosne i Heregovine gdje je nominalno promijenjeno društveno vlasništvo na svim nekretninama pa i na gradskom građevinskom zemljištu u državno vlasništvo, iako su jedinice lokalne samouprave zadržale pravo upravljanja i raspolaganja, nameće se logično rješenje da se u postupku uspostavljanja prava vlasništva, na onom zemljištu na komu ne stječu pravo vlasništva druge osobe, konstituira pravo vlasništva jedinica lokalne samouprave. Sve druge osobe javnog prava, uključujući i državu BiH i njene entitete, imale bi pravo građenja na već izgrađenom zemljištu koje bi odvajalo zgrade u njihovom vlasništvu od zemljišta u vlasništvu jedinica lokalne samouprave uz obvezu plaćanja periodične rente u fond za komunalnu infrastrukturu.

3.8. Neotuđivost građevinskog zemljišta u vlasništvu jedinica lokalne samouprave

Kako bi se sačuvao trajan izvor prihoda za ulaganja u komunalnu infrastrukturu, općine i gradovi ne bi smjeli otuđivati ni ono građevinsko zemljište na kome su pretvorbom ili prijenosom bez naknade stekli pravo vlasništva, osim u iznimnim slučajevima koji bi bili zakonom određeni. U tom slučaju bi se osnivanjem prava građenja i dugogodišnjim zakupom, koncesijama i stvarnim služnostima uz periodičnu naknadu osigurali trajni izvori prihoda ubiranjem gradske rente koja bi se usmjeravala u komunalnu infrastrukturu preko odgovarajućih trgovačkih društava u komunalnom gospodarstvu koje osnivaju općine i gradovi. Time bi se stimuliralo osnivanje prava građenja na neizgrađenom i izgrađenom zemljištu koje smanjuje troškove građenja i cijene postojećih zgrada ili posebnih dijelova zgrada (nekretnina) u vlasništvu općina i gradova za iznos astronomske cijene građevinskog zemljišta.

Konstituiranjem prava građenja ne ugrožava se načelo pravnog jedinstva nekretnine jer je pravo građenja nekretnina u pravnom pogledu[259], a zgrada je njegova pripadnost kao da je ono zemljište[260]. Stoga nekretninu čine pravo građenja sa zgradom koja se ne može pravno odvojiti od prava građenja[261].

---

[259] Čl. 280. st. 2. ZV-a, čl.286.st.2. ZSP RS, čl.300.st.2. Nacrta ZSP FBiH.

[260] Čl. 280. st. 3. ZV-a, čl.286.st.3. ZSP RS, čl.300.st.3. Nacrta ZSP FBiH.

[261] Čl. 285. st. 3. ZV-a; čl.291.st.3. ZSP RS; čl.305.st.3. Nacrta ZSP FBiH.

Na javnom dobru u općoj uporabi kojim upravlja država, odnosno entiteti BiH preko svojih tijela i ustanova, kao i jedinice lokalne i područne (regionalne) samouprave, mogu se davati koncesije radi odvajanja zgrada i drugih građevina u vlasništvu koncesionara[262]. Koncesije se mogu osnivati i na građevinskom zemljištu u turističkim kampovima i drugim tehnološkim kompleksima koje je u vlasništvu Republike Hrvatske ili jedinica lokalne samouprave.

3.9. Pravo prvokupa jedinica lokalne samouprave de lege ferenda

Propisivanjem prava prvokupa u korist jedinica lokalne samouprave omogućilo bi se općinama i gradovima da u granicama svojih gospodarskih mogućnosti povećavaju površine neizgrađenog građevinskog zemljišta u svom vlasništvu. Tako su općine i gradovi u centralnoj i sjevernoj Europi od Beča do Stockholma zadnjih stotinu godina stekli pravo vlasništva na golemim površinama građevinskog zemljišta na kojemu osnivaju pravo građenja ili druga srodna prava pomoću kojih prisvajaju stalno rastuću gradsku rentu i smanjuju troškove izgradnje za visoku cijenu zemljišta koju vlasnici zgrada (investitori), odnosno kupci zgrada i posebnih dijelova zgrada plaćaju u vidu periodične naknade za pravo građenja ili drugo srodno pravo tijekom više desetljeća dok traje to pravo.

Pravo prvokupa neizgrađenog građevinskog zemljišta obuhvaćeno odgovarajućim prostornim planom imala je općina i po Zakonu o prometu nepokretnosti SR BiH (čl.29.), koji je još na snazi u FBiH[263], kao što ga danas ima jedinica lokalne samouprave na gradskom građevinskom zemljištu po ZGZ-u RS iz 2006. (čl.8.st.3.).

4. Raspolaganje građevinskim zemljištem u državnom vlasništvu i vlasništvu jedinica lokalne samouprave de lege ferenda

Iz naprijed izloženog proizlazi društveni imperativ socijalne države da se zadrži preostalo neizgrađeno građevinsko zemljište u vlasništvu jedinica lokalne samouprave, odnosno u državnom vlasništvu kojim bi upravljale i raspolagale jedinice lokalne samouprave i povećaju površine toga zemljišta otkupom, a kad su za ovo ispunjene zakonske pretpostavke i eksproprijacijom, uz osnivanje prava građenja za trajne zgrade, zakupnog odnosa za privremene zgrade i koncesija za zgrade i druge građevine na javnom dobru.

S obzirom da je opseg ovoga rada ograničen, ovdje će se prikazati samo funkcije prava građenja, a ne ustanova prava građenja, i u kratkim potezima ustanova koncesije za trajne zgrade i druge građevine na općem i javnom dobru te ustanova zakupa građevinskog zemljišta za privremenu zgradu.

4.1. Funkcije prava građenja

Pravo građenja po svojoj namjeni razlikuje se od ostalih ograničenih stvarnih prava. Ono omogućava ostvarenje tri bitne svrhe: socijalnu, gospodarsku i pravnu, stoga se mora promatra kao sredstvo (funkcija) za ostvarenje ovih svrha.

---

[262] Čl. 3. st. 4. i čl. 9. st. 4. ZV-a, čl.7.st.4. ZSP RS; čl.7.st.5. Nacrta ZSP FBiH.

[263] Ovaj Zakon se primjenjivao u Republici Srpskoj do 1.srpnja 2009. (čl.355.st.1.točka g) ZSP RS).

4.1.1. Socijalna funkcija prava građenja

U uvjetima enormnih cijena građevinskog zemljišta, razmjerno se povećavaju troškovi izgradnje zgrada, odnosno cijene stanova ili najamnina za stan. Pravo na doličan vlastiti stan, to osnovno pravo čovjeka i obitelji, u takvim okolnostima za mnoge ostaje gotovo nedostižno.[264]

U razvijenim zemljama socijalne orijentacije, traže se različiti modaliteti za stimuliranje jeftinije izgradnje zgrada, posebno socijalnih stanova i obiteljskih stambenih zgrada, a jedno od takvih sredstava je pravo građenja. Tom cilju treba služiti i naše pravo građenja sukladno socijalnoj komponenti prava vlasništva i drugih stvarnih prava koju ističe Ustav RH, propisujući da su nositelji vlasničkoga prava i njegovi korisnici dužni doprinositi općem dobru (čl. 48. st. 2.) i da je socijalna pravda jedna od najviših vrednota ustavnog poretka Republike Hrvatske (čl. 3.). Ovo se posebno odnosi na jedinice lokalne samouprave koje u odnosu na druge osobe, uglavnom imaju najviše građevinskog zemljišta u svome vlasništvu, a po Ustavu su dužne brinuti o socijalnoj skrbi građana[265] .

Stjecatelj prava građenja pribavlja građevinsku česticu upisom u zemljišnu knjigu, bez ikakve naknade uz obvezu plaćanja male mjesečne naknade (čl. 281. st. 2. ZV; čl.287.st.2. ZSP RS)[266]. Budući da se to pravo može hipotekarno založiti[267], njegovim stjecanjem ujedno stječe se mogućnost pribavljanja hipotekarnog kredita za izgradnju zgrade. Na taj se način omogućava ne samo jeftinija izgradnja, nego i kreditiranje izgradnje, dakle građenje tuđim sredstvima. Time se uveliko snižavaju cijene stambenog i poslovnog prostora te otvara mogućnost prodaje stanova i poslovnih prostorija s obročnom otplatom cijene, već tijekom izgradnje ili nakon izgradnje.

Upravo zbog toga se pravo građenja osniva prvenstveno radi izgradnje obiteljskih stambenih zgrada ili radi izgradnje socijalnih stanova (u višestambenim zgradama) koji se prodaju ili iznajmljuju po povoljnijim cijenama stambeno ugroženima, (tzv. socijalni stanovi).

Pravo građenja, u pravilu osnivaju vlasnici velikih površina građevinskog zemljišta. To su kod nas uglavnom općine i gradovi, pa i gospodarski subjekti, ali ne oni koji posluju radi brze dobiti koja se ostvaruje prodajom zemljišta.

Osnivanjem prava građenja gradovi i općine snizuju troškove izgradnje obiteljskih stambenih zgrada kao i troškove gradnje socijalnih stanova. Tako se potiče stambena izgradnja te izgradnja poslovnih prostorija osobito onih koje su namijenjene za neprofitabilne dje-

---

[264] Povelja Svete Stolice o pravima obitelji od 22. listopada 1983. godine, koja je predložena svim osobama, ustanovama i predstavnicima vlasti nadležnim za poštivanje obitelji u suvremenom svijetu, poziva sve države i sve nadležne ustanove i osobe na promicanje poštivanja prava i djelotvorno priznavanje, pored ostalih i prava na stan. Pravo na stan je formulirano u čl. 11. Povelje „Obitelj ima pravo na doličan stan, pogodan za život obitelji i primjeren broju njezinih članova, u okolišu koji osigurava najneophodnije usluge za život obitelji i zajednice" (Sto godina katoličkog socijalnog nauka, „Kršćanska sadašnjost", Zagreb, 1991., str. 568. i 569.). Države, članice Ujedinjenih naroda su se, međutim jedva suglasile da svatko ima pravo na životni standard dovoljan za njega i njegovu obitelj, uključujući primjerenu hranu, odjeću i ***stan***, kao i na stalno poboljšavanje životnih uvjeta. Države ugovornice poduzet će shodne mjere za osiguravanje ostvarenja toga prava, priznajući u tu svrhu bitnu važnost međunarodne suradnje utemeljene na slobodnoj privoli - Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima (dodatak Rezoluciji OSUN 2200 A (XXI) od 16. prosinca 1966.). Pakt je stupio na snagu 3. siječnja 1976. (točka 28. Odluke…), NN 12/93., Međunarodni ugovori).

[265] Čl. 128. st. 1. Ustava Republike Hrvatske.

[266] Nositelj prava građenja dužan je vlasniku zemljišta plaćati mjesečnu naknadu za zemljište u iznosu prosječne zakupnine za takvo zemljište, ako nije što drugo određeno (čl. 281. st. 2 ZV).

[267] Čl. 285. st. 2. u svezi s čl. 280. st. 2. ZV; odnosno čl.291.st.2. u svezi s čl.286.st.2. ZSP RS.

latnosti. Osnivajući pravo građenja, vlasnici zemljišta, dakle postižu pozitivne socijalne i gospodarske učinke.

4.1.2. Gospodarska funkcija prava građenja

Vlasnici zemljišta, posebno općine i gradovi, redovito ne raspolažu potrebnim novčanim sredstvima za stambenu i drugu izgradnju, ali osnivajući pravo građenja potiču takvu izgradnju novčanim sredstvima drugih osoba, bilo radi zadovoljavanja vlastitih potreba, bilo za tržište (izgradnja zgrada i dijelova zgrada za tržište).

Budući da zadržavaju pravo vlasništva na zemljištu, vlasnici zemljišta koji osnivaju pravo građenja ubiru, doduše malu, ali stalnu i relativno sigurnu rentu u mjesečnim iznosima prosječne zakupnine za takvo zemljište kada nije što drugo određeno[268]. Po prestanku prava građenja vlasnik zemljišta postaje vlasnikom zgrade, po načelu *superficies solo cedit*, koju mu je dužan predati u posjed posljednji nositelj prava građenja u ispravnom stanju, jer se na njihove odnose na odgovarajući način primjenjuju pravila po kojima se prosuđuju odnosi nakon prestanka prava plodouživanja, ako nije što posebno određeno[269]. Pri tome je vlasnik zemljišta dužan platiti naknadu za zgradu koliko je njegova nekretnina vrijednija s tom zgradom, nego bez nje[270]. Ali je s time stekao pravo raspolaganja svojom nekretninom: zemljištem sa zgradom, pravo otuđiti ju, opteretiti ili ustupiti u zakup, odnosno najam po tržišnim cijenama, ako ne odredi što drugo (npr. u pogledu „socijalnih stanova" koje grade općine i gradovi, kao i druge osobe koje ne posluju po načelima profita, tzv. neprofitabilne pravne osobe).

Na taj se način uspostavlja i održava kruženje gradske rente, inkorporiranog kapitala u gradsko zemljište, što omogućava održavanje, modernizaciju, obogaćivanje i proširivanje gradske infrastrukture, gradnju socijalnih stanova i sl.

4.1.3. Pravna funkcija prava građenja

Pravo građenja pravno odvaja zgradu od zemljišta, na površini zemljišta ili ispod nje[271]; poništavajući privlačnu snagu prava vlasništva na zemljištu, samo preuzima ulogu zemljišta jer je zgrada njegova pripadnost „kao da je ono zemljište"[272]. Osnivajući pravo građenja, dakle ne ukida se načelo *superficies solo cedit,* već se samo zamjenjuje objekt koji privlači zgradu. Na mjesto prirodnog zemljišta dolazi pravo građenja, kao drugo zemljište, odnosno druga nekretnina ako je zgrada već izgrađena[273] pa je zgrada koja je izgrađena na pravu građenja ili njime odvojena od zemljišta njegova pripadnost.

Pravo građenja osniva se bilo radi pravnog odvajanja postojeće trajne zgrade od zemljišta, bilo radi izgradnje takve zgrade koja bi bez prava građenja bila sastavni dio zemljišta, jer će u oba slučaja nositelj prava građenja biti vlasnik zgrade, dok to pravo postoji.

Budući da se pravo građenja može osnovati na površini ili ispod površine zemljišta (čl. 280. st. 1.) postoji mogućnost da jedna osoba ima pravo građenja na površini zemljišta, a druga ispod površine i da je treća osoba vlasnik zemljišta. Prva osoba će biti vlasnik zgrade na površini zemljišta, druga zgrade ispod površine zemljišta, a treća postaje vlasnikom tih zgrada kada prestane pravo građenja po načelu *superficies solo cedit.*

---

[268] Čl. 281. st. 2., čl.287.st.2. ZSP RS.

[269] Čl. 295. st. 2. ZV; čl.300.st.2. ZSP RS.

[270] Čl. 295. st. 3. ZV; čl.300.st.3. ZSP RS.

[271] Čl. 280. st. 1. ZV; čl.286.st.1. ZSP RS.

[272] Čl. 280. st. 3.; čl.286.st.3. ZSP RS.

[273] Čl. 280. st. 2., čl.286.st.2. ZSP RS.

Nadogradnjom zgrade na temelju prava nadogradnje stječe se pravo vlasništva na posebni dio nekretnine i pravo suvlasništva na nekretninu.

4.2. Koncesije za zgrade i druge građevine

Pogodna forma za stjecanje i imanje prava vlasništva na zgradu i drugu građevinu na zemljištu u vlasništvu države i jedinica lokalne i područne (regionalne) samouprave su koncesije koje potpuno odvajaju zgrade i druge građevine od zemljišta bez konstituiranja prava građenja.

Pravna ustanova koncesije uređena je Zakonom o koncesijama (1992.)[274] s čitavim nizom posebnih propisa o koncesijama za različite namjene koji nisu bitni za ovu temu.[275]

Ova se rasprava ograničava na koncesije za građenje zgrada i drugih građevina na općem dobru, ali i na građevinskom zemljištu u vlasništvu Republike Hrvatske i jedinica lokalne i područne (regionalne) samouprave. Ove koncesije omogućavaju izgradnju zgrada i drugih građevina u vlasništvu koncesionara dok koncesija traje, tako da ih koncesionar može hipotekarno opterećivati i ustupati u fiducijarno vlasništvo ukoliko se to ne protivi uvjetima koncesije. Zasnivanjem koncesije može se steći pravo vlasništva i na već izgrađene zgrade, kao i druge građevine, na primjer na lučka skladišta. Zakon o vlasništvu propisuje ‘’pravno nisu dijelovi općeg dobra one zgrade i druge građevine koje su na njemu izgrađene na temelju koncesije, pa tvore zasebnu nekretninu dok koncesija traje’’ (čl. 3. st. 4.; čl.7.st.4. ZSP). Ovo se odnosi i na zgrade i druge građevine koje ‘’od zemljišta ili općeg dobra pravno odvaja na zakonu osnovana koncesija koja svojega nositelja ovlašćuje da na tome ima takvu zgradu ili drugu građevinu u svome vlasništvu’’ (čl. 9. st. 4.) bez obzira jesu li izgrađene na temelju koncesije ili su njome odvojene od zemljišta dok koncesija traje.

Koncesija dobiva karakter publiciteta upisom u registar koncesija, a ova koncesija koja odvaja zgradu i drugu građevinu od zemljišta i upisom u zemljišnu knjigu (čl. 31. st. 1. ZZK) pa se nakon podnošenja zahtjeva nadležnom sudu za upis ove koncesije nitko ne bi mogao pozivati na to da nije znao kako je odnosna zgrada ili druga građevina pravno odvojena od zemljišta na kome je osnovana koncesija[276] i da je vlasništvo koncesionara.

Slabost koncesije je što je ograničena u pravnom prometu, jer se može prenijeti samo na onu osobu koja pruža jamstvo da će ispunjavati obveze iz koncesije i po pravilu uz suglasnost koncedenta. Stoga je ograničeno i opterećenje koncesije radi osiguranja potraživanja hipotekom ili prijenosom prava vlasništva na objektu koji odvaja koncesiju od zemljišta koje je gotovo nemoguće.

4.3. Zakup zemljišta za privremenu zgradu

Privremena zgrada je po samom zakonu pravno odvojena od zemljišta (čl. 9. st. 3. ZV-a) [277]. Takve zgrade se mogu držati na tuđem zemljištu na temelju ugovora o zakupu ili po drugoj pravnoj osnovi, odnosno uz suglasnost vlasnika zemljišta. Ugovor o zakupu dobiva pravni publicitet upisom u zemljišnu knjigu (čl. 31. st. 1. ZZK RH). Time se u značajnoj mjeri postiže pravna sigurnost u pravnom prometu.

Bez trajne veze zemljište i zgrada su dvije potpuno samostalne stvari koje mogu pripadati različitim vlasnicima, iako ih ne razdvaja pravo građenja. Kada po zakonu nije sastavni

---

[274] NN 89/92.

[275] Šire o koncesijama, Đerđa, D., Pojam i obilježja koncesija, ZPFR, vol. 24, br. 1., str. 617. – 638.

[276] Josipović, T., Zemljišnoknjižno pravo, br. 270.–272. i 274.

[277] Šire u: Prava na nekretninama (1945.-2007.), str.52.

dio zemljišta, zgrada se ne upisuje u zemljišne knjige. Zakon o zemljišnim knjigama propisuje da se u zemljišne knjige upisuje zemljište i sve što je sa zemljištem trajno spojeno (čl. 2.).[278] Sigurnost u pravnom prometu, koja se zasniva na povjerenju u zemljišne knjige, na istinitosti i potpunosti zemljišne knjige, zahtijeva trajnu vezu kao pretpostavku pravnog jedinstva zemljišta i zgrade. S druge strane, postoji potreba da se tuđe zemljište koristi, pored ostalog i za izgradnju privremenih objekata. S režimom podvojenog vlasništva zemljišta i privremenog objekta zadovoljavaju se istovremeno dva zahtjeva: interes pravne sigurnosti koji nalaže da se samo trajni objekti smatraju integralnim dijelom zemljišta, a gospodarske i druge potrebe korištenja tuđeg zemljišta, posebno građevinskog, traže dopuštanje odvojenog vlasništva zemljišta i privremenog objekta, kako bi vlasnik takvog objekta mogao njime slobodno raspolagati. Pravni odnos koji omogućava ovakav način korištenja tuđeg zemljišta zasniva se između vlasnika zemljišta i vlasnika privremenog objekta, najčešće ugovorom o zakupu, ponekad i ugovorom o posudbi ili ugovorom o prekariju (posudba do opoziva).

4.4. Pravo služnosti za naprave i uređaje na tuđem zemljištu

4.4.1. Potreba zasnivanja prava služnosti

U suvremenom društvu koje karakterizira visok stupanj tehnološkog razvitka postoji čitav niz specifičnih raznovrsnih naprava i postrojenja na površini, ispod površine ili iznad površine tuđeg zemljišta, koje su urbanistički ili funkcionalno (po namjeni) spojene s odgovarajućim sustavima za telekomunikacije, za prijenos i razvođenje električne ili toplinske energije, za razne cjevovode, kao što su: naftovodi, plinovodi, vodovodi, kanalizacije i sl.

Ove su naprave s gledišta imovinskog prava priraštaj ili pripadak odgovarajućeg pogona, pravno odvojene od zemljišta. Na jednom zemljištu je pogon kao sastavni dio zemljišta ili kao samostalna nekretnina, a na drugome su naprave i uređaji uvijek odvojeni od zemljišta. Pogon, povlasno dobro, kao samostalni trajni građevinski objekt, od zemljišta odvaja pravo građenja (čl. 280. – 296. ZV - a), odnosno prije trajno pravo korištenja na građevinskom zemljištu u društvenom vlasništvu, a njegove pripatke ili priraštaje koji se nalaze na tuđem zemljištu, u pravilu odvaja od zemljišta pravo stvarne služnosti (čl. 196. ZV-a). Pogon može biti odvojen od zemljišta i koncesijom.

4.4.2. Pojam i ovlaštenja prava služnosti

Pravo stvarne služnosti koje ovlašćuje titulara da na tuđem zemljištu podigne trajne naprave, priraštaje nekog pogona ili njegove pripatke, sadrži i drugo ovlaštenje: pravo držanja tih naprava na tuđem zemljištu. Obrnuto stvarna služnost koja razdvaja samostalni građevinski objekt od zemljišta na koje postoji pravo vlasništva, ne sadrži pravo građenja, odnosno pravo ponovnog građenja (kada se sruši ili ukloni postojeći građevinski objekt) takvog ili sličnog objekta. Ova služnost se jednostavno gasi s rušenjem ili uklanjanjem građevinskog objekta (povlasnog dobra). Služnost o kojoj se raspravlja vezana je za postojeći pogon (povlasno dobro) pa zbog toga postoji nezavisno od naprave radi čije izgradnje je osnovana.

Imatelj služnosti, koji daje ovlaštenje za gradnju priraštaja ili pripadaka nekog pogona na tuđem zemljištu ovlašćuje njegovog imatelja da na zemljištu izvede sve one radove, odnosno izvrši one promjene koje su neophodne kako bi se izgradile odgovarajuće naprave i kako

---

[278] U § 7. st. 4. Pravilnika za uređenje zemljišnih knjiga od 17. veljače 1931. izričito je bilo propisano da se privremene zgrade ne upisuju u zemljišne knjige i da se smatraju pokretnim stvarima. Takva odredba nalazi se i u švicarskom pravu (čl. 677. st. 2. Građanskog zakonika - Code Civil suisse), a odnosi se na lagane građevine, kao što su kiosci, dućani, barake koji su podignuti na tuđem zemljištu (čl. 677. st. 1.).

bi kasnije normalno funkcionirale u skladu s njihovom namjenom. Titular prava ove služnosti također je ovlašten za uklanjanje ili zahtijevanje uklanjanja svih onih prirodnih ili umjetnih promjena koje bi ometale normalno funkcioniranje naprava za čiju izgradnju je konstituirano pravo služnosti, npr. sječa drveća ili drugog raslinja na određenoj udaljenosti od dalekovoda ili zahtijevanje uklanjanja objekata koji ugrožavaju funkcioniranje sustava (npr. zagađenje vode u vodovodu).

4.4.3. Pravna priroda prava služnosti

Pravo stvarne služnosti, o kome se ovdje raspravlja sadrži dva ovlaštenja: prava građenja i prava držanja trajne naprave (priraštaja i pripatka nekog pogona) na tuđem zemljištu (poslužno dobro). Prvo ovlaštenje se ne gasi s izgradnjom naprave, već miruje dok postoji ta naprava, a kada naprava propadne imatelj prava služnosti ima pravo izgraditi drugu odgovarajuću napravu.

Usporedbu između ove služnosti i trajnog prava korištenja na građevinskom zemljištu u društvenom vlasništvu učinjena je na drugom mjestu.[279]

Na drugom mjestu šire se raspravlja o pravnoj prirodi prava stvarne služnosti na građevinskom zemljištu u društvenom vlasništvu, pa i o ovoj specifičnoj služnosti[280].

4.4.4. Zaštita prava služnosti

U pravnom sustavu koji poznaje posjed prava stvarne služnosti, kao naše pravo (čl. 10. st. 5.) imatelj stvarne služnosti o kojoj se raspravlja uživa posjedovnu i petitornu zaštitu od zasnivanja do njenog prestanka. Posjed prava stvarne služnosti ima osoba koja faktički koristi nekretnine druge osobe u obimu koji odgovara sadržaju te služnosti.

Vlasnik povlasnog dobra može zahtijevati tužbom da se prema vlasniku poslužnog dobra utvrdi postojanje stvarne služnosti pri čemu mora dokazati da ima pravo stvarne služnosti i da mu to pravo ne dira vlasnik poslužnog dobra.

4.4.5. Prestanak prava služnosti

Pravo stvarne služnosti koje se konstituira radi izgradnje uređaja ili naprava koje su pripadak ili priraštaj nekom pogonu na drugom zemljištu u pravilu se ne gasi, kao što se općenito gasi pravo stvarne služnosti, kada propadne povlasno dobro. U ovom slučaju ako propadne povlasno dobro (pogon) treba razlikovati dvije situacije:

a) kada postoji obveza obnavljanja pogona (povlasnog dobra) zato što njegov imatelj vrši javnu službu (djelatnost od posebnog društvenog interesa), na koji se nadovezuje ista služnost;
b) kada imatelj pogona (povlasno dobro) objektivno ne može obnoviti pogon ili se odluči ne obnoviti ga, kada nije dužan to učiniti, a na eventualni drugi pogon koji vrši sličnu funkciju se ne nadovezuje ista služnost.

U prvom slučaju služnost ostaje; u drugom se gasi po sili zakona. U ovom drugom slučaju naprave i uređaji gube svojstvo trajnosti, smatraju se pokretnom stvari, autonomnim objektom, kojeg može ukloniti imatelj pogona ili ga na to može prisiliti vlasnik zemljišta.

---

[279] Simonetti, P., Pravo građenja, NIO Sl. list SR BiH,Sarajevo – NIO Sl. list SFRJ, Beograd, 1986., str. 236.–238.

[280] Simonetti, P., Pravo korištenja građevinskog zemljišta u društvenom vlasništvu (3. dio, poglavlje: Pravna priroda prava korištenja građevinskog zemljišta u društvenom vlasništvu), Informator, Zagreb, 1985., str. 231. – 233.

Sažetak

Na izgrađenom građevinskom zemljištu u društvenom vlasništvu uspostavlja se pravo vlasništva pretvorbom trajnog prava korištenja u pravo vlasništva (suvlasništva) vlasnika (suvlasnika) zgrade i posebnih dijelova zgrade. U pravo vlasništva pretvaraju se i prava upisana na neizgrađenom građevinskom zemljištu na kome je izgrađena trajna zgrada u skladu sa zakonom (legalizacija bespravne izgradnje). Ova pretvorba se događala po samom zakonu, izvan zemljišne knjige, čime se uspostavilo pravno jedinstvo nekretnine na onoj površini na koju se prostiralo trajno pravo korištenja, a to je zemljište ispod zgrade i oko zgrade koje je potrebno za njenu redovnu upotrebu u skladu s odgovarajućim prostornim planom. Upis nekretnine u zemljišnu knjigu obavlja se po iscrpno propisanim pravilima bilo da su zemljište ili zgrada upisani u zemljišnu knjigu ili ne. Pravno jedinstvo nekretnine uspostavljeno je *ex lege* spajanjem zgrade u etažnom vlasništvu sa zemljištem u privatnom vlasništvu jer se pravo suvlasništva sada proteže na cijelu nekretninu, a iz tog prava proizlazi pravo vlasništva na posebne dijelove nekretnine. Autor se zalaže za zakonsku zabranu otuđenja građevinskog zemljišta u vlasništvu države i jedinica lokalne samouprave i za primjenu ustanova prava građenja, koncesija, zakupa i služnosti što omogućava permanentno pritjecanje, stalno rastuće gradske rente u fond komunalne infrastrukture i sniženje cijena gradnje, zgrada i posebnih dijelova zgrada u visini cijene zemljišta.

Ključne riječi: građevinsko zemljište, zgrada, nekretnina, vlasništvo

dr *Rodna Živkovska**, Redovni profesor
na Pravnom fakultetu „Justinijan Prvi“ u Skopju
mr *Tina Prželska**, Asistent
na Pravnom fakultetu „Justinijan Prvi“ u Skopju

USPOSTAVLJANJE PRAVA VLASNIŠTVA I PRAVO DUGOROČNOG ZAKUPA IZGRAĐENOG GRAĐEVINSKOG ZEMLJIŠTA U DRŽAVNOM VLASNIŠTVU R. MAKEDONIJE

I. POJAM, GENEZA I PRAVNA PRIRODA PRAVA TRAJNOG KORIŠĆENJA U NR MAKEDONIJI I SR MAKEDONIJI

Zakonodavci i civilna doktrina FNR Jugoslavije, odnosno bivše SFR Jugoslavije (u čijem je sastavu ulazila NR Makedonija i SR Makedonija), su smatrali pravo trajnog korišćenja, **kao pravo koje ovlašćuje vlasnika zgrade izgrađene na zemljištu u društvenom vlasništvu da koristi zemljište ispod zgrade i zemljište koje služi za redovnu upotrebu zgrade dok ista postoji**[1].

1. Razvoj prava trajnog korišćenja pre svega potiče od nacionalizacije građevinskog zemljišta, izvršene Zakonom o nacionalizaciji najamnih zgrada i građevinskog zemljišta iz 1958. godine. Ista uvodi načelo superficiei solum cedit koje podrazumeva dvojni pravni režim: društveno vlasništvo građevinskog zemljišta i pravo vlasništva nad zgradom izgrađenom na tom zemljištu. **Pritom, i pored toga što su zemljište i zgrada trajno spojeni, njih razdvaja pravo trajnog korišćenja građevinskog zemljišta u državnom vlasništvu**. Zbog povezanosti zemljišta sa postojanjem zgrade (do njenog otstranjivanja ili rušenja), u građanskoj doktrini civilisti, kao na primer profesor Simonetti, su smatrali da „i pored toga što ovo pravo nije klasično imovinsko pravo, ipak je stvarno pravo“[2]. Pored toga, profesor P. Simonetti je tvrdio u to vreme da su „*neposrednost i apsolutnost zajednička karakteristika prava korišćenja za izgradnju i prava trajnog korišćenja, jer zajednički objekat za oba dva prava je stvarna građevinska čestica koja je tačno određena – res certa*“. Profesor

---

* Originalni tekst je na lokalnom jeziku.

[1] Prema tome: „*Kada je zgrada na koju postoji pravo vlasništva izgrađena saglasno zakonu na zemljištu u društvenom vlasništvu, vlasnik zgrade ima pravo korišćenja zemljišta na kome je zgrada izgrađena i na zemljištu koje služi za upotrebu te zgrade dok ista postoji“* (čl. 12, st. 1, Zakona o osnovnim svojinsko pravnim odnosima, Sl. List, SFRJ, br. 6/80 i 36/90). Definiciju slično ovoj daju i tadašnji civilisti u bivšoj SFR Jugoslaviji. U tome, oni imenuju ovo pravo na različiti način. Naziv, pravo korišćenja građevinskog zemljišta, upotrebljavaju skoro svi makedonski civilisti. Naziv, pravo gradnje, upotrebljava M. Vedriš, Osnove imovinskog prava, Zagreb, 1976, str. 207, kao i V. Spaić, Građansko pravo (opšti deo i stvarno pravo), Sarajevo, 1971, str. 669. Sa druge strane profesor P. Simonetti korektno pravi distinkciju između *naziva, pravo korišćenja građevinskog zemljišta u društvenom vlasništvu za gradnju, i naziva, pravo trajnog korišćenja građevinskog zemljišta u društvenom vlasništvu*. Vidi: *Pravo građenja*, Sarajevo, Beograd, 1986.

[2] Vidi: P. Simonetti, *cit. delo*, str. 231 i 234.

Andrija Gams je imao stav da je „*teško trvditi da je pravo preče kupovine klasično imovinsko pravo*“[3].

2. U pogledu pravne prirode prava trajnog korišćenja, u civilnoj doktrini SR Makedonije i R. Makedonije od osobitog značaja je stanovište profesora Stefana Georgievskog, prema kome *„pravo korišćenja je trajno zbog toga što je zasnovano na neopredeljeno vreme i to bez naknade za korišćenje građevinskog zemljišta, da je zakonski određeno, da prestaje sa propadanjem zgrade, kao i ukoliko ista nije izgrađena i da se isto prenosi samo prenosom vlasništva nad zgradom izgrađenom na njemu*“. Međutim, profesor S. Georgievski zaključuje da „*i pored toga što je ovo stvarno pravo, isto nije samostalno jer je vezano za izgradnju objekta i deli sudbinu tog objekta*“[4]. Istog mišljenja je i profesor Dimitar Pop Georgiev, prema kome „*pravo korišćenja je deo sadržine društvenog vlasništva nad građevinskim zemljištem stvarno pravnog karaktera, jer je nosilac koristio to zemljište saglasno njegovoj nameni i u tome je mogao isključiti svako treće lice od korišćenja tog zemljišta*“[5]. Unatoč ovim autorima, profesor Asen Grupče pravo korišćenja smatra za „*vid službenosti sa elementima stvarne i lične službenosti ili, preciznije, mešani, prelazni vid službenosti čija osnovna suština je korišćenje tuđe stvari, gde nosilac posuđenog dobra (država) ima pasivan odnos, odnosno nema obavezu da se objektivno ponaša*“[6]. Sa druge strane, profesorka R. Živkovska smatra da „*pravo korišćenja, budući da je izvedeno pravo, je pravo sui generis koje, zbog toga što se odnosi prema svima, i zbog toga što njegov objekat je stvar, ima apsolutni i direktni (stvarnopravni) karakter*“[7].

3. Geneza prava trajnog korišćenja građevinskog zemljišta u društvenom vlasništvu u NR Makedoniji odvijala se u četiri etape. Prva etapa je 1950. do 1954. godine, t.j. od usvajanja Osnovnog Zakona za upravljanje državnim privrednim preduzećima i sa višim privrednim udruženjima sa strane radnih kolektiva (Sl. glasnik FNRJ, br. 43/50), do usvajanja Zakona o prometu zemljišta i zgrada iz 1954. godine (Sl. glasnik FNRJ, br. 26/54), s kim se pravo korišćenja sme dati svakom državljanu FNR Jugoslavije čime se počinje stimulirati individualna stambena gradnja, zbog toga što je predviđena mogućnost prodaje stambenih zgrada opštenarodne imovine državljanima FNR Jugoslavije, čime se oni stiču pravom vlasništva nad kupljenom zgradom, a zemljište na kojem se zgrada nalazila i dvorište ostaju u tzv. Fondu za opštenarodnu imovinu. Druga etapa je iz Zakona o prometu zemljišta i zgrada iz 1954. godine, do usvajanja Izmena i dopuna Zakona o prometu zemljišta i zgrada u 1965. godini (Sl. glasnik SFRJ, br. 15/65), kada se krug nositelja prava korišćenja i trajnog korišćenja širi na društveno-pravna lica. Treća etapa je između Izmena i dopuna Zakona za prometu zemljišta i zgrada u 1965. godini i Izmena i dopuna Zakona o prometu zemljišta i zgrada u 1967. godini (Sl. glasnik SFRJ, br. 17/67) koje propisuju da se pravo korišćenja građevinskog zemljišta u društvenom vlasništvu sme kreirati i sa ciljem izgradnje delovne zgrade i delovne prostorije. Četvrta etapa je od Izmena i dopuna Zakona o prometu zemljišta i zgrada u 1967. godini pa do Izmena Zakona o građevinskom zemljištu u 1991. godini (Sl. glasnik SRM, br. 21/91) kojima se građevinsko zemljište u R. Makedoniji proglašava za državno, t.j. imovina R. Makedonije (čl. 5, st. 1).

---

[3] A. Gams, *Uvod u građansko pravo*, Beograd, 1963, str. 150.

[4] S. Georgievski, *Aspekti transformacije prava korišćenja građevinskog zemljišta u vlasništvu R. Makedonije*, Pravnik, Udruženje pravnika u privredi R. Makedonija, juli-avgust 2002, str. 11.

[5] D. P. Georgiev, *Razvoj prava korišćenja građevinskog zemljišta u društvenom vlasništvu*, Godišnji glasnik Pravnog fakulteta u Skopju, 1967, str. 203.

[6] A. Grupče, *Imovinsko (Građansko) pravo, drugi deo, Stvarno pravo*, Kultura, Skopje, 1983, str. 107-108.

[7] R. Živkovska, *Stvarno pravo*, Evropa 92, Skopje, 2005, str. 87-88.

Nesporno je da stav 1 člana 5 Izmena Zakona o građevinskom zemljištu iz 1991. godine u pravnom smislu označava prelaz društvene svojine građevinskog zemljišta u državnu svojinu, pa prema tome pravo korišćenja kao elemenat društvenog vlasništva, odnosno kao izvedeno pravo iz sadržine društvenog vlasništva, treba prestati i u praksi, t.j. de facto. Međutim, pravni život u R. Makedoniji pokazuje da i je posle ovih Izmena, nadležno ministarstvo - Ministarstvo za transport i veze, davalo građevinsko zemljište na trajno korišćenje, i to putem usvajanja Zakona o građevinskom zemljištu u 2001 godini (Sl. glasnik RM, 52/01).

II. OPŠTE O TRANSFORMACIJI PRAVA TRAJNOG KORIŠĆENJA GRAĐEVINSKOG IZGRAĐENOG ZEMLJIŠTA U PRAVO VLASNIŠTVA I PRAVO DUGOROČNOG ZAKUPA

Zakonodavstvo R. Makedonije pokazuje da se transformacija prava trajnog korišćenja u pravo vlasništva ili u pravo dugoročnog zakupa odvijala u tri faze u pravu R. Makedonije. Prva faza počinje Zakonom o građevinskom zemljištu iz 2001. godine, koji je sveobuhvatno uredio transformaciju prava trajnog korišćenja u pravo vlasništva ili pravo, dugoročnog zakupa. Druga faza počinje uredbom o načinu i postupku za otuđenje izgrađenog građevinskog zemljišta u vlasništvu R, Makedonije od 7. marta 2003. godine, sa kojom se uređuje samo otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije domaćim fizičkim i pravnim licima (t.j. transformacija prava trajnog korišćenja uz naknadu). Treća faza počinje usvajanjem (odnosno primenom) Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu iz 2005. godine (Sl. glasnik RM, br. 4/05), kojim se uređuje privatizacija građevinskog (izgrađenog i neizgrađenog) zemljišta u državnom vlasništvu na koje postoji pravo korišćenja (sa naknadom i bez naknade) i pravo dugoročnog zakupa (u slučaju neizvršene privatizacije), kao vidovi transformacije.

U posebnim poglavljima u narednom tekstu, biće detaljno prikazani način i uslovi prema kojima se odvijala transformacija prava trajnog korišćenja građevinskog zemljišta u državnom vlasništvu u pravo vlasništva ili pravo dugoročnog zakupa, saglasno ovim trima uzastopnim procesima.

I. Transformacija prava trajno izgrađenog građevinskog zemljišta u pravo dugoročnog zakupa, saglasno zakonu o građevinskom zemljištu iz 2001. godine

1. **Zakon o građevinskom zemljištu iz 2001. godine uređuje pravni režim izgrađenog građevinskog i neizgrađenog građevinskog zemljišta, kao stvari opšteg interesa** (čl. 3)[8].

[8] Proklamacija građevinskog zemljišta za dobro opšteg interesa za Republiku stoji u stavu 1 člana 2 Zakona o građevinskom zemljištu, koji je u saglasnosti sa stavom 1 člana 16 Zakona o vlasništvu i drugim stvarnim pravima koji, isto tako, pored drugih dobara proglašava i građevinsko zemljište za dobro opšteg interesa: „*Građevinsko zemljište je dobro opšteg interesa Republike i uživa posebnu zaštitu, na način i prema uslovima utvrđenim u ovom zakonu"*. Sa druge strane, stav 1 člana 16 je u saglasnosti sa stavom 1 člana 56 Ustava R. Makedonije koji tretira, t.j. naziva, građevinsko zemljište „*dobrom opšteg interesa*". „*Sva prirodna bogatstva, biljni i životinjski svet, dobra u opštoj upotrebi, građevinsko zemljište, šume i poljoprivredno zemljište, pašnjaci i vode, kao i stvari i objekti sa osobitim kulturnim i istorijskim značajem opredeljeni su zakonom kao stvari (dobra) opšteg interesa za Republiku"*. (čl. 16, st. 1, Zakon o vlasništvu i drugim stvarnim pravima). „ *Sva prirodna bogatstva Republike, biljni i životinjski svet, dobra u opštoj upotrebi, kao i predmeti i objekti sa osobitim kulturnim i istorijskim značajem opredeljeni su zakonom kao dobra opšteg interesa za Republiku i uživaju posebnu zaštitu* " (čl. 56, st. 1, Ustava R. Makedonija).

Stvari opšte upotrebe, kao podvid stvari opšteg interesa, koje su ekskluzivno rezervirane kao stvari u vlasništvu R. Makedonije[9], prema propisima Zakona o građevinskom zemljištu, mogu da koriste sva fizička i pravna lica. U tom slučaju, **građevinskim zemljištem u opštoj upotrebi upravlja Vlada R. Makedonije u ime R. Makedonije, koja može da prenese svoje pravo upravljanja na drugi organ** (čl. 11).

Izgrađeno građevinsko zemljište u smislu Zakona, je ono građevinsko zemljište na kome je izgrađen objekat trajnog karaktera, saglasno zakonu i zemljište koje služi za redovitu upotrebu objekta. Zakon o građevinskom zemljištu decidno određuje građevinsko zemljište za stvar koja proizilazi iz odredbi člana 7 Zakona: „*Vlasništvo građevinskog zemljišta obuhvata njegovu površinu i sve što je sa njim trajno povezano, a nalazi se na površini ili ispod nje, osim ako nije zakonom drugačije uređeno*".

2. **Saglasno odredbama Zakona, građevinsko zemljište može biti u državnom vlasništvu (vlasništvo R. Makedonije) i privatnom vlasništvu** (vlasništvo domaćih fizičkih i pravnih lica) (čl. 6). Individualizaciju građevinskog zemljišta u stvari, Zakon vrši kroz njegovo izražavanje u građevinske parcele. Građevinska parcela je deo građevinskog zemljišta određena u planovima i aktima koji zamenjuju planove i ista se može sastojati od **jedne ili više katastarskih parcela**, ili **delova katastarskih parcela** određenih detaljnim urbanističkim planom, odnosno overenim urbanističkim projektom i numeričkim podatcima o površini građevinske parcele (čl. 9). Odredba ukazuje na **važnost katastarskog sistema u R. Makedoniji,** koji je u vreme usvajanja Zakona o građevinskom zemljištu bio uređen Zakonom o premeru, katastru i upisivanju prava na nekretnine iz 1986. godine (Sl. glasnik RM, br. 27/86)[10].

3. **U Zakonu o građevinskom zemljištu po prvi put je dozvoljen promet građevinskim zemljištem**: „*Promet građevinskim zemljištem je slobodan, shodno uslovima uređenim u ovom i drugim zakonima*" (čl. 8, st. 1). (Međutim, još uvek je u pravnom životu R. Makedonije diskutabilno pitanje: Dali je u prometu građevinsko zemljište ili građevinska parcela na tom zemljištu?)

Isključivo, promet građevinskim zemljištem može biti ograničen u slučaju otuđenja građevinskog zemljišta u vlasništvu fizičkih i pravnih lica, na kome je planirana izgradnja objekata javnog interesa za Republiku, uređenih zakonom. U tom slučaju postoji ograničenje izbora ugovorne strane (relativno ograničenje prava vlasništva) u korist R. Makedonije koja ima pravo preče kupovine na to građevinsko zemljište. U pogledu uslova i načina ostvarenja ovog prava preče kupovine, Zakon o građevinskom zemljištu se poziva na odredbe Zakona o obligacionim odnosima (čl. 8).

4. **Načelo superficies solo cedit, je decidno izraženo u članu 10 Zakona o građevinskom zemljištu**: „***Objekti izgrađeni na površini ili ispod površine građevinskog zemljišta, sa ciljem da tamo trajno ostanu, su deo građevinskog zemljišta sve dok se od njega ne odvoje,*** *osim ako ih pravno od toga zemljišta ne odvaja stvarno pravo, koje ovlaštava nosioca toga prava da ima objekte u svom vlasništvu na tuđem zemljištu, ili ako na osnovu koncesije nosilac toga prava ovlaštava njega da ima objekte u svom vlasništvu*".

---

[9] „*Stvari opšte upotrebe su stvari u državnom vlasništvu koje koriste sva fizička i pravna lica* ", čl. 16, st. 4, Zakona o vlasništvu i drugim stvarnim pravima...

[10] Isti je bio na snazi do donošenja Zakona o katastru nekretnina u martu 2008. godine (Sl. glasnik RM, br. 40/08), koji se ponovo zasniva na katastarskom sistemu upisivanja prava nad nekretninama

Odredba člana 10 ukazuje da objekti izgrađeni na ili ispod građevinskog zemljišta (ako su saglasni urbanističkim planovima[11]) su priraštaj glavnoj stvari, t.j. građevinskom zemljištu[12].

5. **Zakon omogućuje isključak pravila superficies solo cedit** ako je utvrđeno stvarno pravo gradnje (pravo dugoročnog zakupa) na to zemljište ili ako je na istom utvrđeno pravo koncesije određenom licu. U ova dva slučaja, nosilac prava dugoročnog zakupa i nosilac prava koncesije imaju prava da grade na tuđem zemljištu (saglasno tadašnjim Zakonom o uzgradnji investicijskih objekata iz 1990. godine (Sl. glasnik SRM, br. 5/90 i 11/91 i Sl. glasnik RM, br. 11/94, 18/99 i 25/99)), na kome se mogu izgraditi objekti koji su u njihovoj svojini sve dok traje pravo dugoročnog zakupa, odnosno pravo koncesije. U pravnom smislu reči, treba shvatiti isključak načela superficies solo cedit u smislu da, **ovako izgrađeni objekti, na ili ispod građevinskog zemljišta, prate sudbinu prava dugoročnog zakupa**, a ne sudbinu zemljišta koje je u vlasništvu drugog lica (fizičko ili pravno ili država). Ovo znači da u ovim slučajevima trebamo tretirati pravo dugoročnog zakupa kao „*fingiranu nekretninu*“ kako bi rekli da objekti prate sudbinu te „*fingirane nekretnine*“.

Odredba iz člana 10 se odnosi samo na objekte trajnog karaktera, t.j. sa ciljem da „*tamo trajno ostanu*“, a ne i na privremene objekte[13]. Za njih Zakon decidno kaže da „*nisu delovi građevinskog zemljišta* “ (čl. 10, st. 2)[14].

1. Transformacija građevinskog zemljišta u državnom vlasništvu u pravo vlasništva ili pravo dugoročnog zakupa

Transformacija prava korišćenja građevinskog zemljišta je uređena u Delu IV Zakona o građevinskom zemljištu koji glasi: TRANSFORMACIJA PRAVA KORIŠĆENJA GRAĐEVINSKOG ZEMLJIŠTA (čl. 49-67).

U uređenju pravnog režima transformacije prava korišćenja građevinskog zemljišta, Zakon o građevinskom zemljištu je razlikovao nekoliko kategorija lica koji su bili nosioci prava korišćenja, odnosno imali su pravo transformacije građevinskog zemljišta kojeg su koristili. Prva kategorija lica su korisnici građevinskog zemljišta na osnovu ranijeg vlasništva. Druga kategorija su korisnici građevinskog zemljišta na osnovu kupljenih stambenih i drugih objekata na zemljištu u društvenom vlasništvu, odnosno u vlasništvu R. Makedonije (sa ili bez definiran mestom za dvorište, koji su platili naknadu na zemljište). Treća kategorija lica su korisnici građevinskog zemljišta kojima je dodeljeno građevinsko zemljište za izgradnju objekta. Četvrta kategorija su korisnici zemljišta koji su kupili takozvane društvene, odnosno državne stanove. Ova lica su u stvari vlasnici izgrađenih objekata ili stanova,

---

[11] Saglasno tadašnjem Zakonu za prostorno i urbanističko planiranje iz 1996. godine (Sl. glasnik RM, br. 4/96) planiranje prostora se izvodi Prostornim planom Republike i sledećim urbanističkim planovima: generalnim urbanističkim planom, detaljnim urbanističkim planom, urbanističkom dokumentacijom naseljenog mesta u opštini i urbanističkim planom za granični prelaz (čl. 7).

[12] U ovom slučaju reč je o originernom načinu sticanja prava vlasništva putem gradnje koje je uređeno članom 116, stavom 1 Zakona o vlasništvu i drugim stvarnim pravima: „*Vlasnik zemljišta predviđenog zakonom ili na osnovu zakona o građevinskim objektima, koji je izgradio zemljište saglasno građevinskim propisima is a upisivanjem prava u javne knjige za upisivanje prava na nekretnine* “.

[13] Priraštaj stvari prema Zakona o vlasništvu i drugim stvarnim pravima je: „*svaki njegov deo koji je trajno spojen za njega* “ (čl. 15, st. 3).

[14] „*Objekti privremenog karaktera postavljeni na građevinsko zemljište na osnovu akta nadležnog organa do dana stupanja na snagu Zakona o građevinskom zemljištu su produžili postojati sve do isteka roka utvrđenim u aktu za davanje zemljišta na privremeno korišćenje, odnosno do realizacije urbanističkog plana* “. Vidi: čl. 71.

prodatih saglasno Zakonu o prodaji stanova u društvenom vlasništvu i delova zgrada i delovnih prostorija ili saglasno Zakonu o prodaji delovnih zgrada i delovnih prostorija u vlasništvu R. Makedonije, ili su prodati na drugoj osnovi, odnosno otuđeni na drugi način od države, a za koje objekte pre izgradnje nisu bile određene građevinske parcele.

1.1. Kategorija korisnika građevinskog zemljišta na osnovu ranijeg vlasništva

Korisnici građevinskog zemljišta na osnovu ranijeg vlasništva zemljišta mogli su da transformiraju pravo korišćenja u pravo vlasništva nad građevinskim zemljištem, **podnošenjem zahteva do Ministarstva za transport i veze** (čl. 50). Na osnovu zahteva za transformaciju, Ministarstvo za transport i veze je usvajalo **rešenje za transformaciju prava korišćenja u pravo vlasništva,** koje je pretstavljalo pravni osnov za upisivanje prava vlasništva u katastar nekretnina. **Kao korisnici sa ranijem vlasništvom tretirana su lica koja su bila vlasnici zemljišta do dana kada je zemljište nacionalizirano, odnosno napravljeno društveno na osnovu akta usvojenog sa strane nadležnog organa** (zakon, odluka regionalnog narodnog odbora ili odluka skupštine opštine), kao i korisnici kojima je preneseno pravo trajnog korišćenja neizgrađenog građevinskog zemljišta saglasno Zakonu o nacionalizaciji najamnih zgrada i građevinskog zemljišta („Službeni list FNRJ „ broj 52/58). U slučaju prenesenog prava trajnog korišćenja na osnovu Zakona o nacionalizaciji najamnih zgrada i građevinskog zemljišta, treba se uzeti u obzir da se transformacija mogla sprovesti ako je bio ispunjen jedan od sledećih uslova: 1. da je ugovor za prenos overen sa strane nadležnog organa za overavanje, 2. da ugovorena cena bude plaćena preko banke, ili 3. ako je lice kome je preneseno pravo korišćenja ispunjavalo svoje obaveze prema zajednici u vezi tog zemljišta (plaćalo porez).

ZAKLJUČAK: Korisnici građevinskog zemljišta na osnovu ranijeg vlasništva su transformirali pravo korišćenja građevinskog zemljišta isključivo u pravo na vlasništvo bez naknade, na osnovu rešenja.

1.2. Kategorija korisnika građevinskog zemljišta na osnovu kupljenih stambenih i drugih objekata na zemljištu u društvenom vlasništvu, odnosno vlasništvu R. Makedonije

Korisnici građevinskog zemljišta na osnovu kupljenih stambenih i drugih objekata na zemljištu u društvenom vlasništvu, odnosno vlasništvu Republike Makedonije (sa ili bez definiranim dvorištem), **koji su platili naknadu za građevinsko zemljište, su transformirali pravo korišćenja u pravo vlasništva** ukoliko su podneli validne dokaze o plaćenoj naknadi (čl. 51). Ako nije bila plaćena naknada za dodeljeno građevinsko zemljište, pravo korišćenja su ova lica mogla transformirati u pravo vlasništva ako bi platili naknadu utvrđenu saglasno odredbama Zakona o građevinskom zemljištu. Ako korisnici nisu platili naknadu u postupku za transformaciju, njihovo se pravo korišćenja transformiralo u pravo dugoročnog zakupa građevinskog zemljišta u vlasništvu Republike Makedonije, suglasno odredbama Zakona o građevinskom zemljište.

ZAKLJUČAK: Polazeći od načela savesnosti i poštenja, zakonodavac je sa pravom propisao da kategorija korisnika građevinskog zemljišta u društvenom vlasništvu, koji su pri kupovini stambenog ili drugog objekta platili naknadu za zemljište, transformiše svoje pravo korišćenja u pravo vlasništva. Ukoliko nisu platili naknadu, oni su mogli pravo korišćenja da transformišu u pravo vlasništva ako plate naknadu, odnosno u pravo dugoročnog zakupa građevinskog zemljišta u vlasništvu R. Makedonije, ako nisu platili naknadu.

1.3. Kategorija korisnika građevinskog zemljišta kojima je dodeljeno građevinsko zemljište za izgradnju objekta

а) Korisnici građevinskog zemljišta kojima je **dodeljeno građevinsko zemljište za izgradnju objekta, za koje je plaćena naknada i objekat je izgrađen**, su mogli da **transformišu** pravo korišćenja **u pravo vlasništva,** ukoliko su imali dokaze da je plaćena naknada za građevinsko zemljište dato na korištenje (čl. 52). Pravo korišćenja građevinskog zemljišta se transformiralo u pravo vlasništva **samo u okvirima građevinske parcele definirane urbanističkim planom** ili važećim aktima za planiranje prostora u tom periodu. U tome, suglasno odredbama zakona, pri transformaciji prava korišćenja u pravo vlasništva nad građevinskom parcelom, trebaju se uzeti u obzir i faktičke ili pravne promene na građevinskoj parceli, nastale na osnovu akata usvojenih sa strane nadležnih organa.

б) Ako korisnici građevinskog zemljišta dodeljenog za izgradnju **objekta nisu platili naknadu, a jesu izgradili objekat** oni mogu da transformišu pravo korišćenja građevinskog zemljišta u pravo vlasništva **(u celosti ili deo tog zemljišta)**, ako plate naknadu koja se tada utvrđivala suglasno odredbama Zakona o denacionalizaciji, t.j. primenjivale su se odredbe Uredbe o načinu i postupku za utvrđenje vrednosti imovine koji je predmet denacionalizacije (čl. 51, st. 3 i 4).

в) Kada su korisnici građevinskog zemljišta, pravo **korišćenja tog zemljišta sticali putem javnog nadmetanja, odnosno neposrednim ugovorom**, (što podrazumeva plaćanje za dodeljeno pravo korišćenja), **njihovo se pravo korišćenja se uvek transformiralo u pravo vlasništva**. Uslov je bio priložiti validne dokaze o načinu plaćanja na javnom nadmetanju, odnosno neposrednom ugovoru (čl. 55, st. 1).

ZAKLJUČAK: U prvoj situaciji, suglasno načelu savesnosti i poštenja, zakonodavac je propisao da korisnici građevinskog zemljišta, dodeljenog za izgradnju objekta, koji su platili naknadu za dodeljeno građevinsko zemljište isto transformišu u pravo vlasništva.

U drugoj situaciji, suglasno principu jednakosti uzajamnih davanja, korisnici građevinskog zemljišta koje im je dodeljeno na trajno korišćenje i koji su izgradili objekat, a nisu platili naknadu, transformišu pravo korišćenja u pravo vlasništva ako plate naknadu suglasno propisima o denacionalizaciji (ovo zemljište, jer je izgrađeno, ne može biti vraćeno ranijim vlasnicima).

U trećoj situaciji, država, saglasno načelu savesnosti i poštenja, nema prava tražiti naknadu od kategorije lica koja su platila naknadu za dodeljeno građevinsko zemljište na javnom nadmetanju ili putem direktnog ugovora.

1.4. Kategorija korisnika zemljišta koji su kupili tzv. društveni, odnosno državni objekat ili stan

Transformacija građevinskog zemljišta obuhvata i situaciju u kojoj nosilac prava vlasništva stana ili drugog objekta nije dobio korisničko pravo nad građevinskim zemljištem na kome se nalazi taj stan ili objekat. Tu se radi o transformaciji građevinskog zemljišta u vlasništvu Republike Makedonije na kome je izgrađen objekat ili stan prodat prema Zakonu o prodaji stanova u društvenom vlasništvu i Zakonu o prodaji delovnih prostorija u vlasništvu Republike Makedonije, kao i objekata prodatih, ili na drugi način otuđenih, sa strane države, za koje pre izgradnje nisu bile određene građevinske parcele (**čl. 53). U stvari, radi se o kategoriji lica koja nisu imala pravo trajnog korišćenja upisano, odnosno evidentirano**

u javnim knjigama za upisivanje prava nad nekretninama). U ovim slučajevima (t.j. kada građevinske parcele izgrađenih objekata nisu bile definisane pre gradnje), površina građevinskog zemljišta za koju se pravo korišćenja transformiralo u pravo vlasništva, utvrđivalo se ugovorom o transformaciji na osnovu urbanističkog plana (čl. 53, st. 2). Zbog toga što se površina građevinske parcele za koju je pravo korišćenja bilo transformirano u pravo vlasništva određivala u ugovoru o transformaciji, razgraničenje pojedinih parcela je vršilo Ministarstvo za transport i veze **usvajanjem rešenja** (čl. 53, st. 3). O eventualnim sporovima koji su se odnosili na određivanje površine transformiranog građevinskog zemljišta i građevinskog zemljišta na kome je postojalo pravo vlasništva, odlučivao je sud u vanparničnom postupku za uređenje međa, saglasno odredbama Zakona o vanparničnom postupku iz 1979. godine (Sl. glasnik SRM, br. 19/79).

U slučaju više vlasnika objekta izgrađenog na građevinskom zemljištu, isto se transformiralo prema veličini vlasničkog udela, odnosno vlasništva na posebnom delu objekta, **i to u vlasničko pravo ili pravo dugoročnog zakupa utvrđenog u idealnim delovima**. U slučaju kada je na objektima izgrađenim na građevinskom zemljištu u državnom vlasništvu postojalo zajedničko vlasništvo, pravo korišćenja se transformiralo u pravo zajedničkog vlasništva (čl. 53, st. 4).

ZAKLJUČAK: Zbog toga što se kategorija vlasnika stanova ili drugih objekata nije stekla korisničkim pravom, zakonodavac je pravom propisao da se oni steknu pravom vlasništva (suvlasništva, zajedničkog vlasništva) ili pravom korišćenja dugoročnog zakupa i pored toga što nisu stekli pravo trajnog korišćenja, u momentu kupovine stana ili drugog objekta, pod uslovom da plate naknadu za novoformiranu građevinsku parcelu na kojoj se nalazi taj objekat, odnosno stan.

2. Transformacija građevinskog izgrađenog zemljišta u državnom vlasništvu isključivo u pravo dugoročnog zakupa

Transformacija prava korišćenja u pravo dugoročnog zakupa je ekskluzivno rezervisana za sledeća tri slučaja: 1. za građevinsko zemljište u opštinama, odnosno Gradu Skopje na kome ima izgrađenih objekata koji su putem deobnog bilansom preneseni na opštine, odnosno Grad Skopje, 2. **za steknuto pravo korišćenja građevinskog zemljišta društvenog pravnog lica i drugog lica sa društvenim kapitalom** (na osnovu dodele ili na osnovu korišćenja objekta izgrađenog na tom zemljištu za vršenje privredne ili druge aktivnosti), a koje nije moglo biti nosilac prava vlasništva, i 3. **za inostrana lica** (fizička i pravna) kojima je građevinsko zemljište dodeljeno putem javnog nadmetanja ili direktnim ugovorom.

1. Jedinice lokalne samouprave (opštine i Grad Skopje) koje su se stekle pravom vlasništva nad objektima koji su im preneseni deobnim bilansom, su mogle transformirati pravo korišćenja građevinskog zemljišta na kome se ti objekti nalaze samo u pravo dugoročnog zakupa, zbog toga što je, saglasno sa odredbama Zakona, građevinsko zemljište jedino moglo biti u vlasništvu države i u vlasništvu fizičkih i privatnih lica, ali ne i u vlasništvu jedinica lokalne samouprave (čl. 6). Pravo dugoročnog zakupa, saglasno Zakonu o građevinskom zemljištu iz 2001. godine, one su sticale **na osnovu ugovora** sa Ministarstvom za transport i veze, kao organom koji upravlja građevinskim zemljištem u vlasništvu R. Makedonije, **putem direktnog ugovora bez naknade** (čl. 31, st. 2).

2. Društveno - pravna lica koja su stekla pravo korišćenja građevinskog zemljišta u društvenom vlasništvu društvenim kapitalom na osnovu dodele ili na osnovu korišćenja objekta za vršenje privredne aktivnosti ili druge aktivnosti društvenog pravnog i drugog lica

(u slučaju kada to pravno lice nije moglo biti nosilac prava vlasništva), **su transformirala to pravo u pravo dugoročnog zakupa građevinskog zemljišta u vlasništvu R. Makedonije, bez razlike dali je ili nije izvršena transformacija društvenog kapitala tog pravnog lica** (čl. 54, st. 1). Kod donošenja ovog rešenja zakonodavac sa pravom polazi od fakta da je naknada za dodeljeno građevinsko zemljište plaćena društvenim kapitalom, t.j. sredstvima društvene zajednica (u društvenom vlasništvu), koja su, kao što je poznato, bila „*svačija i ničija*" (a nisu bila prava vlasništva).

3. Inostrana fizička i pravna lica, bez razlike dali im je građevinsko zemljište dodeljeno putem javnog nadmetanja ili direktnim ugovorom (plaćeno), **su transformirali pravo korišćenja tog zemljišta isključivo putem dugoročnog zakupa** (čl. 55, st. 2). Ovo zakonsko rešenje proističe iz opšte odredbe sadržane u članu 245 Zakona o vlasništvu i drugim stvarnim pravima iz 2001. godine koja ne dozvoljava pravo vlasništva inostranih lica nad građevinskim zemljištem, nego samo pravo dugoročnog zakupa[15]. U stvari, Zakon o građevinskom zemljištu iz 2001. godine, izričito propisuje da je pravo vlasništva građevinskog zemljišta ekskluzivno rezervirano samo **za domaća fizička i pravna lica**[16].

ZAKLJUČAK: U navedena tri slučaja, pravo korišćenja građevinskog zemljišta se transformiralo isključivo u pravo dugoročnog zakupa u sledeća tri slučaja - 1. za jedinice lokalne samouprave koje su deobnim bilansima dobila pravo vlasništva nad objektima izgrađenim na građevinskim zemljištem u državnom vlasništvu; 2. za pravna lica koja su radila sa društvenim kapitalom, a koja su stekla pravo korišćenja na osnovu dodele ili na osnovu korišćenja društvenog objekta izgrađenog na tom zemljištu, i 3. inostrana fizička i pravna lica koja su stekla pravo korišćenja građevinskog zemljišta putem javnog nadmetanja ili direktnim ugovorom.

Pravo dugoročnog zakupa kao institut građanskog prava je uvedeno u pravni sistem R. Makedonije Zakonom o građevinskom zemljištu iz 2001. godine. Ovo je definirano u članu 21 Zakona: „*Pravo dugoročnog zakupa građevinskog zemljišta e pravo tuđeg građevinskog zemljišta koje ovlaštava njegovog nosioca na površini ili ispod površine toga zemljišta da izgradi vlastiti objekat, a vlasnik zemljišta je obavezan da to trpi*". Pravo dugoročnog zakupa, prema zakonskim odredbama, može da traje najduže 99 godina. Za to vreme, objekat izgrađen na osnovu ovog prava je u vlasništvu nosioca prava dugoročnog zakupa sa strane pravnog aspekta objekat se tretira kao priraštaj prava dugoročnog zakupa, a ne za priraštaj zemljištu[17]. Pravo dugoročnog zakupa je isključak važnosti načela superficies solo cedit prema kome objekat. Posle prestanka prava dugoročnog zakupa, Zakon o građevinskom zemljištu proklamira ponovno uspostavljanje jedinstva između građevinskom zemljišta i svega što je izgrađeno na tom zemljištu[18]. Ovo znači da, objekat izgrađen na osnovi prava dugoročnog

---

[15] „*Inostrana fizička i pravna lica, pod uslovom reciprociteta, mogu da steknu pravo dugoročnog zakupa građevinskog zemljišta za izgradnju delovnih zgrada i delovnih prostorija i stambenih zgrada i stanova na teritoriji Republike Makedonije, na osnovu saglasnosti ministra pravde, prema prethodno pribavljenim mišljenjima ministra nadležnog za urbanizam i građevinu i ministra finansija"*, čl. 245.

[16] „*Građevinsko zemljište može biti u vlasništvu Republike Makedonije i domaćih fizičkih i pravnih lica, shodno uslovima utvrđenim u ovom i drugom zakonu*".

[17] „*Objekat izgrađen na osnovu prava dugoročnog zakupa, prenosi se, nasleđuje i opterećuje zajedno sa pravom za dugoročni zakup"*, čl. 25, st. 3, Zakon o građevinskom zemljištu...

[18] „*Istekom roka ugovora za dugoročni zakup, ono što je tim pravom bilo pravno odvojeno od zemljišta postaje priraštaj građevinskom zemljištu, odnosno vlasništvo vlasnika zemljišta*", čl. 37, st. 1, isto.

zakupa, posle prestanka prava dugoročnog zakupa, postaje vlasništvo vlasnika građevinskog zemljišta.

U vezi prava dugoročnog zakupa, u civilnoj doktrini se postavlja pitanje: *Dali pravo dugoročnog zakupa je stvarno ili obligacijsko pravo*? Profesorka Rodna Živkovska, kao jedan od autora Zakona, smatra da *„dugoročni zakup uređen Zakonom o građevinskom zemljištu iz 2001. godine predstavlja stvarno subjektivno pravo, jer i sami zakonodavac u pogledu sticanja*[19]*, zaštite*[20]*, prenosa*[21] *i prestanka*[22] *prava dugoročnog zakupa poziva na analognu primenu odredaba Zakona o vlasništvu i drugim stvarnim pravima*". Isto tako, profesorka R. Živkovska potencira da „*pravo dugoročnog zakupa građevinskog zemljišta kao stvarno subjektivno pravo se može uspostaviti samo na neizgrađenom građevinskom zemljištu, a ne i na građevinskom izgrađenom zemljištu*". Što se tiče prava dugoročnog zakupa koje se stiče u postupku transformacije prava trajnog korišćenja građevinskog zemljišta profesorka R. Živkovska kaže da „*ovaj dugoročni zakup, jer se uspostavlja na izgrađenom građevinskom zemljištu na kome je izgrađen objekat u vlasništvu fizičkih i pravnih lica predstavlja obligacijsko pravo. Naime, već izgrađeni objekat ne sme posle isticanja roka od 99 godina da bude priraštaj zemljištu, odnosno da se nacionalizira objekat, pa prema tome dugoročni zakup u procesu transformacije predstavlja obligacijsko subjektivno pravo*[23]. Fakt je da Zakon o građevinskom zemljištu iz 2001. godine ne pravi razlike između dugoročnog zakupa izgrađenog i neizgrađenog građevinskog zemljišta (govori samo o građevinskom zemljištu). Međutim, najvažnija je odredba zakonske definicije prema kojom pravo dugoročnog zakupa je **pravo gradnje na građevinskom zemljištu**, pa prema tome pogrešno je misliti da Zakon podrazumeva samo dugoročni zakup neizgrađenog građevinskog zemljišta. Naime, ovo su dva vida dugoročnih zakupa: prvi je u slučaju davanja pod zakup neizgrađenog građevinskog zemljišta u vlasništvu R. Makedonije, **zbog gradnje** (koja je stvarno pravo), a drugi je pravo dugoročnog zakupa na građevinsko zemljište u procesu transformacije prava trajnog korišćenja (koje je obligaciono pravo).

---

[19] „*Pravo dugoročnog zakupa se obavezno upisuje u javnu knjigu za upisivanje prava nad nekretninama (u daljem tekstu: javna knjiga), kao teret zemljištu koje se opterećuje i kao posebno pravo. ugovor o dugoročnom zakupu proizvodi pravno dejstvo od dana upisivanja u javnu knjigu. Upisivanje prava dugoročnog zakupa u javnu knjigu kao teret izvodi se na osnovu ugovora za dugoročni zakup. Ako je pravo dugoročnog zakupa na štetu već upisanih ograničenih prava na zemljište, isto se može upisati samo uz saglasnost nosioca tih prava. Objekat koji je izgrađen, upisuje se u javnu knjigu kao objekat izgrađen na zemljištu opterećenog pravom dugoročnog zakupa"* čl. 29.

[20] „*Pravo dugoročnog zakupa, dok objekat još nije izgrađen, a i nakon toga, upisuje se uz adekvatnu upotrebu odredaba za zaštitu stvarnih prava Zakona o vlasništvu i drugim stvarnim pravima*", čl. 33.

[21] „*Na prenos prava dugoročnog zakupa adekvatno se primenjuju odredbe za sticanje prava vlasništva nad nekretninama na osnovu pravnog dela, odluke suda ili nasleđa, ako zakonom nije drugačije određeno. Pravom dugoročnog zakupa istovremeno se prenosi i pravo vlasništva nad objektom izgrađenim na zemljištu na kojem je objekat izgrađen na osnovu prava dugoročnog zakupa. Ugovor protivan stavu 2 ovoga člana je ništavan",* čl. 32.

[22] „*Pravo dugoročnog zakupa prestaje propadanjem objekta, otkazivanjem prava sa strane nosioca prava dugoročnog zakupa i ispunjivanjem uslova za raskid ugovora. Prestanak prava dugoročnog zakupa se upisuje u javnu knjigu i proizvodi pravno dejstvo od dana upisa", čl. 34 i „Na prestanak prava dugoročnog zakupa zbog propadanja objekta na adekvatan način se primenjuju odredbe za prestanak prava vlasništva propadanjem stvari iz Zakona o vlasništvu i drugim stvarnim pravima* ", čl. 35, st. 1.

[23] „*Garantuje se pravo vlasništva i pravo nasleđivanja* ", čl. 30, st. 1, Ustav RM, Sl. glasnik RM, br. 52/92.

ZAKLJUČAK: Pravo dugoročnog zakupa koje su korisnici građevinskog zemljišta sticali u postupku transformacije prava korišćenja se odnosi na građevinsko izgrađeno zemljište na kome je izgrađen objekat sa zagarantiranim pravom vlasništva koje je kao takvo trajno pravo i ne može biti vremenski ograničeno. Prema tome, pravo dugoročnog zakupa treba tretirati kao obligaciono pravo, za razliku od pravo dugoročnog zakupa na neizgrađenom građevinskom zemljištu koje je bilo stvarno subjektivno pravo, zbog toga što se nosilac stiče pravom vlasništva nad objektom dok traje zakup.

3. Način, uslovi i postupak za transformaciju prava korišćenja u pravo vlasništva i pravo dugoročnog zakupa

1. Korisnici građevinskog zemljišta na osnovu ranijeg vlasništva, su transformirali pravo trajnog korišćenja isključivo u pravo vlasništva i u tom slučaju je transformacija nastajala **rešenjem koje je donosio organ državne uprave koji upravlja građevinskim zemljištem u državnom vlasništvu** (Ministarstvo za transport i veze) (čl. 50, st. 1). Za sve druge korisnike građevinskog zemljišta koji su transformirali pravo trajnog korišćenja u pravo vlasništva ili pravo dugoročnog zakupa, ovo se pravo uspostavljalo **na osnovu ugovora o transformaciji** koji se ugovara između nosioca prava trajnog korišćenja i R. Makedonije, odnosno u ime R. Makedonije ugovor potpisuje Ministar za transport i veze.

2. **Ugovor o transformaciji suglasno odredbama Zakona je strogo formalno pravno** delo koje mora biti zaključeno u pisanoj formi kako bi proizvelo pravno dejstvo. Zaključeni ugovor o transformaciji kao pravni osnov za sticanje prava vlasništva ili prava dugoročnog zakupa na građevinskom zemljištu, **se upisivao u javne knjige za upisivanje prava nad nekretninama** (čl. 57, st. 2). U slučaju postojanja određenih pravnih nedostataka koji su pravili ugovor o transformaciji ništavnim, tužbu za utvrđenje ništavnosti je imao pravo da podnese Javni pravobranioc R. Makedonije kao i lice koje je to imalo u pravnom interesu (čl. 59)

Ugovorom o transformaciji **obavezno se određivala površina objekta i površina građevinskog zemljišta koje je predmet denacionalizacije** na osnovi urbanističkih planova (čl. 58, st. 1)[24]. Pri određivanju površine građevinskog zemljišta koje je predmet transformacije, zakonodavac je propisivao da ne može biti obuhvaćeno građevinsko zemljište koje prema urbanističkim planovima ne pripada adekvatnoj građevinskoj parceli. Ovo građevinsko zemljište, zbog toga što nije bilo transformirano, moglo je biti oformljeno u posebnu građevinsku parcelu, saglasno aktima za planiranje prostora (čl. 60, st. 1). Međutim, u slučaju kada preostali deo koji se nije transformirao nije mogao biti oformljen kao nova građevinska parcela, nosilac prava trajnog korišćenja je imao prava da isti transformiše. Za taj deo građevinskog zemljišta on je bio obavezan da plati povećanu naknadu (čl. 60, st. 2).

3. **Naknadu koju su korisnici građevinskog zemljišta bili obavezani platiti u postupku transformacije u pravo trajnog korišćenja** određivala se posebnom metodologijom usvojenom sa strane Vlade R. Makedonije (čl. 61, st. 1). Naknada je bila određena u devizama, zakonodavac je različito određivao način plaćanja za fizička i pravna lica. Fizička lica su naknadu plaćala u denarima ili obveznicama Republike Makedonije izdatih za pokrivanje potraživanja građana na osnovu deponiranih deviznih uloga ili na drugim osno-

[24] U slučaju spora oko utvrđene površine građevinskog zemljišta u ugovoru za transformaciju, razgraničenje građevinskih parcela se vrši odlukom Ministarstva za transport i veze. Protiv ovog rešenja dozvoljena je žalba do drugostepene komisije Vlade R. Makedonije. Ako strane ne mogu da postignu ugovor oko određivanja međa, iste određuje sud u vanparničnom postupku. Vidi: čl. 58, st. 2 i 3.

vama određenim zakonom (čl. 62, st. 1). Pravna lica su, pored plaćanja naknade na isti način kao i fizička lica, mogla da plate naknadu i akcijama koje su same izdale prema njihovoj nominalnoj vrednosti, ili pretvaranjem iznosa naknade u vlasnički udeo Republike u iznosu naknade (čl. 64, st. 1).

Sa ciljem olakšanja naknade koju su bili dužni platiti korisnici građevinskog zemljišta, zakonodavac je predvideo mogućnost da ista bude plaćena na rate (najviše do 40 polugodišnjih rata) (čl. 61, st. 2). U slučajevima kad je naknada plaćana na rate, u ugovoru za transformaciju se unosila **posebna klauzula prema kojoj vlasništvo nad građevinskim zemljištem u postupku za transformaciju se stiče tek posle isplate zadnje rate** (čl. 58, st. 4).

Način, uslove i postupak za transformaciju prava korišćenja u pravo vlasništva ili pravo dugoročnog zakupa Zakon o građevinskom zemljištu je uređivao u samo nekoliko članova (čl. 57-67). Način i uslovi za transformaciju prava korišćenja su bili detaljnije uređeni Uredbom o načinu i uslovima za transformaciju prava korišćenja građevinskog zemljišta u vlasništvu Republike Makedonije u pravo svojine ili pravo dugoročnog zakupa (Sl. glasnik RM, br. 79/01). Isto kao i Zakon o građevinskom zemljištu iz 2001. godine, tako je i Uredba predvidela da bivši vlasnici transformišu pravo trajnog korišćenja u pravo vlasništva **na osnovu rešenja**, dok su sve ostale kategorije korisnika prava trajnog korišćenja transformirale pravo vlasništva **na osnovu ugovora** (Vidi: čl. 3-10). **Transformacija prava trajnog korišćenja u pravo dugoročnog zakupa se vršila isključivo na temelju ugovora** (čl. 11).

Uredba, za razliku od Zakona, je sadržala i precizne odredbe o dokaznim sredstvima koja trebaju podneti korisnici u postupku za transformaciju prava korišćenja u pravo vlasništva ili u pravo dugoročnog zakupa, kao i o sadržini ugovora za transformaciju prava korišćenja u pravo vlasništva[25] i sadržinu ugovora o transformaciji prava korišćenja u pravo dugoročnog zakupa[26].

ZAKLJUČAK: Bivši vlasnici prava korišćenja su transformirali pravo korišćenja u pravo vlasništva na osnovu rešenja, dok su sve ostale kategorije lica pravo korišćenja transformirale u pravo vlasništva na osnovu ugovora. Transformacija prava korišćenja u pravo vlasništva vršila se isključivo na osnovu ugovora kao strogo formalno pravno delo koje se obavezno zaključivalo u pisanom obliku.

---

[25] *„Ugovor iz članova 5 i 6 obavezno se zaključuje u pisanoj formi i sadrži: Ugovorne strane: I. Republika Makedonija, odnosno ministar za transport i veze, i II. Fizičko ili pravno lice predlagač za transformaciju prava korišćenja građevinskog zemljišta; predmet ugovora: transformacija prava korišćenja u pravo vlasništva; dokumentaciju iz članova 5 i 6 ove Uredbe; utvrđivanje iznosa naknade (kada naknada nije plaćena); način plaćanja naknade na građevinsko zemljište; uslovi za raskid ugovora: neispunjenje ugovornih obaveza za plaćanje iznosa naknade (neplaćanje dviju uzastopnih rata) i drugi razlozi predviđeni opštim odredbama Zakona o obligacijama; uslov: zemljište i objekat se ne mogu otuđiti do potpunog plaćanja naknade; utvrđena površina građevinskog zemljišta na osnovu urbanističkog plana. Ugovor se priprema u osam (8) identičnih kopija od kojih su dve za davaoca transformacije i jedan za Javnog pravobranioca Makedonije "* (čl. 7 Uredbe)

[26] *„Ugovor iz člana 10 ove Uredbe obavezno se zaključuje u pisanoj formi i sadrži: Ugovorne strane: I. Republika Makedonija, odnosno Ministarstvo za transport i veze, i II. Fizičko ili pravno lice koje traži transformaciju prava korišćenja građevinskog zemljišta; predmet ugovora: pravo dugoročnog zakupa; rok dugoročnog zakupa; uslovi za zaključenje ugovora; utvrđenje iznosa i načina plaćanja zakupnine na naknadu; uslovi za raskid ugovora: neispunjenje ugovornih obaveza za plaćanje iznosa zakupnine (neplaćanje dviju uzastopnih rata); način plaćanja zakupnine. Ugovor za transformaciju prava korišćenja građevinskog zemljišta u dugoročni zakup se priprema u osam (8) identičnih kopija od kojih su dve za davaoca transformacije i jedan za Javnog pravobranioca Makedonije*" (čl. 12 Uredbe).

(Treba uzeti u obzir da je Zakon o građevinskom zemljištu iz 2001. godine osim transformacije izgrađenog građevinskog zemljišta u državnoj svojini na kome fizička i pravna lica imaju pravo korišćenja, ***uređivao i pravni režim građevinskog neizgrađenog zemljišta vo državnoj svojini****. Zbog toga što, kao što smo već rekli, je promet građevinskim zemljištem bio slobodan saglasno odredbama Zakona,* ***R. Makedonija je mogla neizgrađeno građevinsko zemljište da otuđuje, da pod zakup (dugoročan ili kratkoročan) ili da ga da pod koncesiju*** *(čl. 13, st. 1). Otuđenje i davanje pod zakup neizgrađenog građevinskog zemljišta u državnom vlasništvu se vršilo na osnovu* ***Uredbe o načinu i postupku otuđenja, davanju pod zakup i iznos posebnih troškova postupaka za otuđenje i davanje pod zakup građevinskog zemljišta u vlasništvu Republike Makedonije*** *(Sl. glasnik RM, br. 79/01). Davanje neizgrađenog građevinskog zemljišta u državnom vlasništvu je bilo uređeno Zakonom o koncesiji iz 1993. godine (Sl. glasnik RM, br. 42/93 i 44/99), a kasnije i Zakonom o koncesijama (Sl. glasnik RM, br. 25/02 i 24/03).*

II. Transformacija prava trajnog korišćenja građevinskog izgrađenog zemljišta u pravo vlasništva i pravo dugoronog zakupa saglasno uredbi o načinu i postupku za otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonija iz 2003. godine

Na inicijativu notara, u svojstvu članova Notarske komore R. Makedonije, a jer je Zakon o građevinskom zemljištu propisivao da je zemljište glavna stvar, a objekat izgrađen na tom zemljištu je priraštaj zemljišta (čl. 10), kao i zbog toga što se objekat na zemljištu morao otuđivati ako je zemljište privatizirano (čl. 67), ukinut je veliki broj članova Zakona o građevinskom zemljištu sa strane Ustavnog suda R. Makedonije[27], sa obrazloženjem da su protivni članu 30, stavu 1 Ustava R. Makedonije, koji garantira pravo vlasništva. Zbog tih razloga (jer su bile ukinute odredbe koje se odnose na transformaciju sa naknadom), Vlada R. Makedonije je usvojila podzakonski akt sa kojim je samo uredila otuđenje građevinskog zemljišta izgrađenog na zemljištu u vlasništvu R. Makedonije. Ovo je Uredba o načinu i postupku za otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije iz 2003. godine (Sl. glasnik RM, br. 13/03). Sa njom je bio uređen način transformacije prava trajnog korišćenja u pravo vlasništva za one korisnike koji nisu platili naknadu za pravo korišćenja građevinskog zemljišta (čl. 1 i čl. 3, st. 1). Zbog toga što su ova lica bila dužna da plate naknadu za sticanje prava vlasništva **Uredba, umesto termina „*transformacija građevinskog zemljišta*“ koristi termin „*otuđenje građevinskog zemljišta*“.** Uredba se nije odnosila na transformaciju prava korišćenja u pravo vlasništva za korisnike koji su bili raniji vlasnici, kao i za korisnike koji su platili pravo korišćenja građevinskog zemljišta. Za ova lica, u pogledu transformacije, ostale su u primeni odredbe Zakona o građevinskom zemljištu iz 2001. godine (čl. 3, st. 2).

Predmet otuđenja, saglasno Uredbe **o izgrađenom građevinskom zemljištu na kome su domaća pravna i fizička lica imala pravo vlasništva nad objektom (831 u imovin-**

[27] Prva odluka Ustavnog suda R. Makedonije je U. br. 172/2001 - 0 – 0 od 10.07.2002. godine, kojom se ukidaju članovi 52, 52, 53, 55 stav 1, 66 stav 1 u delu „i uslovi“, 67 i 70 stav 1 Zakona o građevinskom zemljištu. Druga odluka Ustavnog suda R. Makedonije je U. br. 208/2001 – 0 – 0 od 25.09.2002. godine, kojom se ukida član 40, stav 5 Zakona o građevinskom zemljištu. Treća odluka Ustavnog suda R. Makedonije je U. br. 225/2001 – 0 – 0 od 15.01.2003. godine, kojom se ukida član 43, stav 7 Zakona o građevinskom zemljištu.

skom listu), a na građevinskom zemljištu na kome je taj objekat bio izgrađen imali su stečeno pravo korišćenja (oznaka 814 u imovinskom listu) (čl. 2). Pri tome, predmet otuđenja, prema Uredbi nije moglo biti građevinsko zemljište koje je predmet denacionalizacije, saglasno propisima o denacionalizaciji (čl. 4).

Otuđenje građevinskog zemljišta saglasno Uredbi se može provesti ukoliko su ispunjeni sledeći uslovi: 1. Da građevinsko zemljište u državnom vlasništvu bude **izgrađeno građevinsko zemljište**; 2. Da **postoji pravo trajnog korišćenja** na građevinskom zemljištu; 3. Da su korisnici građevinskog zemljišta **domaća fizička ili pravna lica**, i 4. Korisnici građevinskog zemljišta da imaju **nespornu faktičku vladavinu** na građevinskim zemljištem (čl. 2).

Otuđenje građevinskog zemljišta u državnom vlasništvu vršilo se samo **na zahtev korisnika građevinskog zemljišta koji je imao obavezu da plati naknadu** za pravo korišćenja građevinskog zemljišta, a koju nije platio (čl. 7).

Građevinsko izgrađeno zemljište, saglasno Uredbu otuđivalo se **na osnovu ugovora** između nosioca prava korišćenja građevinskog zemljišta i R. Makedonije (čl. 9). Sključivanje ovih ugovora je bilo u nadležnosti Ministarstva finansija (čl. 8).

ZAKLJUČAK: Uredbom o načinu i postupku otuđenja izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije iz 2003. godine bio je uređen način transformacije prava vlasništva onih korisnika koji su bili dužni, a nisu platili naknadu za pravo korišćenja građevinskog zemljišta. Zbog ovoga, Uredba nije koristila termin „*transformacija izgrađenog građevinskog zemljišta*“, nego termin „*otuđenje izgrađenog građevinskog zemljišta u državnom vlasništvu*“.

III. Transformacija prava trajnog korišćenja izgrađenog građevinskog zemljišta u pravo vlasništva i pravo dugotrajnog zakupa saglasno zakonu o privatizaciji i zakupu građevinskog zemljišta iz 2005. godine

Donošenjem Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu u 2005. godini, u pogledu transformacije prava korišćenja u pravo vlasništva ili u pravo dugotrajnog zakupa, prestale su da važe odredbe Zakona o građevinskom zemljištu iz 2001. godine[28], kao i Uredba o načinu i postupku za otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije.

Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu je specijalni zakon koji u pravnom sistemu R. Makedonije uređuje tzv. transformaciju prava korišćenja građevinskog zemljišta u državnom vlasništvu. Ovaj Zakon, za razliku od Zakona o građevinskom zemljištu ne koristi termin „transformacija prava na korišćenje “, nego u zavisnosti od toga dali se korisnici građevinskog zemljišta stiču pravom privatnog vlasništva ili pravom dugoročnog zakupa razlikuje ***„privatizaciju građevinskog zemljišta u državnom vlasništvu“ i „uspostavljanje prava dugoročnog zakupa“***. Što se tiče privatizacije, ona prema Zakonu je *„privatizacija sa naknadom“* i *„privatizacija bez naknade“*.

---

[28] Član 87 Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu izričito propisuje: „*Na dan stupanja na snagu ovog Zakona prestaje važnost članova 49, 50, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65 i 66 Zakona o građevinskom zemljištu („Službeni glasnik Republike Makedonije“ broj 53/2001 i 97/2001)*“.

– Građevinsko izgrađeno i neizgrađeno zemljište na kojem postoje sukorisnička prava evidentirana u katastru zemljišta, odnosno upisana u katastru nekretnina u idealnim delovima, privatizuju se **proporcionalno veličini idealnih delova sukorisničkog prava** (čl. 13, st. 1).

– Izmenama Zakona o privatizaciji i zakupu iz 2008. godine (čl. 6-a) **predmet privatizacije nije izgrađeno građevinsko zemljište na kome su izgrađeni stanovi, delovne prostorije, podrumi, garaže i drugi posebni delovi stambenih i delovnih zgrada koji imaju dva ili više stana, odnosno delovnih prostorija i drugih posebnih delova koji su u vlasništvu različitih fizičkih i pravnih lica (etažno vlasništvo)**. Umesto da se olakša postupak u pogledu privatizacije ovakvog građevinskog zemljišta, zadnje Izmene Zakona o privatizaciji i zakupu građevinskog zemljišta iz 2009. godine su vrlo diskutabilno uredile privatizaciju ovog izgrađenog zemljišta na kome postoje objekti u etažnom vlasništvu. Naime, **ukoliko u katastru zemljišta nisu evidentirani, odnosno u katastru nekretnina nisu upisani idealni delovi korisničkog prava, izgrađeno građevinsko zemljište se privatizira u zajedničkom vlasništvu fizičkih i pravnih lica kao etažnih suvlasnika** (čl. 13, st. 2). D**eo naknade koji plaća svaki od etažnih vlasnika se određuje proporcionalno površini posebnog dela zgrade** prema ukupnoj površini zemljišta koje je predmet privatizacije, pri čemu se uspostavljaju odnosi između etažnih vlasnika **koji proizilaze iz pravne sadržine prava zajedničkog vlasništva** na izgrađenom građevinskom zemljište, saglasno Zakonu o građevinskom zemljištu i Zakonu o vlasništvu i drugim stvarnim pravima. **Od sadržine odredbe proizilazi da vlasnici posebnih delova zgrade kupuju zemljište kao vlasnici a potom postaju zajedničari u pravu**!? Uzimajući u obzir da za privatizirano zemljište na kojem postoje izgrađeni objekti važi načelo superficies solo cedit, t.j. oni moraju pratiti sudbinu zemljišta koje je u zajedničkom vlasništvu, postavlja se pitanje: *Kako će vlasnik otuđiti poseban deo zgrade (kao priraštaj zemljištu), ako niko od drugih zajedničara u toj zgradi ne želi da taj stan bude kupljen*? Pitanje je vrlo ozbiljno i veliki deo notara (u čijoj je nadležnosti zavera ugovora o prodaji) odbijaju zaveriti ugovore o prodaji posebnih delova zgrade u etažnom vlasništvu koji se nalaze na zemljištu koje je u privatiziranom zajedničkom vlasništvu, a strane su prodavac kao zajedničar i kupac koji je treće lice.

1. Načini i uslovi privatizacije izgrađenog građevinskog zemljišta u državnom vlasništvu

Privatizacija građevinskog zemljišta u državnom vlasništvu na koje fizička i pravna lica imaju pravo korišćenja podrazumeva sticanje prava vlasništva na to zemljište (čl. 2, st. 1, t. 3). **Predmet privatizacije može biti građevinsko izgrađeno i neizgrađeno zemljište na kome fizička i pravna lica imaju prava trajnog korišćenja** (čl. 12). Predmet privatizacije ne može biti građevinsko zemljište u državnom vlasništvu koje je u opštoj upotrebi, kao i građevinsko zemljište u državnom vlasništvu koje aktima za planiranje prostora je namenjeno za izgradnju stvari opšte upotrebe (čl. 6, st. 1). Zbog toga što pravo korišćenja građevinskog zemljišta u državnom vlasništvu stiču samo lica koja su na tom zemljištu izgradile objekat trajnog karaktera, Zakon sa pravom predviđa da zemljište koje koriste fizička lica na osnovi ugovora za zakup sa ciljem postavljanja privremenih objekata, ne može biti predmet privatizacije (čl. 7).

Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu razlikuje dva vida privatizacije i to: 1. Privatizacija bez naknade, i 2. Privatizacija sa naknadom.

1. **Pravo privatizacije bez naknade** imaju sledeće kategorije fizičkih lica: a) fizička lica koja su raniji vlasnici građevinskog zemljišta u državnom vlasništvu; b) fizička lica

koja su stekla pravo korišćenja građevinskog zemljišta putem naknade[29] i c) fizička lica koja su stekla pravo korišćenja na osnovu steknutog prava vlasništva na objektu od ranijeg vlasnika ili korisnika građevinskog zemljišta koji je za dodeljeno zemljište platio naknadu. Pravo privatizacije be naknade imaju i naslednici ovih lica (čl. 17). Što se tiče pravnih lica, oni mogu privatizirati građevinsko zemljište bez naknade, ako su pravo korišćenja steki naknadom[30].

2. **Privatizaciju naknadom mogu da izvrše sledeće kategorije fizičkih lica:** a) fizička lica koja su stekla pravo korišćenja građevinskog zemljišta bez naknade; b) fizička lica koja su stekle pravo korišćenja na osnovu sticanja prava vlasništva nad objektu bivšeg korisnika građevinskog zemljišta koji nije platio naknadu, i c) fizička lica koja su stekle pravo korišćenja građevinskog zemljišta na osnovi prvenstva gradnje, a koje zemljište nije bilo u prethodnom vlasništvu nosioca prvenstvenog prava koje je stekao za doformiranje građevinske parcele (čl. 18). Isto tako, privatizaciju građevinskog zemljišta sa naknadom mogu da izvrše i pravna lica korisnici građevinskog zemljišta koja nisu platila naknadu za dodeljeno zemljište[31].

Naknada za privatizaciju građevinskog zemljišta utvrđuje se posebnim propisom koji usvaja Vlada R. Makedonije, a iznos naknade pre svega zavisi od zone i pod zone (namenjena suglasno urbanističkim planom) u kome se nalazi građevinsko zemljište – predmet privatizacije[32]. Iznos naknade za privatizaciju građevinskog zemljišta se plaća u denarima. Međutim, Zakon propisuje da ova naknada može biti plaćena i obveznicama R. Makedonije za isplatu deponiranih deviznih uloga građana za koje garant je R. Makedonija ili obveznicama iz denacionalizacije (čl. 25).

Postupak za privatizaciju izgrađenog građevinskog zemljišta u državnom vlasništvu na kome fizička i pravna lica imaju pravo korišćenja, započinje se isključivo **na zahtev korisni-**

---

[29] **Radi se o licima koja su stekla pravo trajnog korišćenja putem**: javnog nadmetanja; direktnog ugovora sa naknadom; dodelom zemljišta sa strane nadležnog organa sa naknadom; dodelom zemljišta u zamenu za eksproprisanu nekretninu; dodelom zemljišta u zamenu za građevinsko zemljište oduzeto iz vlasništva bivšeg vlasnika i prioritetnim pravom korišćenja građevinskog zemljišta za površinu građevinskog zemljišta koja je bivše vlasništvo korisnika prioritetnog prava. (čl. 17, st. 1).

[30] **Smatra se da je pravno lice platilo naknadu za građevinsko zemljište, ako je ono to steklo putem**: javnog nadmetanja; direktnog ugovora sa naknadom; dodelom zemljišta sa strane nadležnog organa sa naknadom i dodelom zemljišta u zamenu za eksproprisano zemljište pravnog lica u privatnom vlasništvu; sticanjem prava vlasništva nad objektom bivšeg vlasnika zemljišta, sticanjem prava vlasništva nad objektom bivšeg korisnika građevinskog zemljišta koji je platio naknadu za sticanje prava korišćenja; dodelom zemljišta u zamenu za građevinsko zemljište oduzeto iz vlasništva pravnog lica u privatnom vlasništvu i osnivačkim ulogom fizičkog lica u pravnom licu u privatnom vlasništvu u kome građevinsko zemljište predstavlja bivšu imovinu, odnosno pravo korišćenja je stečeno naknadom (čl. 19).

[31] **Smatra se da pravno lice nije platilo naknadu za građevinsko zemljište ako je pravo korišćenja stečeno na osnovu**: stečenog prava vlasništva nad objektom sa pravnom osnovom koji je bivša društvena, odnosno državna svojina; stečenog prava vlasništva nad objektom sa pravnom osnovom pri čemu prenosom prava vlasništva nad objektom je preneseno i pravo korišćenja građevinskog zemljišta u društvenom, odnosno državnom vlasništvu i privatizacija pravnih lica u društvenom, odnosno državnom vlasništvu (čl. 20)..

[32] Zona prema kojima se određuje iznos naknade za privatizaciju se određuju saglasno članu 83 Zakona: „*Sa ciljem određivanja iznosa naknade za privatizaciju, zakupnine za dugoročni zakup i privremeni zakup građevinskog zemljišta, izvodi se reonizacija zona gradova i naseljenih mesta u Republici Makedoniji. Reonizacija se izvodi prema: 1. lokaciji i 2. stepenu komunalne uređenosti građevinskog zemljišta. Reonizaciju iz stava (1) ovog člana određuje Vlada Republike Makedonije na predlog Ministra za transport i veze*“.

ka građevinskog zemljišta. Pravo da podnese zahtev za privatizaciju ima **svako domaće fizičko i pravno lice korisnik građevinskog zemljišta (izgrađeno i neizgrađeno) u državnom vlasništvu**. Za razliku od prethodnih propisa (Zakona o građevinskom zemljištu i Uredbe o načinu i postupku otuđenja izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije), Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu omogućava, osim domaćih fizičkih i pravnih lica, **da mogu privatizaciju da vrše i inostrana fizička i pravna lica, korisnici građevinskog zemljišta u državnom vlasništvu** (čl. 12, st. 2)[33].

Postupak privatizacije sprovodi Uprava za imovinsko-pravne stvari i donosi se **rešenje o privatizaciji**. Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu zadužuje Upravu za imovinsko-pravne stvari posle usvajanja **rešenja, da isto dostavi na mišljenje do Državnog pravobranilaštva R. Makedonije**, koje je dužno da dâ svoje mišljenje u roku od 15 dana od dostave (čl. 30). Razlog zbog kojeg Zakon propisuje obavezu da Uprava za imovinsko-pravne stvari dostavi rešenje za privatizaciju do Državnog pravobranilaštva, je sa ciljem zaštite imovinskih interesa države u postupku za privatizaciju. Rešenje o privatizaciji se dostavlja tek kada Državno pravobranilaštvo da pozitivno mišljenje ili kada isteče zakonski određeni rok za davanje mišljenja (čl. 30, st. 4).

Fizička i pravna lica koja nisu zadovoljna rešenjem o privatizaciji mogu da podnesu žalbu do drugo stepene komisije u Vladi R. Makedonije (čl. 31).

U slučajevima kada se vrši privatizacija građevinskog zemljišta u državnom vlasništvu sa naknadom, sa ciljem osiguranja plaćanja naknade sa strane korisnika građevinskog zemljište, Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu propisuje da rešenje za privatizaciju može biti poništeno ako naknada nije plaćena na vreme (čl. 32).

2. Način i uslovi za sticanje prava dugoročnog zakupa na građevinsko zemljište u državnom vlasništvu

Korisnici građevinskog zemljišta, koji nisu privatizirali građevinsko (izgrađeno i neizgrađeno) zemljište, mogu se steći pravom dugoročnog zakupa (čl. 34, st. 1).

1. Pravo dugoročnog zakupa građevinskog zemljišta u državnom vlasništvu može da traje najmanje 10, a najviše 99 godina (čl. 36, st. 1). Pritom, Zakon dopušta pravo dugoročnog zakupa da se produži do isteka roka za koji je bilo uspostavljeno (čl. 36, st. 2). Lica koja su se stekla pravom dugoročnog zakupa na građevinsko zemljište **su obavezana da plaćaju zakupninu**. Naknada za plaćanje zakupnine se plaća u denarima. Međutim, Zakon propisuje da ova naknada može biti plaćena i obveznicama R. Makedonije za isplatu deponiranih deviznih uloga građana za koje garant je R. Makedonija ili obveznicama iz denacionalizacije (čl. 39).

2. Za razliku od Zakonu o građevinskom zemljištu iz 2001. godine i novog Zakona iz 2008. godine (Sl. glasnik RM, br. 82/08) koji uređuju pravo dugoročnog zakupa građevinskog zemljišta u vlasništvu R. Makedonije (ili RM), **Zakon o privatizaciji i zakupu građevinskog zemljišta uređuje dugoročni zakup građevinskog izgrađenog i neizgrađenog zemljišta u državnom vlasništvu na kome postoji korisničko pravo.** U ovome, **u pogledu dugoročnog zakupa na izgrađenom građevinskom zemljištu, Zakon decidno isključuje**

---

[33] Ova odredba Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu je u saglasnosti sa odredbama Zakona o vlasništvu i drugim stvarnim pravima koji, sa Izmenama i dopunama Zakona, omogućava inostranim fizičkim i pravnim licima, pod određenim uslovima (dali su članovi EU i OECD ili ne) da steknu pravo vlasništva nad građevinskim zemljištem. Vidi: čl. 245, Zakon o vlasništvu i drugim stvarnim pravima...

načelo superficies solo cedit: „*kada završi pravo dugoročnog zakupa na izgrađenom građevinskom zemljištu objekat ne može postati priraštaj i ne prelazi u državno vlasništvo***“** (čl. 36, st. 3). Ovo znači da posle završetka prava dugoročnog zakupa objekat neće biti priraštaj zemljištu, nego i dalje ostaje vlasništvo tadašnjeg vlasnika objekta kome je Ustavom R. Makedonije zagarantirano pravo vlasništva tog objekta.

Što se tiče dugoročnog zakupa neizgrađenog građevinskog zemljišta na kome postoji pravo korišćenja, zakonodavac nije dao odgovor na pitanje kakva je pravna sudbina objekta kojeg tek treba izgraditi na građevinskom zemljištu na kome se određuje pravo dugoročnog zakupa, saglasno Zakonu o privatizaciji i zakupu. Smatramo da je ovaj dugoročni zakup (na neizgrađenom građevinskom zemljištu R. Makedonije na kome postoji građevinsko pravo) **stvarno pravni dugoročni zakup,** koji podrazumeva da kada prestane trajati, objekat kao priraštaj dugoročnog zakupa se treba vratiti R. Makedoniji, kao vlasniku zemljišta, čime se ponovo uspostavlja načelo superficies solo cedit. Ova nebuloza Zakona nas dovodi do konstatacije da je pravo dugoročnog zakupa neizgrađenog građevinskog zemljišta na kome postoji korisničko pravo, uređeno Zakonom o zakupu i privatizaciji iz 2005. godine, identično pravu dugoročnog zakupa građevinskog zemljišta R. Makedonije, uređenim Zakonom o građevinskom zemljištu iz 2001., odnosno 2008. godine. **U ovom kontekstu, smatramo da zakonodavac treba napraviti razliku u terminologiji: dugoročni zakup neizgrađenog građevinskog zemljišta treba se imenovati *„pravo na gradnju“* (kao stvarno subjektivno pravo), a dugoročni zakup izgrađenog građevinskog zemljišta treba zadržati naziv *„pravo dugoročnog zakupa“*, a da se u svojoj sadržini odnosi samo na izgrađeno građevinsko zemljište R. Makedonije na kome postoji korisničko pravo (da se preciznije uredi pravna sudbina neizgrađenog građevinskog zemljišta na kome postoji korisničko pravo).**

3. Što se tiče pravne prirode prava dugoročnog zakupa građevinskog zemljišta uređenog Zakonom o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu, zakonodavac u odredbi stava 1, člana 2, tačke 5 izričito određuje: **„***Dugoročni zakup je **stvarno pravo** koje se uspostavlja između Republike Makedonije u svojstvu zakupodavca i korisnika građevinskog zemljišta kao zakupca, shodno načinu određenim u ovom Zakonu*“. Unatoč decidnoj zakonskoj odredbi, civilisti, kao što je profesorka R. Živkovska, smatraju da pravo dugoročnog zakupa izgrađenog građevinskog zemljišta treba tretirati kao obligaciono subjektivno pravo, a pravo dugoročnog zakupa neizgrađenog građevinskog zemljišta na kome postoji pravo korišćenja, isto kao i pravo dugoročnog zakupa neizgrađenog građevinskog zemljišta u vlasništvu R. Makedonije na kome ne postoji korisničko pravo, treba tretirati kao stvarno subjektivno pravo.

4. Pravo dugoročnog zakupa, saglasno odredbama Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu uspostavlja se **na zahtev korisnika građevinskog zemljišta ili po službenoj dužnosti** sa strane nadležnog organa za upravljanje građevinskom zemljištem (čl. 46, st. 1). Nadležni organ provodi postupak po službenoj dužnosti za sticanje prava dugoročnog zakupa ukoliko korisnik građevinskog zemljišta ne izvrši privatizaciju građevinskog zemljišta u zakonski predviđenom roku (šest godina od dana stupanja na snagu Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu) i ako u tom roku ne podnese zahtev za sticanje prava dugoročnog zakupa (čl. 46, st. 2).

- Kada je postupak za sticanje prava dugoročnog zakupa građevinskog zemljišta poveden na zahtev, **tražitelj zaključuje ugovor sa nadležnim organom,** kojim se uređuju prava i obaveze ugovornih strana (čl. 49).
- Kada nadležni organ inicira postupak za uspostavljanje prava dugoročnog zakupa po službenoj dužnosti **usvaja se rešenje** sa kojim se uređuju obaveze nosioca prava dugoročnog zakupa (čl. 51).

5. Pravo dugoročnog zakupa uređeno u Zakonu o privatizaciji i zakupu građevinskog zemljišta još uvek nema praktične primene u R. Makedoniji.

ZAKLJUČAK: Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu uređuje privatizaciju izgrađenog i neizgrađenog građevinskog zemljišta (sticanje prava privatnog vlasništva nad građevinskim zemljištem na kojem fizička i pravna lica imaju pravo trajnog korišćenja), kao i sticanje prava dugoročnog zakupa.

U pogledu privatizacije, zakonodavac razlikuje *„privatizaciju bez naknade"* i *„privatizaciju sa naknadom"*. Pravo *„privatizaciju bez naknade"*, na osnovu zahteva, imaju fizička lica koji se raniji vlasnici, lica koja su pravo trajnog korišćenja stekla naknadom i lica koja su pravo stekla na osnovu stečenog prava vlasništva na objektu ranijeg vlasnika ili od korisnika koji je stekao pravo korišćenja naknadom, kao i naslednici ovih lica. Pravna lica mogu izvršiti *„privatizaciju bez naknade"*, na osnovu zahteva, ako su pravo korišćenja stekli naknadom. Sve druge kategorije fizičkih i pravnih lica koje su stekle pravo korišćenja bez plaćanja naknade mogu, na osnovu zahteva, da izvrše privatizaciju sa naknadom. U oba slučaja (*„privatizaciju bez naknade"* i *„privatizaciju sa naknadom"*), nadležni organ donosi rešenje o privatizaciji, koji je pravni osnov kreiranja prava vlasništva nad privatiziranim građevinskim zemljištem.

Lica koja nisu izvršila privatizaciju građevinskog zemljišta mogu steći pravo dugoročnog zakupa. Dugoročni zakup se uspostavlja na zahtev korisnika ili po službenoj dužnosti sa strane nadležnog organa kada korisnik nije sproveo privatizaciju u zakonski određenom roku, niti je podneo zahtev za sticanje prava dugoročnog zakupa. Kada se dugoročni zakup uspostavlja na zahtev korisnika, nadležni organ zaključuje ugovor sa tražiteljem, a kada se dugoročni zakup uspostavlja po službenoj dužnosti, nadležni organ usvaja rešenje za kreiranje prava dugoročnog zakupa.

Rezime

Zakonodavstvo R. Makedonije pokazuje da se transformacija prava trajnog korišćenja u pravo vlasništva ili pravo dugoročnog zakupa, u pravnom sistemu R. Makedonije odvijala u tri faze. Prva faza počinje Zakonom o građevinskom zemljištu iz 2001. godine kojim je sveobuhvatno uređena transformacija prava trajnog korišćenja u pravo vlasništva ili pravo dugoročnog zakupa. Druga faza počinje sa Uredbom o načinu i postupku otuđivanja izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije od 7. marta 2003. godine, koja uređuje samo otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije domaćim i stranim fizičkim i pravnim licima (t.j. transformacija prava trajnog korišćenja sa naknadom). Treća faza počinje donošenjem (odnosno primenom) Zakona o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu iz 2005. godine (Sl. glasnik RM, br. 4/05) kime se uređuje privatizacija izgrađenog i neizgrađenog građevinskog zemljišta u državnom vlasništvu (sa i bez naknade) na kome postoji korisničko pravo i pravo dugoročnog zakupa (u slučaju neizvršene privatizacije), koji su vidovi transformacije.

I.

1. U uređenju pravnog režima transformacije prava korišćenja građevinskog zemljišta, Zakon o građevinskom zemljištu iz 2001. godine je propisivao četiri kategorija lica nosioca prava korišćenja, odnosno lica koja su imala pravo transformacije građevinskog zemljišta kojeg su koristili.

1. Prva kategorija su korisnici građevinskog zemljišta koji su na osnovu ranijeg vlasništva transformirali pravo korišćenja građevinskog zemljišta isključivo u pravo vlasništva bez naknade, na osnovu rešenja.
2. Druga kategorija su korisnici građevinskog zemljišta u društvenom vlasništvu koji su pri kupovini stambenog ili drugog objekta koji se nalazi na građevinskom zemljištu platili naknadu za zemljište, pa zbog toga transformišu svoje pravo korišćenja u pravo vlasništva. Ukoliko nisu platili naknadu, oni su mogli da pravo korišćenja transformišu u pravo vlasništva ako plate naknadu, odnosno u pravo dugoročnog zakupa građevinskog zemljišta u vlasništvu R. Makedonije ako ne plate naknadu.
3. Treća kategorija korisnika su lica kojima je građevinsko zemljište dodeljeno za izgradnju u sledeće tri situacije:
   - U prvoj situaciji, saglasno načelu savesnosti i poštenja zakonodavac je propisao da korisnici izgrađenog zemljišta dodeljenog za izgradnju objekta, koji su platili naknadu za dodeljeno građevinsko zemljište, mogu isto transformirati u pravo vlasništva.
   - U drugoj situaciji, saglasno principu uzajamnih davanja, korisnici građevinskog zemljišta koje im je dodeljeno na trajno korišćenje i na komu su izgradili objekat, a nisu platili naknadu, transformiraju pravo korišćenja u pravo vlasništva ukoliko plate naknadu saglasno propisima o denacionalizaciji (ovo zemljište, jer je izgrađeno, ne može biti vraćeno ranijim vlasnicima).
   - U trećoj situaciji, država, saglasno načelu savesnosti i poštenja, nema prava tražiti naknadu za transformaciju od kategorije lica koja su platila naknadu za dodeljeno građevinsko zemljište na javnom nadmetanju ili putem direktnog ugovora.
4. Četvrta kategorija su vlasnici stanova ili drugih objekata za koje, zbog toga što se nisu stekli korisničkim pravom, zakonodavac je sa pravom propisao da se oni trebaju steći pravom vlasništva (suvlasništvo, zajedničko vlasništvo) ili pravom dugoročnog zakupa (iako se nisu stekli pravom trajnog korišćenja u momentu kupovine stana ili drugog objekta) pod uslovom da plate naknadu za novo formiranu građevinsku parcelu na kojoj se nalazi taj objekat, odnosno stan.

2. Pravo korišćenja građevinskog zemljišta se transformiralo u pravo dugoročnog zakupa u sledeća tri slučajeva - 1. za jedinice lokalne samouprava koje su deobnim bilansima stekle pravo vlasništva nad objektima izgrađenim na građevinskom zemljištu u državnom vlasništvu; 2. za pravna lica koja su privređivala društvenim kapitalom, a koja su pravo korišćenja stekla na osnovu dodele ili n osnovu korišćenja društvenog objekta izgrađenog na tom zemljištu, i 3. za inostrana pravna i fizička lica koja su stekla pravo korišćenja građevinskog zemljišta put javnog nadmetanja i direktnog ugovora.

- Pravo dugoročnog zakupa građevinskog zemljišta u državnom vlasništvu koje su korisnici sticali u postupku transformacije prava korišćenja, se odnosi na građevinsko zemljište u državnom vlasništvu na kome je bio izgrađen objekat sa zagarantiranim pravom vlasništva. Budući da je stečeno pravo vlasništva nad objektom zagarantirano trajno pravo, koje ne može biti vremenski ograničeno zakupnim odno-

som, pravo dugoročnog zakupa izgrađenog građevinskog zemljišta u državnom vlasništvu treba tretirati kao obligaciono pravo, za razliku od prava dugoročnog zakupa neizgrađenog građevinskog zemljišta koje je predstavljalo stvarno subjektivno pravo, jer je nosilac sticao pravo vlasništva objekta dok traje zakup.

– Prijašnji vlasnici su pravo korišćenja transformirali u pravo vlasništva na osnovu rešenja, dok sve druge kategorije lica su pravo korišćenja transformirali u pravo vlasništva na osnovu ugovora. Transformacija prava korišćenja u pravo vlasništva se vršilo isključivo na osnovu ugovora, kao strogo formalno pravno delo, koje se obavezno zaključivalo u pisanom obliku.

II.

1. Uredbom o načinu i postupku za otuđenje izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije iz 2003. godine, bio je uređen način transformacije prava trajnog korišćenja u pravo vlasništva za one korisnike koji su bili dužni, a nisu platili naknadu za pravo korišćenja građevinskog zemljišta. Zbog ovoga, Uredba nije koristila termin *„transformacija izgrađenog građevinskog zemljišta“,* nego termin *„otuđenje izgrađenog građevinskog zemljišta u državnom vlasništvu“.*

III.

Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu iz 2005. godine uređuje privatizaciju građevinskog zemljišta (sticanje prava privatnog vlasništva nad izgrađenim i neizgrađenim građevinskim zemljištem na kome fizička i pravna lica imaju pravo trajnog korišćenja), kao i sticanje prava dugoročnog zakupa.

1. U pogledu privatizacije, zakonodavac razlikuje *„privatizaciju bez naknade“* i *„privatizaciju sa naknadom“*. Pravo *„privatizaciju bez naknade“*, na osnovu zahteva, imaju fizička lica koji se raniji vlasnici, lica koja su pravo trajnog korišćenja stekla naknadom i lica koja su pravo stekla na osnovu stečenog prava vlasništva na objektu ranijeg vlasnika ili od korisnika koji je stekao pravo korišćenja naknadom, kao i naslednici ovih lica. Pravna lica mogu izvršiti *„privatizaciju bez naknade“*, na osnovu zahteva, ako su pravo korišćenja stekli naknadom. Sve druge kategorije fizičkih i pravnih lica koje su stekle pravo korišćenja bez plaćanja naknade mogu, na osnovu zahteva, da izvrše privatizaciju sa naknadom. U oba slučaja (*„privatizaciju bez naknade“* i *„privatizaciju sa naknadom“*), nadležni organ donosi rešenje o privatizaciji, koji je pravni osnov kreiranja prava vlasništva nad privatiziranim građevinskim zemljištem.

– Privatizacija građevinskog izgrađenog i neizgrađenog zemljišta na kojem postoje sukorisnička prava evidentirana u katastru zemljišta, odnosno upisana u katastru nekretnina u idealnim delovima, vrši se proporcionalno veličini idealnih delova sukorisničkog prava.
– Zadnje Izmene Zakona o privatizaciji i zakupu građevinskog zemljišta iz 2009. godine su vrlo diskutabilno uredile privatizaciju građevinskog izgrađenog zemljišta na kome postoje objekti u etažnom vlasništvu. Naime, ukoliko u katastru zemljišta nisu evidentirani, odnosno u katastru nekretnina nisu upisani idealni delovi korisničkog prava, izgrađeno građevinsko zemljište se privatizira u zajedničkom vlasništvu fizičkih i pravnih lica kao etažnih vlasnika. Deo naknade koji plaća svaki od etažnih vlasnika se određuje proporcionalno površini posebnog dela zgrade prema ukupnoj površini zemljišta koje je predmet privatizacije, pri čemu se uspostavljaju odnosi između etažnih vlasnika koji proizilaze iz pravne sadržine prava zajedničkog vlasništva.

2. Lica koja nisu izvršila privatizaciju građevinskog zemljišta mogu steći pravo dugoročnog zakupa. Dugoročni zakup se uspostavlja na zahtev korisnika ili po službenoj dužnosti sa strane nadležnog organa kada korisnik nije sproveo privatizaciju u zakonski određenom roku, niti je podneo zahtev za sticanje prava dugoročnog zakupa. Kada se dugoročni zakup uspostavlja na zahtev korisnika, nadležni organ zaključuje ugovor sa tražiteljem, a kada se dugoročni zakup uspostavlja po službenoj dužnosti, nadležni organ usvaja rešenje za kreiranje prava dugoročnog zakupa.

Korišteni zakonski propisi:

1. Zakon o vlasništvu i drugim stvarnim pravima (Sl. glasnik RM, br. 18/01 i 92/08);
2. Zakon o građevinskom zemljištu (Sl. glasnik RM, br. 52/01);
3. Odluka Ustavnog suda, U. br. 172/2001 - 0 – 0 od 10.07.2002. godine;
4. Odluka Ustavnog suda, U. br. 208/2001 – 0 – 0 od 25.09.2002. godine;
5. Odluka Ustavnog suda, U. br. 225/2001 – 0 – 0 od 15.01.2003. godine;
6. Uredba o načinu i postupku otuđenja, davanja pod zakup i iznosu posebnih troškova postupka za otuđenje i davanje pod zakup građevinskog zemljišta u vlasništvu R. Makedonije (Sl. glasnik RM, br. 79/01);
7. Uredba o načinu i postupku otuđenja izgrađenog građevinskog zemljišta u vlasništvu R. Makedonije (Sl. glasnik RM, br. 13/03);
8. Zakon o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu, Sl. glasnik RM, br. 4/05, 13/07, 165/08 i 146/09;

- Odluka Ustavnog suda, U. br. 140/2005 – 0 – 1 od 21.06.2006. godine, i

9. Zakon o građevinskom zemljištu, Sl. glasnik RM, br. 82/08 i 143/08.

Dr. sc. *Petar Simonetti**,
redovni profesor građanskog prava u trajnom zvanju,
Rijeka, Republika Hrvatska

USPOSTAVLJANJE PRAVA VLASNIŠTVA NA IZGRAĐENOM GRAĐEVINSKOM ZEMLJIŠTU KOJE JE BILO U DRUŠTVENOM/DRŽAVNOM VLASNIŠTVU U DRŽAVAMA JUGOISTOČNE EUROPE

Sažetak

U svim državama jugoistočne Europe bivšim vlasnicima nacionaliziranog građevinskog zemljišta ili po drugoj osnovi prisilno prenijetog u državno/društveno vlasništvo vraćeno je pravo vlasništva na onu površinu koja pripada zgradi (po pravilu obiteljskoj stambenoj zgradi) u njihovom vlasništvu, a koja je bila pravno odvojena od zemljišta trajnim pravom korištenja.

REPUBLIKA ALBANIJA

Suvremeno pravo Republike Albanije ne poznaje pravni dualitet zemljišta i zgrade. Načelo superficies solo cedit nema iznimke, a uređeno je Građanskim zakonikom iz 1994. Pravno jedinstvo zemljišta i zgrade, izgrađene na zemljištu u državnom vlasništvu u socijalističkom pravnom režimu uspostavlja se inverzijom načela superficies solo cedit: Vlasnik zgrade stječe pravo vlasništva na zemljište koje pripada zgradi. Zakonom o privatizaciji objekata u vlasništvu države iz 1992.[1] privatizacijom stječe se vlasništvo na zgradi i zemljištu koje pripada zgradi. Vlasnici posebnih dijelova zgrade (bivši stanari) stekli su pravo suvlasništva na građevinskoj čestici „dvorištu". Ovi suvlasnički odnosi uređeni su Građanskim zakonikom iz 1994.

Po Zakonu o povraćaju imovine i naknadama bivšim vlasnicima iz 1993.[2] bivšim vlasnicima vraćeno je pravo vlasništva na zemljištu koje pripada zgradi u njihovom vlasništvu.

Zakon o legalizaciji, urbanizaciji i integraciji nelegalnih objekata iz 2006.[3] legalizirani su građevinski objekti izgrađeni bez dozvole, a zemljište koje pripada zgradi preneseno je u vlasništvo vlasnika zgrade. Pravo vlasništva na ovim nekretninama upisuje se u registre nekretnina po pravilima Zakona o registraciji nekretnina iz 1993.[4] u skladu s odredbama Građanskog zakonika iz 1994.

---

* Originalni tekst je na lokalnom jeziku.

[1] Zakon br. 7652 od 23.12.1992.

[2] Zakon br. 7698 od 15.4. 1993.

[3] Zakon br. 9482 od 3.4. 2006.

[4] Zakon br. 7843 od 13.7.1993.

Posebnim Zakonom o legalizaciji, urbanizaciji i integraciji nelegalnih objekata iz 2009.[5] uređeno je stjecanje prava vlasništva na zemljištu u državnom vlasništvu unutar područja „s prioritetom za razvoj turizma". Zakonom su propisani modaliteti za zaključenje kupoprodajnih ugovora između države i privatnih vlasnika koji su izgradili objekte na državnom zemljištu kao i postupak uspostavljanja pravnog jedinstva zemljišta i zgrade tj., nekretnine koja se sastoji od zemljišta i zgrade na koju stječu pravo vlasništva dosadašnji vlasnici objekata, fizičke i pravne osobe.

REPUBLIKA CRNA GORA

U Republici Crnoj Gori uspostavljeno je pravo vlasništva na izgrađenom građevinskom zemljištu povratom bivšem vlasniku ili pretvorbom trajnog prava korištenja u pravo vlasništva vlasnika (suvlasnika) zgrade odnosno posebnih dijelova zgrade:

Po Zakonu o povraćaju oduzetih imovinskih prava i obeštećenja[6] (u nastavku: Zakon o povraćaju) izgrađeno građevinsko zemljište vraća se prijašnjem vlasniku odnosno njegovim pravnim sljednicima (u nastavku: bivši vlasnik) „samo u slučaju kad je u vrijeme oduzimanja prava vlasništva na njemu postojao objekt koji se vraća" (čl. 18. st.1.)

Budući da su ostale odredbe iz čl. 18. izmjenjenje i dopunjene čl.8. Zakona o izmjenama i dopunama Zakona o povraćaju 25.7. 2007., u nastavku se pozivamo na te odredbe. Po tim odredbama kad postoje zakonske pretpostavke za vraćanje objekta koji je od prisilnog prijenosa u društveno vlasništvo „značajno dobio na vrijednosti uslijed ulaganja" zemljište i objekt se vraća „samo ako bivši vlasnik plati iznos za koji je vrijednost imovine porasla uslijed ulaganja". Bivši vlasnik koji odbije platiti taj iznos „postaje suvlasnik u visini svoga udjela nepokretnosti" (čl. 8. st.2. i 4.)

Bivši vlasnik koji po zakonu nema pravo povraćaja (restitucije) nekretnine (zemljišta i objekta) kad je na nju stekla pravo vlasništa druga fizička ili pravna osoba „čiji osnivač nije država" ima pravo na obeštećenje (čl. 8. st. 2. i 5.). U načelu se vraćaju nekretnine u vlasništvu osoba koje je osnovala država. Iznimke su propisane zakonom.

Po Zakonu o povraćaju… „sadašnji vlasnik objekta" koji je izgrađen u skladu sa zakonom i važećim urbanističkim planom koji ima trajno pravo korištenja na zemljištu, može zahtjevati „uspostavljanje prava svojine" na tom zemljištu ako plati „tržišnu vrijednost zemljišta umanjenu za vrijednost koja je prethodno plaćena za trajno pravo korištenja" (čl. 19.) tj. za pravo korištenja radi građenja koje se izgradnjom objekta pretvorilo u trajno pravo korištenja vlasnika objekta, odnosno nositelja prava raspolaganja (bivše društvenopravne osobe).

Ovaj se iznos uplaćuje u fond za obeštećenje bivših vlasnika (čl. 19. st.2.)

Potonjim zakonom o osnovnim svojinskopravnim odnosima od 26.2.2009. danom njegova stupanja na snagu trajno pravo korištenja se pretvara u pravo vlasništva vlasnika objekta bez ikakve naknade (čl. 419.st.1.) Budući da su trajno pravo korištenja imali i vlasnici posebnih dijelova zgrada, oni su stekli pravo vlasništva na zemljištu koje pripada zgradi. Tako su svi vlasnici objekta koji dotada nisu stekli pravo vlasništva na zemljište, kupovinom ili po drugom pravnom osnovu postali vlasnici na tom zemljište bez naknade, ako posebnim zakonom nije drukčije određeno.

Drukčije je određeno, kad u postupku privatizacije ili stečaja nije plaćena tržišna naknada za zemljište. U tom slučaju zemljište „ostaje u svojini države", a „vlasnici objekta imaju pravo preče kupovine ili pravo prečeg zakupa" (čl.419. st. 2.).Mišljenje da je plaćena tržišna

[5] Zakon br. 10186 od 5.11.2009.

[6] Službeni list RCG 21/04

naknada u postupku privatizacije da je organ nadležan za poslove privatizacije, a u postupku stečaja nadležni privredni sud (čl.419. st.4.) U skladu s odredbama iz čl. 420. Zakona o svojinskopravnim odnosima, na zahtjev vlasnika zgrada čije je trajno pravo korištenja bilo upisano u katastar nekretnina upisat će se pravo vlasništva na zemljištu i zgradu kao posebnu nekretninu. Vlasnik koji je vlasništvo na objektu stekao u postupku privatizacije ili stečaja, dužan je uz zahtjev za upis prava svojine u katastar nekretnina, priložiti mišljenje organa nadležnog za privatizaciju, odnosno privrednog suda, da je za zemljište plaćena tržišna naknada.

Kako upis nositelja prava u katastar nekretnina ima presumptivan značaj, tko tvrdi suprotno „mora pred sudom to dokazati". Onaj koji pred sudom dokaže da njemu pripada pravo na nekretnini, a ne osobi koja je upisana u katastar nekretnina, može tražiti brisanje nositelja prava i upis svoga prava vlasništva na temelju pravomoćne sudske odluke.

REPUBLIKA HRVATSKA I BOSNA I HERCEGOVINA

Na izgrađenom građevinskom zemljištu u društvenom vlasništvu uspostavlja se pravo vlasništva pretvorbom trajnog prava korištenja u pravo vlasništva (suvlasništva) vlasnika (suvlasnika) zgrade i posebnih dijelova zgrade. U pravo vlasništva pretvaraju se i prava upisana na neizgrađenom građevinskom zemljištu na kome je izgrađena trajna zgrada u skladu sa zakonom (legalizacija bespravne izgradnje). Ova pretvorba se događala po samom zakonu, izvan zemljišne knjige, čime se uspostavilo pravno jedinstvo nekretnine na onoj površini na koju se prostiralo trajno pravo korištenja, a to je zemljište ispod zgrade i oko zgrade koje je potrebno za njenu redovnu upotrebu u skladu s odgovarajućim prostornim planom. Upis nekretnine u zemljišnu knjigu obavlja se po iscrpno propisanim pravilima bilo da su zemljište ili zgrada upisani u zemljišnu knjigu ili ne. Pravno jedinstvo nekretnine uspostavljeno je *ex lege* spajanjem zgrade u etažnom vlasništvu sa zemljištem u privatnom vlasništvu jer se pravo suvlasništva sada proteže na cijelu nekretninu, a iz tog prava proizlazi pravo vlasništva na posebne dijelove nekretnine.

Pravo vlasništva (suvlasništva) na građevinskom zemljištu koje pripada zgradi stekli su vlasnici (suvlasnici) zgrada i posebnih dijelova zgrada po pravilu bez naknade. Zato u Republici Hrvatskoj prijašnji vlasnici, odnosno njihovi nasljednici prvog nasljednog reda imaju pravo na naknadu samo na onu površinu izgrađenog građevinskog zemljišta na koju su stekla pravo vlasništva trgovačka društva u postupku pretvorbe poduzeća s društvenim kapitalom (društvena poduzeća). Ova naknada se „ostvaruje" u dionicama ili udjelima društava koja su stekla pravo vlasništva na to zemljište; supsidijarno u dionicama ili udjelima društava iz portfelja Hrvatskog fonda za privatizaciju na način koji je propisan Zakonom o privatizaciji. Dionice su na tržištu po pravilu obezvrijeđene, a trgovačka društva koja su stekla pravo vlasništva na zemljište, stekla su time i stalno rastuću vrijednost za građevinsko zemljište bez ulaganja i rizika. I to je jedno od žarišta velikih deformacija (i kriminala) u postupku pretvorbe (privatizacije) društvenog vlasništva.

U Bosni i Hercegovini (FBiH i RS) još nije donesen Zakon o denacionalizaciji.

REPUBLIKA MAKEDONIJA

U Republici Makedoniji transformacija trajnog prava korištenja na građevinskom zemljištu u društvenom vlasništvu odvijala se u tri faze, i to: na temelju pravnih propisa iz 2001., 2003., i 2005. (izmjene i dopune 2009.).

Po Zakonu o građevinskom zemljištu iz 2001[7] :

- bivšim vlasnicima nacionaliziranog građevinskog zemljišta vraćeno je pravo vlasništva na površinu zemljišta koje pripada zgradi u njihovom vlasništvu, odnosno u vlasništvu njihovih pravnih sljednika;
- pravo vlasništva na zemljištu koje pripada zgradi stekli su i kupci zgrada ili drugih objekata, ako su platili naknadu za zemljište;
- kupci zgrada ili drugih objekata koji ni naknadno nisu platili naknadu za zemljište stekli su pravo dugotrajnog zakupa zemljišta.

Vlasnici zgrada kojima je zemljište bilo dodjeljeno radi izgradnje zgrade dijele se u tri skupine:

- pravo vlasništva na zemljište koje pripada zgradi stječu oni koji su platili naknadu za dodjeljeno zemljište;
- pravo vlasništva stječu i oni koji nisu platili naknadu za zemljište ukoliko je naknadno plate saglasno propisima o denacionalizaciji;
- pravo dugotrajnog zakupa stječu oni koji nisu ni naknadno platili naknadu za zemljište.

Napokon, pravo vlasništva (suvlasništva, zajedničkog vlasništva) stekli su i kupci stanova u društvenom vlasništvu koji su kupovinom stana ili naknadno platili naknadu za zemljište – „novoformirana građevinska parcela".

Pravo dugotrajnog zakupa na izgrađenom građevinskom zemljištu u državnom vlasništvu stekli su:

- jedinice lokalne samouprave koje su temeljem diobnih bilansi stekle pravo vlasništva na zgrade i druge objekte izgrađene na građevinskom zemljištu u državnom vlasništvu;
- pravne osobe koje su pravni sljednici poduzeća s društvenim kapitalom, a kojima je zemljište bilo dodjeljeno na korištenje radi izgradnje ili su izgradili zgradu na zemljištu na kome su imali pravo korištenja po pravilu i prije nego što je zemljište uključeno u građevinsko područje;
- strane fizičke i pravne osobe koje su stekle pravo korištenja na neizgrađeno građevinsko zemljište putem javnog nadmetanja ili neposredne pogodbe.

Pravo dugogodišnjeg zakupa ima obveznopravnu prirodu za razliku od trajnog prava korištenja koje je razdvajalo zgradu i zemljište u društvenom vlasništvu, a koje je po svojoj pravnoj prirodi bilo stvarno pravo.

Uredbom o načinu i postupku utvrđivanja građevinskog izgrađenog zemljišta u vlasništvu Republike Makedonije iz 2003[8] bio uređen je način transformacije trajnog prava korištenja (po Uredbi: otuđivanje izgrađenog građevinskog zemljišta u državnom vlasništvu) za one koji su bili dužni platiti naknadu za zemljište, a nisu je platili.

Zakonom o privatizaciji i zakupu građevinskog zemljišta u državnom vlasništvu iz 2005.[9] uređena je privatizacija građevinskog zemljišta, stjecanje prava vlasništva na građevinskom zemljištu na kome su fizičke i pravne osobe imale trajno pravo korištenja i stjecanja dugotrajnog zakupa.

Rješenjem o privatizaciji utvrđuje se da su pravo vlasništva na zemljište koje pripada zgradi stekli prijašnji vlasnici zemljišta koji na njemu imaju zgradu u svom vlasništvu te

---

[7] Zakon za gradežnoto zemjište, Sl. vesnik R. Makedonije, br.53/01 od 12.07.2001.

[8] Uredbata na načinot i postopkata za otuģovanje na gradežno izgrađeno zemljište sopstvenost na Republika Makedonija, Sl. vesnik na Republika Makedonija,br.13/03 od 4.3.2003.

[9] Zakon za privatizacija i zakup na gradežno zemjište vo državna sopstvenost, Sl. vesnik na R. Makedonija, br.4/05, od 17.1.2005.

fizičke i pravne osobe koje su pribavile pravo korištenja uz naknadu kao i one osobe koje nisu pribavile pravo korištenja uz naknadu ako su takav zahtjev istakle u postupku privatizacije u skladu sa Zakonom. U oba slučaja rješenje o privatizaciji je pravni temelj za stjecanje prava vlasništva upisom u javnu knjigu u koju se upisuju prava na nekretninama.

Suvlasnička prava evidentirana u katastru zemljišta, odnosno u katastru nekretnina, privatiziraju se srazmjerno veličini idealnih dijelova sukorisničkog prava.

Na temelju izmjena i dopuna Zakona o privatizaciji… 2009.[10] na neevidentiranim, odnosno neupisanim idealnim dijelovima zemljišta vlasnici posebnih dijelova zgrada stječu zajedničko pravo vlasništva na zemljištu. Plaćanjem dijela naknade srazmjerno površini posebnih dijelova zgrade uspostavlja se ekvivalentno pravo suvlasništva na to zemljište. Za osobe koje nisu podnijele zahtjev za privatizaciju građevinskog zemljišta u zakonskom roku, na njihov zahtjev ustanovljava se dugotrajni zakup zemljišta zaključenjem ugovora o zakupu, odnosno po službenoj dužnosti na temelju rješenja nadležnog organa (ako nije podnesen zahtjev).

REPUBLIKA SRBIJA

U Republici Srbiji je uspostavljeno pravo vlasništva (suvlasništva) na izgrađenom građevinskom zemljištu u društvenom/državnom vlasništvu pretvorbom (konverzijom) trajnog prava korištenja u pravu vlasništva vlasnika (suvlasnika) zgrade i posebnih dijelova zgrade.

Po Zakonu o planiranju i izgradnji[11], u nastavku: ZPI, osobama koje u javnom knjizi o evidenciji nepokretnosti i pravima na njima (u nastavku: javna knjiga) upisane kao nositelji prava korištenja na izgrađenom građevinskom zemljištu u državnom vlasništvu „prestaje pravo korištenja…“ i prelazi u „pravo svojine“. Dakle trajno pravo korištenja se pretvara (konvertuje) u pravo vlasništva vlasnika objekta[12] i to bez naknade (čl. 101. st.1.). Pod istim pretpostavkama pravo korištenja vlasnika posebnih dijelova zgrada „prelazi u pravo svojine, razmjerno površini posebnih fizičkih delova“ (čl. 101. st.2.) tj., u pravo suvlasništva (susvojine).

Vlasnicima objekata kao i vlasnicima posebnih dijelova zgrada izgrađenih na temelju ugovora o zakupu radi izgradnje na rok od preko 50 godina „utvrđuje“ se pravo vlasništva, odnosno pravo suvlasništva na zemljištu također bez naknade (čl. 101. st.3.).

Ali „lica“ koja su na temelju ugovora o zakupu građevinskog zemljišta u državnom vlasništvu izgradila zgrade i potom prodala „posebne fizičke delove“ trećim osobama, „ostaju obveznici plaćanja zakupnine po važećem ugovoru o zakupu“ (čl. 101. st.4.). Iz ove odredbe bi se moglo zaključiti da su kupci posebnih fizičkih dijelova objekata (zgrada) stekli pravo vlasništva na te dijelove, a da je zemljište ostalo u državnom vlasništvu, ali zakupninu za zemljište ne plaćaju vlasnici posebnih dijelova zgrade nego zakupnik – investitor koji je te dijelove prenio u vlasništvo trećih na temelju ugovora o kupoprodaji.

Na taj način su vlasnici posebnih dijelova zgrada, koji su to pravo stekli na temelju ugovora o kupoprodaji od zakupnika zemljišta, koji je zgradu izgradio za tržište, doduše oslobođeni plaćanja naknade za korištenje zemljišta koju umjesto njih plaća zakupnik, ali nisu ostali vlasnici zemljišta kao oni koji su za sebe izgradili zgradu na zemljištu u državnom vlasništvu na temelju ugovora o zakupu. Ako se ova odredba (čl. 101. st. 4. ZPI) protumači tako da su kupci posebnih dijelova zgrada postali suvlasnici zemljišta, razmjerno površini (ili vrijednosti) stana postoji vrlo neobično rješenje da zakupninu plaća onaj koji nije vlasnik nekretnine

---

[10] Zakon za izmenuvanje i dopulnovanje na zakonot za privatizacija i zakup za gradežno zemjište vo državna sopstvenost, Sl. vesnik na RM, br.146/09 od 7.12.2009.

[11] Službeni glasnik 72/09 i 81/09 – ispr.

[12] Objekat po ZPI je širi pojam od zgrade (čl. 2. toč.22.)

(zemljišta i zgrade) a da ni zakupodavac kome se plaća zakupnina nije vlasnik zemljišta. U oba slučaja se ugovor o zakupu zemljišta, po kome se plaća zakupnina odvaja od prvobitne kauze.

Ova rješenja su vrlo nepraktična, jer zakupodavac neće moći osigurati svoja periodična potraživanja, koja traju do isteka ugovorenog roka o zakupu (u praksi do 99 godina) hipotekarnim zalaganjem zgrade, odnosno posebnih dijelova zgrade koji su sada u vlasništvu trećih osoba koje iz tog pravnog odnosa ništa ne duguju zakupodavcu.

Pretpostavke za upis prava vlasništva (suvlasništva) u javnu knjigu propisane su u stavku 5. i 6. članka 101. ZPI.

Pod pretpostavkom da vlasnik objekta, kao i vlasnik posebnog dijela zgrade, „nije upisan kao nosilac prava korišćenja na građevinskom zemljištu na kome je objekt izgrađen, već je kao nosilac prava korišćenja upisana jedinica lokalne samouprave, autonomne pokrajine, Republika Srbija“ utvrđuje se zemljište „za redovnu upotrebu objekta u skladu s odredbama iz čl. 70. ovog zakona“[13] na kome vlasnik objekta kao i vlasnici posebnih dijelova zgrade stječu pravo vlasništva (suvlasništva) „bez naknade“ (čl. 102. st. 1. i 2. ZPI).

Ali ako se utvrdi da je zemljište za redovnu upotrebu objekta „manje od katastarske parcele na kojoj je objekt izgrađen“, vlasnik zemljišta može ako se od preostalog zemljišta ne može formirati posebna građevinska parcela taj „deo dati u zakup vlasniku objekta u skladu s čl. 96. st. 9. toč. 4. ovog Zakona ili otuđiti vlasniku objekta po tržišnoj ceni, neposrednom pogodbom“ (čl. 102. st.3.). U tom slučaju besmisleno je raspisivanje natječaja (javne prodaje) jer jedina osoba koja ima interes otkupiti preostali dio zemljišta je vlasnik objekta i zemljišta koje pripada objektu koje se graniči sa preostalim dijelom.

Na temelju pravomoćnog rješenja o utvrđivanju prava vlasništva na zemljištu koje pripada zgradi, provodi se upis prava vlasništva odnosno zakupa u javnoj knjizi (čl. 102. st.5.)

Na građevinskom zemljištu u državnom odnosno javnom vlasništvu, na kome su nositelji prava vlasništva bila ili jesu „privredna društva i druga pravna lica na koja su se primjenjivale odredbe zakona kojima se uređuje privatizacija, stečajni i izvršni postupak kao i nji-

---

[13] Čl. 70. ZPI glasi: Zemljište za redovnu upotrebu objekta jeste zemljište ispod objekta i zemljište oko objekta u površini koja je određena kao minimalna za formiranje novih parcela za tu zonu, po važećem planskom dokumentu, za taj objekat.

Po zahtevu vlasnika objekta, organ jedinice lokalne samouprave nadležan za imovinsko-pravne poslove, donosi rešenje o utvrđivanju zemljišta za redovnu upotrebu objekta i formiranju građevinske parcele.

Rešenje o utvrđivanju zemljišta za redovnu upotrebu objekta i formiranju građevinske parcele donosi se u slučaju da:

1) postojeća katastarska parcela, na kojoj je objekat izgrađen, predstavlja samo zemljište ispod objekta;

2) se radi o objektu za koji je podnet zahtev za legalizaciju i za koji je nadležni organ utvrdio da postoji mogućnost legalizacije, odnosno doneto rešenje o legalizaciji u skladu sa ranije važećim zakonom;

3) je u postupku konverzije prava korišćenja potrebno utvrditi zemljište za redovnu upotrebu postojećeg objekta, kada je vlasnik objekta fizičko ili pravno lice, a nosilac prava korišćenja na građevinskom zemljištu na kome je taj objekat izgrađen jedinica lokalne samouprave, autonomna pokrajina ili Republika Srbija, odnosno drugo pravno lice čiji je osnivač jedinica lokalne samouprave, autonomna pokrajina ili Republika Srbija.

Uz zahtev za donošenje rešenja o utvrđivanju zemljišta za redovnu upotrebu postojećeg objekta i formiranju građevinske parcele, vlasnik objekta dostavlja dokaz o pravu svojine na objektu, odnosno dokaz da je po podnetom zahtevu za legalizaciju nadležni organ utvrdio mogućnost legalizacije, odnosno rešenje o legalizaciji i kopiju plana parcele.

Rešenje iz stava 2. ovog člana sadrži sve potrebne elemente za formiranje građevinske parcele, u skladu sa važećim planskim dokumentom, koje nadležni organ pribavlja po službenoj dužnosti.

Na rešenje iz stava 2. ovog člana može se izjaviti žalba u roku od 15 dana od dana dostavljanja rešenja ministarstvu nadležnom za poslove finansija.

Pravnosnažno rešenje iz stava 3. ovog člana je osnov za provođenje promene u katastarskom operatu organa nadležnog za poslove državnog premera i katastra.

hovi pravni sljednici“ pravo korišćenja se može konvertovati u pravo svojine, uz naknadu tržišne vrednosti građevinskog zemljišta u momentu konverzije prava umanjenu za troškove prava korišćenja na građevinskom zemljištu“ (čl. 103. st. 1.ZPI).

Nositelji prava korišćenja građevinskog zemljišta – osobe čiji je položaj određen zakonom kojim se određuje sport, kao i udruženja građana zadržavaju to pravo, ako nije prestalo po posebnim odredbama ZPI.

Privatizirane osobe stječu pravo vlasništva konverzijom prava korištenja po odredbama ZPI „na osnovu potvrde Agencije za privatizaciju…o uplati kupoprodajne cene nakon privatizacije“ (čl.105.).

Novčana sredstva ostvarena po osnovu konverzije prava korištenja u pravo vlasništva po ovom zakonu uplaćuju se u iznosu od 50% u poseban fond za restituciju (koji se osniva kao budžetski fond) i u iznosu od 50% u budžet jedinice lokalne samouprave, a koriste se namjenski u skladu s čl. 92. st.3. ovog Zakona, dok se sredstva uplaćena u fond za restituciju ne mogu koristiti do donošenja zakona kojim se uređuje restitucija (čl.107.)

* * *

Samo u referatu za Republiku Hrvatsku i Bosnu i Hercegovinu izložena je kritika uspostave prava vlasništva na građevinskom zemljištu u društvenom/državnom vlasništvu u korist vlasnika (suvlasnika) zgrada i posebnih dijelova zgrada, koji nisu bili vlasnici zemljišta do dana prisilnog prijenosa u društveno/državno vlasništvo, jer je postojalo alternativno zakonsko rješenje: pretvorba trajnog prava korištenja u ekvivalentno pravo građenja koje bi trajalo dok postoji zgrada koliko je trajalo i trajno pravo korištenja. U tom slučaju vlasnik (suvlasnik) zgrade odnosno posebnih dijelova zgrade kao nositelj prava građenja plaćao bi periodičnu novčanu naknadu vlasniku zemljišta. Ova naknada bi se umanjila srazmjerno iznosu koji je plaćen za pribavljanje prava korištenja radi izgradnje zgrade na građevinskom zemljištu u društvenom/državnom vlasništvu jer je taj iznos plaćen bivšem vlasniku u postupku deposediranja nacionaliziranog neizgrađenog građevinskog zemljišta kao i u slučaju dobrovoljne predaje posjeda nacionaliziranog zemljišta.

Na zemljištu koje se po zakonu ne vraća prijašnjem vlasniku odnosno njihovim nasljednicima (ovlaštenicima prava na denacionalizaciju), jedinice lokalne samouprave imale bi pravo vlasništva, jer su njihove pravne prednice – socijalističke općine imale pravo upravljanja i raspolaganja na tom zemljištu.

Referat za Republiku Hrvatsku i Bosnu i Hercegovinu zalaže se za to da se zakonom isključi mogućnost otuđenja građevinskog zemljišta u vlasništvu države (i entiteta BiH), županija (Republika Hrvatska) i kantona (FBiH) kao i jedinica lokalne samouprave, jer u hrvatskom i bosanskom pravu postoje četiri pravne ustanove koje omogućavaju izgradnju i imanje vlastite zgrade i druge građevine, uređaja i naprava na tuđem zemljištu uz obvezu plaćanja periodične naknade koja bi se u tom slučaju slijevala u odgovarajući fond za komunalno uređenje zemljišta, a to su: a) pravo građenja (Baurecht) koje odvaja zgradu od zemljišta, preuzimajući ulogu zemljišta pa je zgrada njegova pripadnost kao da je ono zemljište; b) zakup zemljišta na kome su privremene zgrade koje su po samom zakonu pravno odvojene od zemljišta; c) koncesija na općem i javnom dobru koja pravno odvaja zgradu od zemljišta iako ne preuzima ulogu zemljišta kao pravo građenja i, napokon; d) stvarne služnosti koje odvajaju od zemljišta trajne naprave i uređaje koji su pripadnost gospodujuće (povlasne) nekretnine. Primjenom građenja smanjuju se troškovi izgradnje za cijenu zemljišta i osigurava trajni izvor prihoda vlasnika zemljišta.

U Rijeci, 29. travnja 2010. *Petar Simonetti*

CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд

34(4-12) (082)
347.4/ .5(4-12)(082)
349.412 (4-12)(082)

CIVIL Law Forum for South East Europe. Regional Conference (1 ; 2010 ; Cavtat)
Collection of studies and analyses. Vol. 1 / Civil Law Forum for South East Europe, First Regional Conference, Cavtat, 2010 = Izbor radova i analiza. Knj. 1 / Forum za građansko pravo za jugoistočnu Evropu, Prva regionalna konferencija, Cavtat, 2010. – Beograd : Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) = Nemačka organizacija za tehničku saradnju (GTZ) : Offener Regionalfonds für Südosteuropa – Rechtsreform = Otvoreni regionalni fond za jugoistočnu Evropu – Pravna reforma : Jugoslovenski pregled, 2010 (Hrvatska). - 667 str. : ilustr. ; 24 cm

Tekst uporedo na engl.i srp. jeziku. – Tiraž 500. – Str. 5-6: Introduction / Mike Falke, - Str. 7: Introduction / Christian Athenstaedt. - Napomene i bibliografske reference uz tekst. - Bibliografija uz pojedine radove.

ISBN 978-86-7149-057-3 (JP)

a) Право – Југоисточна Европа – Зборници
b) Облигационо право - Југоисточна Европа – Зборници c) Грађевинско земљиште – Имовинско-правни односи - Југоисточна Европа – Зборници
COBISS.SR-ID 178579980

Civil Law Forum for South East Europe

Forum za građansko pravo za jugoistočnu Evropu

I

ISBN 978-86-7149-057-3

gtz