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Ovaj broj Časopisa sadrži Tematske članke – Prava manjina, Aktuelne članke i Prikaze. Tematski članci napisani su na engleskom jeziku (izuzev jednog). Zbog toga je Redakcija odlučila da ih urednik kratko predstavi. U okviru Tematskih članaka – Prava manjina, jedan skup radova istražuje i sintetički analizira prava manjina u Evropi ili, u užem obimu, u Evropskoj uniji i na Balkanu. Drugi skup radova istražuje prava manjina u pojedinim članicama Evropske unije.

U prvi skup radova svrstavaju se članci Silva Devetak, Tomasa Bremera, Antoniete Pjakadio i Gorana Bašića.

Silvo Devetak u radu *Eliminacija diskriminacije kao osnova prava manjina u EU* ističe da Evropska unija nema sopstvene zakone o zaštiti prava etničkih i religijskih manjina. Članice Evropske unije su, kao članice Saveta Evrope, obavezne da se pridržavaju normi međunarodnog prava.

Tomas Bremer u radu *Međureligijski odnosi i status prava religijskih manjina u EU* smatra da je ekumenski pokret doprineo boljem razumevanju među hrišćanskim crkvama. Osim toga, postoji dijalog između hrišćanske i ostalih religija. Istražuje vezu između teoloških stanovišta i položaja religijske većine (manjine) u državi.

Antonieta Pjakadio u radu *Pravni instrumenti manjinskih jezika u Evropi* ističe da nije dovoljno samo ne diskriminisati male jezike i narode, već da ih je potrebno i aktivno podržati. Na taj način će se nadoknaditi nepovoljni uticaji iz prošlosti i sačuvati ovi živi oblici evropskog kulturnog nasleđa.

Goran Bašić u radu *Status nacionalnih manjina na Balkanu – komparativni prikaz* daje opšti prikaz nacionalih manjina na Balkanu, u kome postoji „narcizam malih razlika“. Zaključuje da još uvek na ovim prostorima postoje problemi i tenzije koje je nužno rešiti zbog ulaska zemalja Balkana u Evropsku uniju.

Drugi skup obuhvata članke Vladislava Čaplinskog, Karmen Tile, Olesee Sirbu i Ecija Benedetija.

Vladislav Čaplinski u radu *Zakon i politika o manjinama u Poljskoj* upoznaje nas sa stanjem nacionalnih manjina u ovoj zemlji. Utvrđuje da u Poljskoj nema puno manjina. Status manjina u Poljskoj regulisan je bilateralnim sporazumima sa drugim državama (prvenstveno sa Nemačkom, Litvanijom, Ukrajinom i Rusijom). Postojeće stanje pokazuje da čak i članstvo u Evropskoj uniji ne rešava sve probleme među zemljama članicama.

Karmen Tile u radu *Prava etničkih manjina u Nemačkoj* smatra da zaštita identiteta nacionalnih manjina čuva raznolikost. Prava manjinskih naroda se štite na nacionalnom nivou, na nivou Evropske unije i na svetskom nivou.

Olesea Sirbu u radu *Ugrožena manjinska kultura i jezik – slučaj Cangosa u Rumuniji* ukazuje da ni zemlje članice Saveta Evrope nisu osigurale sva prava manjinskih etničkih zajednica. Analizira primer Čangoša u Rumuniji i ponuđene projekte za očuvanje nihovog identiteta.

Ecio Benedeti u radu *Zaštita nacionalnih manjina u Italiji – dostignuća i dileme* upoznaje nas sa stanjem u Italiji iz ove oblasti. Italija nije donela zakon koji štiti nacionalne manjine, ali je Zakon o zaštiti slovenačke manjine, izglasan 2005, doneo novu nadu. Pravni status manjina mahom je ustanovljen poveljama i pravnim dokumentima Evropske unije.

Tematski članci obuhvataju prvi, a zatim drugi skup radova, redosledom koji je naveden u ovoj belešci. Redosled autora u delu Aktuelni članci utvrđen je na uobičajen način – prema vremenu sticanja akademskih zvanja autora.

Glavni i odgovorni urednik
Prof. dr Ilija Babić

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ELIMINATION OF DISCRIMINATION AS FOUNDATION OF MINORITIES RIGHTS IN THE EU

Abstract – *The European Union (EU) has not developed its own legislation and standards concerning the protection of members of ethnic and religious minorities living within the Community. Nonetheless, those members of the EU who have joined the Council of Europe's instruments establishing the basic rights of national minorities and regulating the use of regional and minorities languages are bound by these provisions of international law. The sound basis for implementing these international instruments efficiently within the countries members of the EU was created by the EU Council of Ministers Directives – mandatory law of the EU–on the prohibition and elimination of discrimination, among others, on the basis of race, ethnicity and religion. In addition, the process is under way of ratification by the members of the EU of the Protocol 12 to the European convention of fundamental freedoms and human rights, which created the legal basis for combating discrimination, including, through procedures at the European court of human rights, in regard of all human rights enshrined in the European convention. The paper will represent the achievements and shortcomings in the implementation of the elimination of discrimination on ethnic, racial or religious basis within the EU as a foundation of the rights of members of ethnic and religious minorities*

Key words: *equality, discrimination, racism, European Union, minorities*

1. FOREWORD

The demographic structure of about 495 million people living in the EU (7.4% of the world population) is composed of a great variety of ethnic, cultural, linguistic, religious and similar identities. Viewed from the political aspect – which is not a subject of this analysis–the EU is, in addition, a conglomerate of political positions which are firmly anchored in the "national interests" of the states' members and, exclusively in accordance with European contractual law, combined into common decisions of EU institutions. Cultural, ethnic, linguistic and religious diversity is a strong characteristic defining the demographic composition of the population of all 27 state members of the European Union.[1] European integration is an economic and political process interwoven with elements, which emanate from the cultural, ethnic and linguistic diversity of Europe. The efficiency of economic and political action is thus related to the stability of inter–ethnic and inter–religious relations within the Community.

As a result of historical reminiscences, or the political process of decentralizing government, 268 regions exist in the EU.[2] Regional identity is the main identity in some of the EU countries (for instance, Bavaria in Germany, Piedmont and Lombardy in Italy or Carinthia in Austria). It is very strong especially in those regions, which have been established on an ethnic basis, like Catalonia, the Basque country and Galicia in Spain; Flanders and Wallonia – Belgium; Scotland and Wales – UK; South Tyrol – Italy; Hargita and Kovasna – Romania. Regionalism represents in the EU a political, economic and sometimes a geopolitical aspect of diversity that must be taken into account when making decisions both at national and EU level (Nagel 2004; Togennburg 2007). In some cases regional identity is linked

[1] The population of the Union in 2005 spoke more than 90 languages, 53 of them is „stateless languages": Frisian, Welsh, Catalan, Sorbian, Roma languages, etc. The most widespread languages were English (spoken by 38% of the EU population), French and German (14% each) and Spanish and Russian (6% each). Some 40 million people living in the Union speak a regional or minority languages. There are presumably 94 ethnic and national groups who live as minorities in another EU country. 23 national languages are official languages of the EU. But statistical data show that the meager knowledge of „other languages" represents a divisive factor within the Union. In 2005, for instance, the majority population in eight EU states did not speak a foreign language (Ireland 66%, UK 62%, Italy 59%, Portugal 58%, Hungary 58%, Spain 56%, Romania 53%, and Turkey as a candidate state, 67%). Some expert are therefore proposing building up of the system of learning „other" languages as a tool for promoting the principle of „unity in diversity" that should constitute in practice a binding factor of EU societies.

[2] For more info on the EU regions see the EU Inforegio site: *http://ec.europa.eu/regional_policy/index_en.htm* (accessed on 25 January 2008).

with religious affiliation (for instance, Catholicism in Bavaria, or Protestantism in Hargita and Kovasna in Romania).

The 'management' of the European Union's cultural and ethnic diversity is composed of balanced elements of national and supranational, in many cases linked, involvements. They could be defined in the following way: 1) the Union has great competencies in regard to ensuring equality without ethnic, racial or religious discrimination, 2) the Union and national states have linked competences in regulating migration and integration issues, and 3) the competencies of member states are unchallenged concerning such matters as the preservation of cultural or ethnic identity, including the rights of national minorities, ethnic territorial and other autonomies, and similar issues (Toggenburg 2005).

2. ACHIEVEMENTS AFTER THE DISSOLUTION OF THE COLD WAR DIVISION OF EUROPE

Since the dissolution of the cold war division of Europe, there have been significant achievements, especially in eastern European states (later new members of the EU) concerning the legal regulation of the status and rights of members of national minorities (Pentassuglia 2001; Henrard 2002; Liebich 2002; Ram 2003; Vermeersch 2004; Togennburg 2004).

The European law on minorities is composed of norms adopted at national and bilateral levels or within the Council of Europe, while the EU has not yet adopted its own legal standards on the status and rights of ethnic minorities (Benedikter 2006; Arnold 2001). New constitutional and legal provisions stipulating the status, rights, self-managing organizations and institutions, legal representation and the inclusion of minorities in decision making processes were adopted, for instance, in Hungary, Slovenia and Romania (De Witte 2004). The result of political movements was the improvement of territorial ethno-political autonomies, for instance, in Spain (Catalonia, Galicia, Basque lands) and United Kingdom (Scotland, Wales), which added a new political value to the traditional European territorial autonomies in South Tyrol/Alto Adige in Italy and the Aaland Islands in Finland (Benedikter 2006a; Nagel 2004). More than twenty bilateral agreements were signed stipulating co-operation between neighbors and the rights of minorities–for instance, agreements signed after 1990 such as the German-Polish agreements and the agreements of Hungary with its neighbors (Gal 1999).

The main sources of European law on the rights of ethnic minorities are international instruments adopted within the Council of Europe. Some general human rights that have a value also for members of minorities are included in

the European convention on human rights – ECHR (for instance art. 11 of the ECHR, the importance of which for establishing minorities' political organizations was confirmed also by decisions of the ECHR in Strasbourg.[3]. Several efforts to adopt an additional protocol to the ECHR, which would have evaluated minority rights as a constituent part of the ECHR failed. The framework convention on the rights of national minorities (1995) is a pragmatic compromise between advanced proposals included in the draft Convention prepared by the Venice "Commission on democracy through law", which is an consultative body with the COE and the attitude of non-recognizing the existence of minorities exercised by some European states; in the first rank are France and Greece, but Bulgaria is also among them[4] (Weller, ed. 2005). The European charter for regional or minority languages (1992) is a positive achievement of the COE, but opened the possibilities that the states "select" the provisions which will be binding, thus creating double standards for the states members of the Charter (Ò Riagáin 2001).[5] Members of minorities were provided with new mechanisms for protecting their rights both on international and domestic level (Weller, ed. 2004).

This progress was first of all the result of bewilderment among European political elites with the bloody confrontations on the basis of different ethnicity and religions, firstly in the Caucasus area and later in the Balkans. The new political behavior of the EU was manifested also through criteria which the EU put forward for the recognition of new states and as conditions for the acceptance of new states in the EAR. These criteria were: 1) human rights and minority protection standards as a condition for EU recognition of newly established states.[6]

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[3] Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State. *http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=10/5/2008&CL=ENG* (retrieved on 3 Oct. 2008)

[4] Still very accurate in this regard is the statement made by the Greek Helsinki Monitor to the UN Working Group on Minorities, 7th session, Geneva, 14–18 May 2001: „ (Partly or Fully Unrecognized) National Minorities" *http://www.greekhelsinki.gr/bhr/english/organizations/ghm/ghm_14_05_01.doc* (retrieved on 3 December 2007).

[5] Council of Europe, 1992 (entry into force 1998). European Charter for Regional or Minority Languages (CETS No.: 148) *http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=148&CM=7&DF=3/6/2008&CL=ENG* (accessed on 25 February 2008).

[6] See the EC Declaration on „the recognition of the new states in Eastern Europe and former Soviet Union and Yugoslavia", adopted on 16 December 1991.

2) human rights, minority protection and good neighborhood relations as a part of the so-called Copenhagen criteria for examining the preparedness of states for EU membership.[7] and 3) stimulation and the conclusion of bilateral agreements on neighborhood cooperation and minorities' protection, which were later included as an integral part of the Balladour pact of 1994[8] that was initiated in order to "prepare" the countries on the list for the EU fifth enlargement for the negotiating process (for different aspects of this issue see: Heidbreder and Carasco 2203; Henrard 2002; Hillion 2004; Pujadas 2003; Sasse and Hughes 2003; Wiener and Schwellnus 2004). The EU established a "reflection group on long-term implications of EU enlargement", which examined minoritiy rights and EU enlargement (Amato and Batt 1998).

3. THE REEFS UNDER THE OCEAN OF EU HARMONY

In spite of the progress achieved in the process of the latest European integration, many problems regarding inter-ethnic and inter–religious relations exist within the EU and its neighborhood, some of them constituting a source of possible conflict (Lynch 1996; Moucheboeuf 2006). On the all-European level, many ethno-political negative activities have been noted that could be transformed into sources of instability (for instance, racism, xenophobia, racist motivated crime, neo-Nazi ideologies, Roma syndrome).[9] The situation of members of the biggest European national minority, Roma and Sinti (11 to 12 million people) is the most outstanding case of discrimination in Europe. This was confirmed at the first EU Roma summit held on 16th of September 2008 in Brussels under the joint patronage of the EU Commission President Barroso and the French presidency of the European council. According to the OSCE report, the Roma and Sinti populations continue to face discrimination and remain divided

[7] More on the conditionality for the EU membersip can be consulted on: *http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm* (accessed on 25 February 2008). The Minority protection is EU accession criterion was monitored and elaborated by several experts (EUMAP 2001 and 2002).

[8] The French proposal, prepared under the Premier Eduard Balladur, was first discussed at the European Council meeting in Copenhagen, June 21–22. The inaugural conference of the Stability Pact was held in Paris on May 26–27 1994.

[9] The FRA published in August 2007 the „Report on Racism and Xenophobia in the Members States of the EU", in which it is stated that, inspite of the EU's anti-discrimination legislation, ethnic descrimination and inequalities in employment, education and housing still continues. Significant intolerance towards Roma population is present and an increase is recorded in racist crimes. *http://fra.europa.eu/fra/material/pub/racism/report_racism_0807_en.pdf* (retrieved on 25 February 2008).

from mainstream society across Europe. Significant gaps remain in areas such as education, housing, employment and access to social services and justice.[10]

The ethnic factor as a source of misunderstanding could be discerned in bilateral relations between some of EU countries, for instance, sensitive Hungarian-Slovak and Hungarian-Romanian relations concerning the huge size of the Hungarian minority in both countries, and German-Polish relations concerning property, and citizenship issues concerning Germans who were resettled from former German territories in Poland (Driessen 1999; Gal 2000; Breuer 2002).

"Domestic" political notions developed on ethnic bases represent a serious challenge for the countries concerned (for instance, the Basque movement in Spain, the Catholic-Irish and Protestant-British divisive political patterns in Northern Ireland, the Turkish secession in Cyprus, the Corsica autonomy demands in France).[11] The unresolved issues concerning the status and rights of ethnic minorities could be a "domestic source" of turmoil and instability of an EU country–for instance, the rights of Russian minorities in Estonia, Lithuania and Latvia, where they are in the latter a significant part of the population.[12] (Dorodnova 2000; Roger 2001; Smith 2003; Tesser 2003; Törnquist 2001).

Similar phenomena could be found in inter-religious relations in Europe, both on pan-European and bilateral and domestic levels (for instance, suspicious relations with the Islamic communities, ambiguous relations between Catholic and Orthodox churches, attitude towards Judaism).[13] This state of affairs could

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[10] 2008 Status Report on fulfilling the commitments made in the Action Plan published on 2 October 2008 by the OSCE Office for Democratic Institutions and Human Rights. *http://www.osce.org/odihr/item_11_33130.html* (retrieved on 3 October 2008).

[11] In 2002 the Committee of Ministers of the Council of Europe adopted a reply to CLRAE Recommendation 43 (1998) on territorial autonomy and national minorities: *https://wcd.coe.int/ViewDoc.jsp?id=853855&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75* (retrieved on 15 January 2008). The Committee of Ministers stated in the point 6 of the reply that. . „While it is clear that under certain circumstances and through democratic decisions taken within its constitutional framework a State might also deem appropriate to address the question of the protection of national minorities through territorial subdivision, one needs to bear in mind the need to preserve the social cohesion of the population of the country as a whole and to respect the corresponding general integration policy pursued to that end, as well as to respect the territorial integrity and national sovereignty of states.".

[12] For statistical data on the population structure, see the Eurostat: *http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1090,30070682, 1090_31583003&_dad=portal&_schema=PORTAL* (accessed on 25 February 2008).

[13] The EU established with the Decision No 1983/2006/EC the 2008 as the European Year of Intercultural Dialogue (EYID). Religion in the contemporary Europe is one of key-topics of this initiative and the EYID aims to encourage the dialogue both within and between the communities of faith and conviction. More on EYID: *http://www.interculturaldialogue2008.eu/* (accessed on 25 February 2008).

have a negative consequence for the rights of members of particular religions.[14] The recent experiences in the Balkans and elsewhere in similar circumstances have shown that the religious factor *per se* has not such an explosive strength as the ethno-political one, but could be a "spiritual strength" that fuels negative, mostly nationalistic extremist and exclusive political behavior.[15] The most controversial development has been the rise of religion-based political movements.[16]

Situations concerning inter-ethnic and inter–religious relations, including the status and rights of minorities, that could produce political frictions and even conflicts exist also in the relations of the EU's member states with states "on the other side" of the present and future EU external borders. For instance: relations between Greece and Macedonia, Bulgaria and Macedonia, Hungary and Serbia, the Russian federation and the Baltic states; relations between the Russian Orthodox Church with national Orthodox Churches in the Baltic states and with the Romanian Orthodox Church; relations of the Romanian Orthodox Church with the Moldovan and Serbian Orthodox Churches; relations of the Greek and Bulgarian Orthodox Churches with the Macedonian Orthodox Church (Devetak 2007).

The unilateral declaration of independence, adopted on 17 February 2008 by the local Albanian parliament in Kosovo, which does not have a firm international legal foundation, opened a Pandora's box whose impact on international security and especially on the stability of the Balkan region cannot yet be foreseen for the time being. This move, sponsored by the USA and major European states, produced a great division among EU countries and was met, of course, with firm opposition from Serbia, of which Kosovo has been an integral part Kosovo since 1919, which has the firm support of Russia.[17]

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[14] See, for instance, Lucy Vikers, European network of legal experts in the non-discrimination field, Religion and belief discrimination in the enlarged EU (2007). Brussels: European Community, Directorate-General foe employment, social and equal opportunities, Unit G-2.

[15] The role of the three principal organised religions in the Balkan (the Croatian Catholic Church, the Serbian Orthodox Church, and the Islamic community) in providing a religious base for nationalist thought and movements in the recent history of the Balkan is further elaborated also in the book by Vjekoslav Perica (2004) : Balkan idols: Religion and Nationalism in Yugoslav States. Oxford University Press, USA.

[16] See also The rise of religion-based political movements. Selected papers, Darwis Khudori (ed). SIRD, Malaysia, 2009.

[17] For analytical debate on Kosovo independece, see among plenty sources also CEPS European Neighbourhood Watch, Issue 35 from February 2008 *http://www.ceps.eu/files/NW/NWatch35.pdf* (retrieved on 3 March 2008) ; Centre for Research on Globalization, 16 February 2008: Kosovo Independence „End of Europe": *http://www.globalresearch.ca/index.php?context=va&aid=8098* (retrieved on 3 March 2008) and EU Observer, 18 February 2008: „EU fudges Kosovo independence recognition": *http://euobserver.com/9/25684* (retrieved on 3 March 2008).

On the surface these situations are for the time being under "control", but the factual historical, political and other causes of their existence, like nationalism, irredentism, historical negative reminiscences, have not been eliminated at all.

4. THE LAW ON ELIMINATION OF DISCRIMINATION ON RACIAL AND ETHNIC BASIS AS FOUNDATION OF MINORITIES RIGHTS IN THE EU

The responses of the EU to the needs for international protection of the rights of ethnic and religious minorities have been not at all adequate. In addition there is a great disparity between the use of minority rights as a tool of EU foreign and enlargement policy and the political willingness of the EU to elaborate its own standards on minority rights (Hilpold 2001; Toggenburg 2001; De Witte 2002; Brunner 2002; Hofmann 2002; Schlögel 2004; Van den Berghe 2004). The lack of political willingness to adopt legally binding norms has been shown also in the rejection of modest attempts for the contractual regulation of these issues during negotiations for the European constitution, which later was not accepted because of the negative votes on the referenda on that issue in France and Netherlands. In the new Treaty of Lisbon, which is in the process of ratification by member states, some progress was achieved. Article 1 (8) of the Treaty of Lisbon provides that Article 6 (1) of the Treaty on European Union is to be replaced by the following: "The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."[18]

The Charter does not include an obligation of EU member states to ensure the rights of minorities. It only stipulates that "the Union shall respect cultural, religious and linguistic diversity" (art. 22) and that "any discrimination based on any ground such as . . . ethnic or social origin. . . language. . . membership of a national minority. . . . shall be prohibited" (art. 21).[19] In addition the new Treaty stipulates the 'collective membership' of the EU in the ECHR. The provisions of the Charter do not extend in any way the competences of the Union

[18] Official Journal of the European Union, 17 December 2007. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

http://europa.eu/lisbon_treaty/full_text/index_en.htm (retrieved on 25 February 2008).

[19] European Parliament, Council, Commission, 14 December 2007. Charter of Fundamental Rights of the European Union (2007/C 303/01).

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ: C: 2007: 303: 0001: 0016: EN: PDF (retrieved on 25 February 2008).

as defined in the Treaties. The obligations of members will be confined to the promulgation of EU law and standards. In the case of minority rights, these are articles 21 and 22 of the Charter (De Witte and Togennburg 2002).

Progress has been shadowed by the requests of Poland, UK and Ireland not to be bound by the Charter on basic rights. These requests have introduced new divisions in the pattern of European identity. Nonetheless, it is the first time in EU history that the prohibition of discrimination because of one "membership in a national minority" and respect of cultural and linguistic diversity is a legally binding obligation of the EU and of its member states respectively. But after the rejection of the Treaty on the referendum held in June 2008 in Ireland, it is not clear what the fate of the Treaty will be. Probably it will come in force, if the second referendum in Ireland will be successful, on 1 January 2010. With the transformation of the European centre on racism and xenophobia in the EU agency for fundamental rights (FRA), on 1 March 2007, the EU established a watchdog for human rights and freedoms, which is otherwise a consultative body with no decision making competencies.[20]

Initially, the legislation of the EU had predominantly focused on discrimination against EU migrant workers, as well as gender discrimination connected to participation in the labour market. An important step forward toward the equal status of the inhabitants of the EU regardless of their ethnic and racial origin and religion or belief has been the acceptance (on the basis of art. 13 of the EU Treaty[21]) of Council directive 2000/43/EC of 29 June 2000 ensuring the principle of equal treatment of persons irrespective of racial or ethnic origin[22] and directive 2000/78/EC of 27 November 2000 on the elimination of discrimination in employment.[23] The Racial Equality Directive prohibited discrimination on grounds of racial or ethnic origin in a wide range of areas including employment, vocational training, education, social protection, housing and the provision of goods and services. The Employment Equality Directive prohibited

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[20] The European Monitoring Centre on Racism and Xenophobia became the European Union Agency for Fundamental Rights (FRA) on 1 March 2007 based on the Council Regulation (EC) No 168/2007 of 15 February 2007. *http://fra.europa.eu/fra/index.php* (accessed on 25 february 2008).

[21] See Treaty of Amsterdam amending the treaty on European Union, the treaties establishing the European communities and related acts, Official Journal c 340, 10 november 1997.

[22] Official Journal of the European Communities, 19.7. 2000. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. *http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_180/l_18020000719en00220026.pdf* (retrieved on 1 December 2007).

[23] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal L 303 , 02/12/2000 P. 0016–0022* (accessed 13 July 2009).

discrimination on a longer list of grounds (religion or belief, disability, age and sexual orientation), but across a more limited material scope (employment and vocational training). We will present only the contents of these directives, which is relevant for this article with emphasis on the Directive on equal treatment of people irrespective of their racial or ethnic origin.

Directives have established a large concept of discrimination. They include the "direct" and "un-direct" discrimination, harassment and instruction to discriminate. The genuine novelty in the definition of discrimination in the Directive under consideration is the proposal to create a fifth limb to the concept of discrimination which would be "denial of reasonable accommodation" (article 2/2). Directive on racial and ethnic equality protects "all persons", as regards both the public and private sectors, including public bodies (art. 3). Protection against discrimination "covers":

- conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
- access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
- employment and working conditions, including dismissals and pay;
- membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- social protection, including social security and healthcare;
- social advantages;
- education;
- access to and supply of goods and services which are available to the public, including housing (art. 3/1).

But the Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned (art. 3/2). Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;
(b) any provisions contrary to the principle of equal treatment which are included in individual or collective contracts or agreements, internal rules of undertakings, rules governing profit-making or non-profit-making as-

sociations, and rules governing the independent professions and workers' and employers' organisations, are or may be declared, null and void or are amended (art. 14).

Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended (art. 7/1).

Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights (art. 13/1).

An important tool for combating discrimination is Protocol no. 12 to the ECHR of the Council of Europe, which was adopted in 2000. It stipulates for members of minorities living in countries that will ratify the possibility of "suing" at the European Court of Human Rights a country which commits a discriminatory act towards them on ethnic and racial grounds concerning all norms of the ECHR.[24]The members of the EU didn't show great eagerness to join this instrument. Until 7 July 2009 only 6 out of 27 members ratify Protocol 12.[25]

5. PROHIBITION OF DISCRIMINATION ON THE BASIS OF RELIGION OR BELIEF

The religious composition of the European population is also a rainbow of varieties. Christianity is roughly comprised of Roman Catholicism, Orthodox Christianity[26] and Protestantism. Of the 750 million Europeans (living on the continent) 269 million are Catholics, 171 million Orthodox, 79 million Protestants, and 28 million Anglicans. Active participation in faith-based organizations

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[24] Council of Europe, 2000 (entry into force 2005). Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 177). *http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=177&CM=7&DF=3/6/2008&CL=ENG* (accessed on 13 February 2008).

[25] Cyprus, Finland, Luxembourg, Netherlands, Romania and Spain.

[26] Orthodoxy is the largest single religious f*aith* in B*elarus* (88%), B*ulgaria* (83%), R*epublic of Macedonia* (80%), Republic of C*yprus* (80%), G*eorgia* (89%), G*reece* (98%), M*oldova* (98%), M*ontenegro* (84%), R*omania* (87%), S*erbia* (84%), R*ussia* (80%), and U*kraine* (80%). The number of Eastern Orthodox adherents represents about 31% of the population in B*osnia and Herzegovina.* As the dominant religion in northern K*azakhstan,* it represents 40% of the K*azakhstan,* and 4% of L*ithuania,* 9% of L*atvia,* and 13% of the E*stonian* population.

in the EU is *not* largely a function of a society's level of trust in them; there is also a great disparity between belief and weekly attendance at religious services.[27] In 2002 the EU had roughly over a million *Jews*. It was estimated that 16 million Muslims live in 2006 in the EU (3.2% of the total population) and in particular countries the percentage was much higher (in France, for instance, 8–9%). According to the estimate of the Central Institute of Islamic Archives in Soest, Germany, Islam will be in near future the second largest religion in Europe (nearly 52 million by the year 2014) due first of all to the 6.5 per cent annual growth rate.[28] Tens of other minor religious groups were established and "registered" in accordance with the norms on the freedom of religion enshrined in the Universal Declaration on Human Rights (art. 18).[29]

Belief is nowadays developing in Europe essentially through individualized and deregulated forms which are no longer under the control and mediation of organized political and spiritual institutions. The EU is a secular body, with no formal connections to any religion and no mention of religion in any current or

[27] According to the spring 2004 Eurobarometer survey Denmark has the highest level of confidence in religious institutions at 74%, yet a meager 3% of Danes attend church at least once a week (5% of Swedes and 5% of Finns). Swedish citizens express the lowest level of trust in religious institutions at 21%, while Finland's population, like Denmark's, expresses one of the highest levels of trust at 71%. Among the other old EU countries, weekly attendance at religious services is below 10% in France and Germany, while in Belgium, the Netherlands, Luxembourg, and the United Kingdom between 10% and 15% of citizens are regular churchgoers. Among the Catholic old member countries, Austria is closest to the more secularized Protestant countries in weekly church attendance, with 18% attending at least weekly. Twenty-one percent of Spaniards attend at least weekly, and just under a third of Portuguese (29%) and Italians (31%) do so. Only in Roman Catholic Ireland do a majority of residents (54%) still go to church weekly. The only Orthodox country among the old members — Greece — has a weekly church participation rate of 27%. According to the spring 2004 Eurobarometer survey, Malta and Poland have the highest percentages of weekly churchgoers in Europe with 75% and 63%, respectively. Estonia and Latvia, the two Baltic countries with Protestant traditions, are among the most secularized in Europe with only 4% and 7% of residents attending services once a week. The Czechs (11%), Hungarians (12%), and Lithuanians (14%) are also in the more secular camp. Eighteen percent of people in Catholic Slovenia attend church weekly, while Orthodox Cyprus (25%) and the dominantly Catholic Slovakia (33%) still have sizable active religious minorities.

[28] Russia, including Siberia and Chechnya, has 25 million Muslims, more than any other European country. She is followed by Turkey (5.7 million), France (5 million), and Germany (3.5 million). Muslims hold the majority in Turkey, Albania and Bosnia. In some countries, they have overtaken Protestantism as the second largest religious constituency behind Catholicism. This is the case in Belgium, France, Italy and Spain. In Austria, the number of Protestants and Muslims are roughly the same. Muslims come second to the Orthodox Church in Bulgaria, Greece, Macedonia, Russia and Serbia. Adventist Press Service (APD.) *http://www.stanet.ch/APD* (retrieved on 3 Oct. 2008).

[29] General Assembly of the United Nations, December 10, 1948. Universal Declaration of Human Rights. *http://www.un.org/Overview/rights.html* (retrieved on 20 January 2008).

proposed treaty. Discussions of the draft texts of the European Constitution and later the Treaty of Lisbon have included proposals to mention Christianity and/or God in the preamble of the text. However, this idea faced opposition and was dropped.

The European Union in its Declaration No 11 on the status of churches and non-confessional organisations, annexed to the Final Act of the Amsterdam Treaty, has explicitly recognised that it respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States and that it equally respects the status of philosophical and non-confessional organisations.[30]

The 2000 Directives on racial and ethnic discrimination and on the discrimination in employment have always carried an aura of unfinished business. No coherent argument of principle was advanced as to why the prohibition of racial discrimination was much more extensive in its application than that which applies to the other grounds.[31] As to discrimination on the ground of religion or belief, for instance, only the Directive on equality in employment declares as it purpose to "lay down a general framework for combating discrimination on the grounds of *religion or belief*, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment".[32]

This is a reason for the preparation of new Directive on elimination of discrimination on the ground of religion or belief, disability, age or sexual orientation. The draft of Directive was presented on 2 July 2008.[33]Questionable are the exceptions to the prohibition of discrimination envisaged in the proposal. Paragraphs 2, 3 and 4 state that the Directive is "without prejudice to" among other:

- differences in treatment in access to educational institutions based on religion or belief;
- national legislation on the secular nature of the State;
- national legislation on churches and other organisations based on religion or belief.

Further, the latent rationale for the reference to the secular State is laid bare in recital 18 in the preamble to the proposal, which states that "Member

[30] See Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European communities and related acts, Official journal c 340, 10 november 1997, Declaration No. 11.

[31] See Mark Bell, Advancing EU Anti-Discrimination Law: the European Commission's Proposal for a New Directive, The Equal Rights Review, Vol. Three (2009), pp. 7–18.

[32] Ibidem.

[33] European Commission, „Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation", COM (2008) 426

States may also allow or prohibit the wearing or display of religious symbols at schools". Unsurprisingly, the French Presidency proposed that this reference to religious symbols should be moved into the main text of the Directive. It is, therefore, necessary to strike in the final version of the Directive a careful balance between permitting limited and proportionate instances of preferential treatment based on religion whilst not completely emasculating the principle of equal treatment. The proposed Directive, however, makes no attempt to engage with the nuances of this issue; the permission for "differences of treatment in access to educational institutions based on religion or belief" is unqualified.[34]

The states members of the EU are already bound by existing international norms on elimination of religious discrimination. One of the basic goals of the UN is development and stimulation of the respect of human rights and fundamental freedoms for all regardless their differences on the basis of race, sex, language or religion. The most relevant are the following norms of the UN Universal declaration on human rights.[35]

- everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (art. 2) ;
- everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance (art. 18).

With the Convention on political and civil rights had the states members acquired the following obligations concerning religious rights and freedoms and elimination of discrimination on the basis of religion or belief:

- to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status (art. 2)
- the measures in time of emergency should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (art. 4/1).
- the right to freedom of thought, conscience and religion shall include freedom to have or to adopt a religion or belief of one's choice, and free-

[34] See Mark Bell, Advancing EU Anti-Discrimination Law: the European Commission's Proposal for a New directive, The Equal Rights review, Vol. Three (2009), p. 13.

[35] Universal Declaration of Human Rights, G. A. res. 217A (III), U. N. Doc A/810 at 71 (1948).

dom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching (art. 18/1).

- the obligation that no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice (art. 18/2).
- freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others (art. 18/3).
- to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (art. 18/4).
- to ensure that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language (art. 27).
- to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be (art. 20 / 2).[36]

Declaration on the elimination of all forms of Intolerance and of discrimination based on religion or belief (1981.[37] declares the rights of everyone to have "the right to freedom of thought, conscience and religion". This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practices and teaching art. 1). The right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:

- To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- To establish and maintain appropriate charitable or humanitarian institutions;
- To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

[36] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49.

[37] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief Adopted by the General Assembly at the 73rd plenary meeting, 25 Nov. 1981.

- To write, issue and disseminate relevant publications in these areas;
- To teach a religion or belief in places suitable for these purposes;
- To solicit and receive voluntary financial and other contributions from individuals and institutions;
- To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels. (art. 6)

For the stand of the members of the EU concerning religious freedoms and rights represent moral and political standards the principles, which were adopted at the Vienna meeting of CSCE in 1989. The participating States had confirmed their obligations, which emanate from the UN Declaration elaborated above, and have expressed in addition their determination to inter alia.[38]

- take effective measures to prevent and eliminate discrimination against individuals or communities on the grounds of religion or belief in the recognition and to ensure the effective equality between believers and non-believers (16.1) ;
- foster a climate of mutual tolerance and respect between believers of different communities as well as between believers and non-believers (16.2) ;
- respect the right of everyone to give and receive religious education in the language of his choice, whether individually or in association with others (16.6) ;
- in this context respect, inter alia, the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions (16.7).

The European convention on basic freedoms and human rights (1950) confirms the religious freedoms and rights enshrined in the UN Declaration on human rights (1948) and stipulates that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance (art. 9/1). The enjoyment of freedoms and rights from the

[38] Concluding Document of the Vienna Meeting 1986 of representatives of the participating States of the Conference on Security and Co-operation in Europe, held on the basis of the provisions of the Final Act relating to the Follow-up to the Conference (Vienna 1989)

Convention should be ensured to everyone without discrimination, including discrimination on the ground of religion or belief (art. 14). These two articles have been in combination with others a legal basis for a great number of cases at the European Court on Human Rights.[39]

6. CONCLUDING REMARKS

In order to improve the legal status of ethnic and religious minorities in the EU it would be recommendable that the EU states which have not yet done so, adhere to the following international standards on the elimination of discrimination and on the rights of minorities: a. Protocol 12 to the ECHR–on the elimination of discrimination.[40] b. the European charter on regional or minority languages.[41]**c.** the Framework convention on the protection of national minorities**.**[42] The resolution of the European Parliament 'Protection of minorities and anti-discrimination policies in an enlarged Europe' of 2005 is a good starting point for elaborating further EU policies in this field.[43] The expert group established by the European Commission on the recommendation of the European Parliament has prepared a valuable background for further consideration of the protection of minorities in the enlarged EU.[44]

In addition, the following actions could contribute significantly to the amelioration of inter-ethnic and inter-religious relations in European societies: **a.** Strict monitoring of the implementation of the provisions of the European Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal

[39] See among other: Sara Vann, European court final judgments on religious freedom issues 1964–2001, Human Rights Without Frontiers.

[40] Of the EU members ratified only by Cyprus, Finland, Luxembourg, Netherlands, Romania and Spain. See Chart of signatures and ratifications, status of 16 July 2009 *http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=7&DF=3/7/2008&CL=ENG*

[41] Not members: Belgium, Bulgaria, Estonia, France, Greece, Ireland, Italy, Latvia, Lithuania, Malta, Portugal, and candidate state Turkey. See Chart of signatures and ratifications, status of 7 March 2008: *http://conventions.coe.int/Treaty/.*

[42] Not members: Belgium, France, Greece, Luxembourg, and the candidate state Turkey. See Chart of signatures and ratifications, status of16 July 2009: *http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=8&DF=16/07/2009&CL=ENG*

[43] See: Protection of minorities and anti-discrimination policies in an enlarged Europe. European Parliament resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2005/2008 (INI)), P6_TA-PROV (2005) 0228.

[44] See: Thematic comment No. 3, The Protection of minorities in the European Union, 25 April 2005. Référence : CFR-CDF. ThemComm2005. en; Kristin Henrard, Associate Professor, University of Groningen, Equal rights versus special rights, Minority Protection and the Prohibition of Discrimination (2007). Brussels: European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit G. 2

treatment between persons irrespective of racial or ethnic origin[45] (Bell 2002), **b.** Elaboration of a common EU policy concerning the improvement of legal provisions on the status and rights of minorities, and **c.** Adoption of improved policy and standards concerning the Roma population of the EU, and assurance of the necessary funds in the 2007–2013 financial perspective to create a political and material framework – together with activities adopted on domestic level – for the improvement of the social and economic position of the Roma population, and thus to the political and social stability of countries affected by unresolved Roma problems.[46]

It is necessary to take into account new values which were brought into the EU with the inclusion of the large orthodox communities of Romania and Bulgaria and the values of the large Muslim communities living within the EU as well. Mutual understanding and exchange between the three religions–Christian, Jewish and Muslim–which trace their roots to Abraham's heritage–is a very serious problem of today's and the future Europe, directly linked with its identity (Devetak 2007).

And finally, there is an increasing disjunction between, on the one hand, the array of EU policy initiatives seeking to advance equality via positive action, mainstreaming and data collection, and, on the other hand, the actual content of EU legislation which remains wedded to a traditional complaints-based anti-discrimination model. The preparation of the Directive on elimination of discrimination on the ground of religion or belief, disability, age or sexual orienta-

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[45] The commission has sent in June 2007 formal request to 14 Member states to fully implement the Directive (Czech Republic, Estonia, France, Ireland, United Kingdom, Greece, Italy, Latvia, Poland, Portugal, Slovenia, Slovakia, Spain and Sweden) - For more information on infringement procedures , see: *http://ec.europa.eu/employment_social/fundamental_rights/legis/lginfringe_en.htm* (accessed on 3 March 2008).

[46] On this topic see among other The situation of Roma in the enlarged European Union (2004). Brussels: Euroepan Commission, Directorate-General for Employment and Social Affairs, Unit D-3. Important in this regard is also the European parliament Resolution of 15 November 2007 *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007–0534+0+DOC+XML+V0//EN* (accessed on 3 March 2008), which calls, among other, on the Commission to act without delay by pursuing an overall strategy for social inclusion of the Roma. The Commission has till today still not prepared such a strategy, the existing EU actions for Roma can be consulted on the: *http://ec.europa.eu/employment_social/fundamental_rights/roma/index_en.htm* (accessed on 3 March 2008). Worth mentioning in this regard is an unprecedented regional intitiative for improvement of the socio-economic status and social inclusion of Roma within a regional framework–the intitiative of the nine countries of Central and Southeastern Europe: „Decade of Roma Inclusion 2005 -2015". *http://www.romadecade.org/index.php* (accessed on 3 March 2008).

tion could be a chance for fulfilling a missed opportunity for modernisation and improvement of the EU law on discrimination.[47]

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[47] Mark Bell, Advancing…. ., p. 16.

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INTER-RELIGIOUS RELATIONS AND THE STATUS AND RIGHTS OF RELIGIOUS MINORITIES IN THE EU

Abstract – *In the last 60 years, inter-denominational and inter-religious relations in Europe have become quite strong. The ecumenical movement has significantly contributed to a mutual understanding between Christian churches. The dialogue between Christianity and other religions in Europe has a shorter history, and it implies different problems, but it is also going on. In almost all cases, some of the religious communities are in a minority position towards one or two other communities in a respective country. In this contribution, it will be explored how such a situation influences inter-religious dialogue. Which strategies do religious communities develop in order to strengthen there position in their country? How is the interaction between similar religious communities in different member states of the EU? Is there a connection between theological positions and minority/majority status of a given community?*

Key words: *inter-religious dialogue, ecumenical movement, interchurch relations, religious minorities.*

Relations between religious communities within the European Union (EU) and in Europe generally have significantly developed in the last few decennia. Until the middle of the 20th century, there was virtually no contact between the religious communities, at least on official level. Although in local communities faithful lived together and communicated, and although leaders on local level like priests, imams or others could cooperate, nevertheless such contacts were not frequent, and the leading officers of religious communities usually had no contact.

However, during the 20th century the ecumenical movement developed and began to gain importance among the Christian churches, first in Europe and

North America, later worldwide. Churches and their representatives understood that they had to strengthen their ties, to cooperate and to try to overcome doctrinal differences between them. In this enterprise, almost all churches took part, with two important exceptions: One was the churches in communist countries which refused (or were urged to refuse by their governments) to participate in ecumenical encounters. It was only in the 60ies, that they were allowed to join the ecumenical movement. However, they frequently had to praise the respective regime's polities abroad. The other important exception was the Roman-Catholic Church. Until the II Vatican Council (1962–1965), the RCC refused any contacts and negotiations with other religious communities. Only after the Council during which the RCC acknowledged the value of other churches and religions, and the importance of freedom of consciousness, she entered in contacts and dialogues with other religious communities.

Since then, the relations between Christian denominations and (as a consequence) also with other faiths became stronger. Due to doctrinal closeness, Christian churches could always easier communicate and cooperate which each other, and they had a common goal, as Christian unity is something which all Churches want to achieve. Between Christianity and other religions, there can be cooperation (especially on local level and in concrete questions), but there is no idea to create something like a hyper-religion which would transcend the existing religions. Therefore, there is an essential difference between both kinds of contact.

At the same time, a significant change of the population structure has taken place in Europe. Due to wars, expulsions and voluntary migration processes, more and more people lived in circumstances in which they did not belong to the majority population. They formed a minority, mostly in ethnic regard. That meant frequently also that they formed a religious minority.

European societies were not well prepared for this new situation. Generally, they expected the population of a given country or at least region to belong to the same faith, with very few exceptions. But legislation, school system, or state administration, to mention only some of the areas affected, were not prepared to handle a plurality of people.

For religious communities, the expectations were that they were given rights which would enable them to live feely their convictions and to integrate into the societies which received them. They also started to develop relations to the majority religions in their new environment. This was not always a spontaneous impulse but sometimes rather something which took time.

How did religious communities develop, what did they do in order to strengthen there position in their "new" countries? Which strategies and mechanisms were taken up to continue their life and their mission in a context which was

different from the context of their origin? How did politics, above all politics of the European Union, react, and which measures were taken to enable a peaceful coexistence of different religions in a region or a country? These questions will be dealt with in several theses which will be shortly commented. The accent is on Christian churches. Nowadays, non Christian religions play a more and more important role in Europe, but they are not the topic of this paper as this issue raises a lot of further questions which cannot be dealt with here.

The new situations of religions in Europe fostered dialogue and cooperation between religious communities

The ecumenical Movement came up in a situation when the migration processes mentioned did not yet take place; it was rather the epoch of colonialism and mission which gave the first experiences of interreligious and interdenominational cooperation. However, when members of different religious communities came to live close together, they usually started to communicate, to exchange and to cooperate. Although there were cases of self-isolation, mostly the new kind of coexistence led to new contacts. This changed the attitude of religious communities, both majorities and minorities, in a significant way, and it paved way for a further development of the ecumenical movement.

The ecumenical movement has significantly contributed to a mutual understanding between Christian churches.

The ecumenical movement had started with a very strong theological emphasis. The mission, i. e. the proclaiming of the Christian message to the whole world, and the unity of the church were the main aims. But when the representatives of the churches had to learn that this was quite a difficult task which would not achieved in short time, they stressed the practical cooperation of the churches. And indeed, the churches cooperated in the 20th century more than ever. They developed common Christian ideas also in many political questions and became an influential player in political affairs. Therefore, it was interesting for minority churches to become part of this community and to try to influence also the politics of the state where they lived.

Dialogue proved to be helpful for minority churches.

A better and stronger political position was one of the reasons for churches in a minority position to enter dialogue with others. However, it had more positive functions and consequences: the smaller churches became a partner which was taken seriously by the bigger ones which so far had not been questioned. The latter now had to be aware that the way they believed and lived was not the only possible. Frequently, they experienced the smaller church as enriching, and they did not perceive it as a threat but rather as something positive. In this way, the minority church had advantages from such kind of dialogues and enjoyed the acknowledgement or even support from the majority church. Of course, there are also different experiences, but mostly entering a dialogue proved as helpful for the minority church.

Dialogue and cooperation has also consequences for the theological positions.

When churches enter dialogue, it can easily lead also to practical cooperation. Both bring the churches in question closer to each other. They do not only follow practical aims, but they also will come into a closer consideration of the motives and the positions of the other church. This will lead to a slow change of the own positions which are influenced by this kind of contact. If the change comes too quickly, the church in question will experience this as a lost of its identity and will not be able to accept the change. However, in the case the change is regarded as something which enriches the own tradition, it can be integrated into the own system of convictions. Thus, the theological positions of a do not stay unchanged by a dialogue with another church.

Minority experience makes a church more open.

There are several examples which can show that a church in a minority position has the tendency to lock up against influences from outside. A church tries to preserve what it understands as its identity, and frequently it tries this by not changing anything. However, when minority churches come into contact and dialogue with the majority church, they necessarily change, and mostly they change in a way which makes them more open to new perspectives and insights. Both churches, in minority as well as in majority positions, will understand (and even more important: they will experience) that the other church has positions which can enrich one's own standpoints, that the other church may help in prac-

tical matters, and that the members of the two churches anyway live together, work together and develop friendly relations. But all these processes have more effect and more significantly influence the minority churches.

Within the EU, there is a range of different ways to deal with religion

When the European Union was founded, there were almost no ideas about religion (and also not so much about the Christian foundation of Europe which nowadays are more and more stressed). The EU started as a political and economical body which was founded in order to prevent another war in Europe. Therefore, there was no special European way to deal with religion. The main examples for the complete different approach to religion are France which has a long tradition of laicité (which is not exactly the same as laicism), Germany with a form of separation and cooperation at the same time, and Great Britain with a state church. New members of the Union brought in new models for the state-church-relationship. Therefore, there cannot be spoken about "the" European model in this question.

EU deals with religious issues on the level of member countries

Because of this historical heritage, the EU decided to leave the politics of religion in the realm of its member states. There are no European laws which would prescribe form of dealing with religion to the single members. Each traditional form can be preserved, and no state is urged to develop a relationship to religion which is not in line with its traditions. The regulation of minority/majority questions, however, can be subject to European legislation. It will be one of the main tasks for the future to find out which questions are of religious character, and which one belong to tradition, culture, or other individual features. This will not always be simple, but it is necessary in order to come to a European system in which the religious rights of each individual inhabitant are protected.

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LEGAL INSTRUMENTS OF MINORITY LANGUAGES PROTECTION IN EUROPE

Abstract – *Many European countries have on their territory regionally based autochthonous groups speaking a language other than that of the majority of the population. This is a consequence of historical processes whereby the formation of states has not taken place on purely language-related lines and small communities have been engulfed by larger ones. The demographic situation of a regional or minority languages varies greatly, from a few thousand speakers to several million, and so does the law and practice of the individual states with respect to them. However, what many have in common is a greater or lesser degree of precariousness. Moreover, whatever may have been the case in the past, nowadays the threats facing these regional minority languages are often due at least as much to the inevitable standardizing influence of modern civilization and especially of the mass media as to an unfriendly environment or a government policy of assimilation. For many years various bodies within the Council of Europe have been expressing concern over the situation of regional or minority languages. It is true that the Convention for the Protection of Human Rights and Fundamental Freedoms in its Article 14 lays down the principle of non-discrimination, in particular outlawing, at least with respect to the enjoyment of the rights and freedoms guaranteed by the Convention, any discrimination based on such grounds as language or association with a national minority. Important though this is, however, it creates only a right for individuals not to be and the communities using them, as was pointed out by the Consultative Assembly as long ago as 1957 in its Resolution 136. In 1961, in Recommendation 285, the Parliamentary Assembly called for a protection measure to supplement the European Convention to be devised in order to safeguard the rights of minorities to enjoy their own culture, to use their own language, to establish their own schools and so on. The Charter is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage For this reason it not only contains a non-discrimination clause concerning the use of these languages but also provides for measures offering active support for them the aim is to ensure, as far as reasonably possible, the use of regional or minority languages in education and the media and to permit their use in judicial and administrative settings, economic and social life and cultural activities. Only in this way can such languages be compensated, where necessary for unfavorable conditions in the past and preserved and developed as a living facet of Europe's cultural identity.*

Key words: *minority languages, protection, legal instruments, European Charter of Regional and Minority Rights, Framework Convention for the Protection of National Minorities*

1. The European Charter of Regional and Minority Languages

This Charter has been adopted as a Convention by the Committee of Ministers in its meeting of 25 June 1992, with the abstentions of Cyprus, France, Greece, Turkey and the United Kingdom. France, Greece and Turkey had opposed that the Charter had the nature of a convention and proposed to consider it as a "recommendation". The Charter was ready for signature by the member states on 5 November 1992 and came into force on 1 March 1998 after having been ratified by the first five countries.

The main purpose of the Language Charter is to protect and promote regional or minority languages as a threatened element of Europe's cultural heritage. So, the Language Charter tries to ensure the use of these languages in education and the mass media, allowing also their use in administrative, judicial, economic and social fields. The charter does not establish individual or collective rights for the speakers or regional or minority languages, but sets out the obligations of states and their respective legal systems with regard to the use of these languages. Indeed, the Language Charter seeks to promote regional or minority languages and only in an indirect way can it be considered as a legal instrument to protect linguistic minorities.

In Part I the Language Charter define its terms of reference excluding from its contents the non-European languages which have recently appeared in the member states as a consequence of immigration. Although the protection is not limited to languages with a linguistic dominion in a given territory, the purpose of the Language Charter is to develop the use of the languages traditionally spoken in the continent, regardless of their official status, that is to say, the languages which are used in limited areas of the territory of a state or which are part of the heritage of minority groups not concentrated in any specific part of such territory. In this respect, each state, at the time of ratification, must declare which regional or minority languages are spoken within its jurisdiction and what dispositions of the Charter will be applied to each of them, whilst being aware of the different socio-linguistic realities and the structure of the Language Charter. This includes in Part II a list of basic principles that must be implemented with respect to all the languages concerned, while the Part III contains more specific provisions allowing the states, within the limits and requirements shown on the text, to decide freely whether to apply a provision for a given minority language. Finally, the Charter establishes in its Part IV measures for its application, including the creation of a European Committee of Experts.

This Charter nonetheless is designed for a limited purpose and that it manages to achieve providing a limited "undertaking" to recognize minority lan-

guages rather then to accord specific language rights to recognized languages. The approach adopted by the Charter enables countries to apply only those provisions which the state retains to be capable to apply allowing a huge space of flexibility. What might appear as an advantage to many states, in reality is a disadvantage to the national minorities which are not entitled to challenge concrete provisions under a precise text of international law.

2. The Framework Convention for the Protection of National Minorities

The origin of the Framework Convention for the Protection of National Minorities (FCNM) can be found in Recommendation 1134 (1990) of the Assembly of the Council of Europe, in which the parliamentary body defined some principles that should be applied to the protection of national minorities. On 10 November 1994 the Convention was adopted by the Committee of Ministers and came into force on 1 February 1998 after having been ratified by 12 member states. The FCNM is the first multilateral legally binding instrument devoted to the general protection of European minorities. Its aim is to protect the existence of national minorities within the respective territories of the parties. The Convention seeks to promote the full and effective equality of national minorities by creating appropriate conditions enabling them to preserve and develop their culture and to retain their identity. It sets out principles relating to persons belonging to national minorities in the sphere of public life, such as freedom of peaceful assembly, freedom of association, of expression and thought, conscience and religion and access to the media, as well as in the sphere of freedoms relating to language, education, and cross-border co-operation.

The FCNM tries to give the signatory states a high degree of flexibility with respect to its implementation and to encourage the participation of the maximum number of states. The dispositions contained in the FCNM, unlike conventional international treaties, are not directly applicable, but oblige the state parties to set forth legislative and executive measures appropriate to implement the dispositions of the convention. The FCNM does not contain any definition of the term national minority. This initial claim was rejected on a pragmatic basis because of the great difficulties involved in reaching a general consensus amongst the different states in such a definition. On the other hand, according to the European liberal perspective, the rights included in the Convention correspond to the persons belonging to minorities and there is no reference to collective rights for the minority groups themselves. The explanatory report notes that the Convention does not imply the recognition of collective rights. This

individualistic approach, following the UN-Declaration on minority members of 1992, recognizes the right of any person to be considered as a member of a given national minority, regardless of his or her ethnic, linguistic or religious identity.

Generally the FCNM carries many flexible definitions open to each kind of interpretation depending on the interests and attitudes of the states. A good example is Art. 14.2: "In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavor to ensure, as far as is possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language. " Formulations of this kind clearly give national governments a good deal of discretion on whether and, if so, how, to make provision for minority language education.

The FCNM can be considered therefore as a weak protective legal instrument giving to the states a wide margin within which to operate, within the respect to the existence of national minorities and the rule of non-discrimination. Its adoption shows in a way the fear generated by the Yugoslavian conflict, in the sense that neglect of protection for national minorities could provoke political instability, mainly in the Eastern and Central part of Europe. Despite its flaws, the Convention in its form and contents offers a minimum level of protection. The tentative nature of its goals is also reflected in the mechanisms which monitor its implementation contained in Section IV. These are based in the submission by member states of periodical reports that will be analyzed by an Advisory Committee and the Committee of Ministers.

After the approval of the FCNM, the Parliamentary Assembly of the Council of Europe continued to press for the elaboration of an "Additional Protocol to the European Convention of Human Rights" to include the rights of persons belonging to national minorities, particularly in the cultural field. How has the FCNM been implemented? The control mechanism established by the FCNM is based mainly on the state reports on the implementation of the Convention to be delivered within a year. In 2002 32 European states were obliged to provide for this report. Most of them reported about the new legislation put into force since the 1990ies in the field of minority protection. This legislation very often still is to be improved and applied, but the first steps have been set and are enforcing a growing dynamics towards recognition and protection of minorities. It is sometimes astonishing to assist to real U-turns of state behavior from ignoring totally the very existence of a minority, to a friendly attention and activity. A new political culture of appreciating ethnic minorities as a general enrichment

is slowly spreading over the continent. From the single state reports some major issues are resulting.

a) About 50% of the states do not anymore have any problem with recognizing their traditional minorities. Most of them in the next census will register the ethnic and linguistic affiliation of their citizens, if they have not done it yet. Some states (for instance Finland, Norway and Sweden) went further: beyond the already recognized minorities they are recognizing more of them.
b) About 50% of the states have already created the legal prerequisites for the non-discrimination of members of minorities and the formal equality for all legal aspects. Of course full compliance by facts is still to be delivered, especially regarding the Romany.
c) The factual equality in terms of equal opportunities of all minorities in most states is still lying ahead and still seem in many fields a long way to go.
d) The right to use the mother tongue when dealing with public institutions and in the judiciary in nearly all states still is quite inadequate. Sometimes existing legal provisions are simply not applied. In some cases this is due to the fact that minorities have no homogenous settlement area rendering any language facilities more difficult.
e) The public education in the mother tongue of minorities is assured in a few states only. Most of the states are still lacking the legal basis or haven't yet implemented it.
f) The compliance with assuring the right to free association is much better now as 2/3 of the states have met their obligations.
g) The right of members of ethnic minorities to have cross-boarder contacts with their fellow persons and organizations sharing the same culture, language, history, traditions.
h) The right to information requires the equal access of minority members to all audiovisual and print media. In only 1/8 of the states this right is definitely assured, but not for all minorities living therein.
i) Major problems, apart from some more progressive states, have arisen with the political representation of the minorities, with the right to self-government and administration, with autonomy, with safeguarding the legal protection and enforcing the laws.

Regarding autonomous development there is nothing more than the statement that "the parties shall create conditions necessary for the effective participation of persons belonging to national minorities in cultural and economic life and in public affairs, in particular affecting them" (art. 15), this a very weak obligation.

3. The effects of the Framework Convention of National Minorities and the Charter on Regional and Minority Languages

The Framework Convention on National Minorities has come into force in 2003 for 34 European and Transcaucasian states. Just France and Turkey still keep aside as their very raison d'état does not recognize any minorities at all. In January 2006 38 states have ratified the FCNM, 4 governments had put their signature, but parliaments have denied ratification. No signatures have been registered by: Andorra, France, Turkey, and Monaco. No ratification has been accorded to the text by Greece, Belgium and Luxembourg. The "Language Charter" has been adopted by 19 European states, but 13 governments had given their signature without a ratification following. For both instruments there has been developed a multiphase control mechanism within the Council of Europe. This mechanism since 1999 has been successfully applied in several cases both legal instruments; the FCNM and the Language Charter, in recent years have triggered a considerable dynamics in the recognition and protection of ethnic minorities in Europe. Not only the Eastern European countries seem to be fully involved in this evolution, but in a certain extent even the Caucasus region. Whereas the emphasis of the FCNM is lying in fundamental features and encompassing all basic issues of minority protection, the Language Charter is focusing on the linguistic and cultural questions, but in a more detailed way. The implementation of the Language Charter is linked to a broad set of practical and technical decisions, while the FCNM in many aspects provides provisions for minority protection in rather flexible and generic terms. The Language Charter might appear an instrument with a lesser impact as only the languages, but not the speakers are protected. But as languages, at least in the European social reality, are the main distinctive feature of cultural identity, their recognition, protection and active promotion is of utmost importance. Adopting effective means to protect and promote a minority language often is the immediate official public commitment to a comprehensive responsibility for the minorities as such.

The introduction of both instruments has in some cases even produced some surprising results. The implementation of the FCNM brought about divergence in both, the choice of the goals and the choice of the means, due to the diverging interests of the states and the national minorities. There are different strategies to tackle the respective interests. Some states try to involve their minorities in solving the problems like Hungary and Finland; others are not even interested to reach a consensus with their minorities. This is simply the continuation of a pattern of state actors' behavior tracing back to the constitution of Europe's na-

tion states. France, with its deeply rooted tradition of centralist organization, is only slowly setting new steps towards the recognition of its minority languages.

On the other hand it has been surprising that not a few minorities have not yet been able to participate in the process of elaborating objectives and projects, tools and proposals for their own protection. This phenomenon came up mostly in those cases where minorities did not face resistance from central governments and they have been invited to join the process of implementation. There are many minorities in Europe which are still not politically organized and technically prepared to assume a role of full self-representation, as they still have to solve the problem of democratic legitimacy which is essential in a democratic system with the rule of law.

Some specific questions turned out in the 90ies as a medium and long term consequence of the dissolution of the Soviet Union in 1991. This is the change of roles between majorities and minorities which occurred in various former member states of the USSR, which gained independence. The former national minorities of the Latvians, Estonians, Lithuanians, Byelorussians, Ukrainians, and Moldavians became overnight state-nations, whereas the Russians living in USSR as a dominant majority in those states found themselves as national minorities. In all the new nation states the respective national language was accorded the status of official languages and to put much effort in recovering as a standard language. Paradoxically this new state languages–Estonian, Latvian, Lithuanian, Byelorussian, Ukrainian and Moldavian–had to be sustained, instead of protecting the new national minorities of the Russians. In most fields of state functions, from the education system to the judiciary, those languages had to be strengthened vis-à-vis the former dominant public language Russian.

4. Minority protection in the framework of the European Union

The EU, is not an international, but a supranational organization, which sets forth practical law in a broad range of policy sectors. It is estimated that nearly two thirds of all legal provisions in the area of the EU now is stemming from the Union. But every single act of the EU needs to be founded on a particular article of the EU-Treaty, where all its powers are precisely enumerated. In other terms, the EU cannot limit itself to issue just political statements and very flexible covenants, but it has to put in force concrete and binding legal instruments. Since commitment to minority issues would have binding force in legal terms for each member state, the EU members still have been reluctant to include this matter in EU-powers, considering it a classical core affair of the single states.

With the completion of the creation of the European Union (Treaty of Maastricht 1992) and the completion of the single market (1993) the European integration opened up to more political spheres, but still in the Amsterdam Treaty (in force since 1 May 1999) the EU refrained from taking up powers regarding ethnic or linguistic minorities. Although at least 30 millions of EU-citizens as their mother speak a regional or "lesser used" language, the efforts of the EU-institutions have been scarce. Rather a negative approach can be perceived as the EU is actively controlling whether national law aimed to protect minorities is compatible with EU principles and laws, for instance it is checking carefully whether specific linguistic provisions (bilingualism in minority areas) are compatible with the basic freedom of residence of EU-citizens and freedom of movement of workers on the whole EU-territory.

Hence, the activities of the EU relating to minorities, also after the Treaty of Nizza (2000) remained rather scarce. They can be divided into four groups:

- measures of mainly political character, developed by the European Parliament, in promotion of cultural diversity and preservation of the cultural heritage
- measures undertaken by the European Commission, the Council (and the Parliament), characterized by a functional approach;
- measures taken in the framework of the EU foreign policy, without touching the internal sphere of the EU;
- not minority oriented policies, which still are relevant to minority issues. These include areas such as human rights policies, anti-racism policy, refugee policy etc.

Among all European institutions (Parliament, Council, Commission, various courts) the Parliament is the organ which has shown the most intensive interest in minority issues. A range of resolutions dealing with ethnic and linguistic minorities have been approved by the Parliament:

- 1981: Resolution on a "Community Charter of Regional Languages and Cultures" and on a "Charter of Rights of Ethnic Minorities"
- 1983: "Resolution on Measures in favour of Linguistic and Cultural Minorities
- 1987: "Resolution on the Languages and Cultures of the Regional and Ethnic Groups in the European Community".
- 1994: "Resolution on Linguistic Minorities in the European Community" on the basis of the so called Killilea report.

The member states should recognize their linguistic minorities and create the basic conditions for the preservation and development of these languages. The legal acts should at least cover the use and encouragement of such languages and cultures in the sphere of education, justice and public administration, the

media, topographic names and other sectors of public and cultural life. This resolution for the first time laid also to concrete measures and programmes of the EU to promote minority languages.

The European Parliament reiterated its fundamental approach to human rights establishing the respect of the rights of minorities (ethnic, linguistic, religious, homosexual etc.) as prerequisites for accession negotiations. Another example of that approach is the "Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination. It states that combating discrimination against immigrants and religious minorities is "integral to any comprehensive policy against racism and xenophobia". Last but not least there have to be mentioned some European Parliament-resolutions which are treating specific minorities (in Albania, Romania, resolutions on discrimination of the Romany in several countries). As the EU has no normative powers regarding the protection of minorities, it could not create any binding normative act such as directives or regulations.

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THE STATUS OF NATIONAL MINORITIES ON THE BALKANS-COMPARATIVE REVIEW

Abstract – *The Balkans is most often described as a place were great religions and cultures meet: Islam, Christianity, Judaism. Mediterranean, Orient and Levant cultures introduced peoples from the Balkans to the Classic, Byzantine, Islamic and Hebraic traditions. On the foundations of the ancient cultures a cross-cultural civilization was built which attributes are both, the Cross and the Crescent, the holy books are both, the Bible and the Koran, and it is both Hellenistic and Pan-Slavistic. Archeological, linguistic, ethnic and historic heritage point to the, if not unique, then for sure, germane cultures of the peoples of the South-East Europe.*

However, the similarity of cultures did not always mean good relationships among the peoples and states on the Balkans. The "Narcissism of the small differences" was often at the root of the conflicts and the ethnic, linguistic and religious differences were the cause of suffering. Modern times and political changes that have occurred in Europe during the last two decades established new legal criteria the goals of which are regional stability and protection of minority ethno-cultural identity. Multilateral and bilateral instruments and mechanisms were adopted and developed, both on the European and regional level, to ensure the rights and identity of minorities. Balkan states in the process of political and legal transition were given conditions and regulations regarding the protection of minority rights, which were to be realized before their joining the European Union. Most of the Balkan states brought, in the framework of their statutory-legal systems, clauses which regulate legal status of the minorities. On the regional level, a policy is being developed which should help civil societies and states overcome the effects of the conflicts, especially those from the last decade of XX century.

In spite of the efforts of the international community and the Balkan states there are still places where a high level of interethnic tension endangers the process of reconciliation and stability in the region.

Key words: *national minorities, the Balkans, identity, post-conflict society*

1. The Balkan Ethnic Myth

Points of meeting of great religions and different cultures permeated and enriched the Balkans spiritual sphere, but at the same time they were the cause of partitions and schisms. Tribal and religious passions, kindled by the centres of power outside the Balkans, inhibited the process of deeper connecting of peoples. Tempestuous history of the region testifies not only to rising movements for the liberation from the imperial paternalism but also to the mutual separatist and irredentist experiences of the Balkans states. In situations like these, closeness of languages, religions and traditions presented a burden that had to be shaken of and exchanged for a new one, more difficult and poorer in content.

Exclusive ethnic "ego" of Balkan nations was based on the irrational romanticism, glorification of the heroic and mythic past, as well as on the underdeveloped civil society and the creation of the collective individual as the foundation of progress (Boyd, 1982, 234). Ethnocentrisms on the Balkans is based on the primordial understanding of ethnicity which aspires to give universal meaning to the relations within a group, mostly blood relations, on the broader scale of social relations. Other, especially neighbouring nations are usually perceived from the point of view of the ethno cultural narcissism. Nations who have lived for centuries under the imperial shadows, who have, both, endured and done injustice, can not judge unbiased neither others nor themselves. Their ideas about the others have the power of the mass, but these, as a rule are not always valid and just. Several years ago Ms. Adela Peeva, Bulgarian ethnologist, toured the Balkans in order to establish the origin of a single folk song sung in a different way (lyric, patriotic, or as an elegy) in different Balkan states[1]. Exclusivity and "property claim" on the melody noted by Peeva among the majority of the respondents only confirmed that "narcissism of small differences" of the Balkan nations is not to be regulated easily by the modern standards of protection of human and minority rights. The fact that such a small matter could involve even people not directly concerned was proved by my younger faculty colleague whose ethnic roots are not in the Balkans but in the rich heterogeneous and limitrophic Middle European ethno cultural identity. Upon hearing my students and me discussing the problems of ethnical identity and ethno cultural differences and dilemmas instigated by the mentioned song, he sent me a soundtrack of it recorded at the beginning of the twentieth century, which, in his words, "undoubtedly" proves the song to be of the south Serbian origin. A never ending debate.

[1] *http://ferdyonfilms.com/2006/02whose-song-is-this.php*

In literature, travel and living guides but also in geopolitical and professional analyses, the Balkans are described on the basis of numerous prejudices and stereotypes. Some of these are founded in the romantic concept of the Balkans being the meeting and melting point of great religions and cultures-Islam, Judaism and Christianity, and the others based on the malicious reminder that the Balkans "produces more history than it can itself take". Well informed diplomats write that the American Administration had created a substantial part of the contemporary politics towards the Balkans mostly on the literature abounding in prejudices and stereo types about the Balkans and its people[2]. "Balkanisation" became a synonym for all ethnic schisms. In Africa, in literature and political jargon, the term "balkanisation" is often used in disputes about ethnic and tribal successions and demarcations. Leopold Sengor, former President of Senegal, and Patris Lumumba, the first Prime Minister of Congo, persistently warned and pointed out the dangers of the phenomenon of "balkanisation". In the balkanisation of the continent Lumumba saw the highs evil and latent restitution of colonization. Congo, only formally undivided, Somalia and Sudan too, are the most often mentioned states in the context of the Balkan fate of dramatic schisms, conflicts and ethnic exclusivity. It appears that even American scientists lack no motivation to use the Balkans as a picturesque metaphor of a possible racial stratification of American society. Trailing Huntington's concern about the future of white, protestant America (Huntington, 2005) quite a few conservative authors find that the USA suffer from the latent syndrome of balkanisation, that is since the policy of the "melting pot" has not contributed to the creation of a unified American nation, a period of segregative multiculturalism will follow during which, the weaker (language and culture) Hispano-American population will put on the agenda the question of recognizing and institulaizing the collective rights (Hanson, 2006).

The "ghost" of the Balkans is not restricted to its geographic background (Teodorova, 1997) and it is reflected in all ethnic tensions all over the world. Many are willing to pigeonhole all ethnic conflicts "smouldering" and opening around the world under the term of balkanisation (India, China, Spain, Belgium, Congo, Indonesia). However, there are but a few who understand the essence of Balkan Gordian knot in the core of which lie all primordial factors of ethnic identity tightly knit together. Missunderstandings among the Balkan nations exceed the political rational and have often been, over the years, the cause of reconstructions of the scenes and experiments in times when man was a wolf to a fellow man (Hobs, 1955).

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[2] See: Noel Malcom*, Bosnia: a short history*; 1994;Robert D. Kaplan, *Balkan Ghosts*, 1993

2. Minorities in the Balkans

The present status of national (ethno cultural) minorities on the Balkans is determined by the misconception about the "end of the history", that is about the beginning of the last large transition which has with its reforms encompassed contemporary social and economic systems. However, during that process, disintegration of the socialist states, especially Yugoslavia, which, apart from Greece and Turkey, were the rest of Balkan states, reopened the question of the status of several Balkan nations. Albanians, who, alongside their native state, live in significant numbers in Macedonia, in the northwest of Greece, southeast of Montenegro and Kosovo, have been actively trying to solve the question of their political and cultural identity as well as the question of their territorial and political links.

Resolving of political, state and national identity of the Bosnjaks started during the '70s in the socialist Yugoslavia, and, upon its disintegration, through a dramatic civil and religious war. When the war ended in 1995 it was the Dayton Agreement that contributed to the constituting of a complex state of Bosnia and Herzegovina, in which the Bosnjaks comprise the majority in the relation to the Serbs and Croats. It also helped establish the native state of Balkan's Bosnjaks (Muslims). The problem lies in the fact that other Bosnjak enclaves in different Balkan states, except the religion that ties them to Bosnjaks in Bosnia and Herzegovina, have no other recognizable ethno cultural identity nor collective links.

After the disintegration of Yugoslavia about two millions of Serbs, who remained to live in the neighbouring Balkan states, believed that they have historic and also ethnic right to the lands they had traditionally inhabited over the centuries. The Serbian establishment of that time, supported by a part of the Serbian elite, endeavoured to preserve, on all accounts, the political and territorial unity using nonpolitic and nonlaw means, i. e. to ensure the conditions for the majority of the Serbian population to live "under one roof". This lead to a faster break up of political ties with south Slovenian nations and to the war. When the war ended the Serbs remained scattered in several states – in native Serbia, Republika Srpska (as one of the entities of Bosnia and Herzegovina), Croatia, Montenegro, Macedonia and Slovenia[3]. A significant enclave of Serbs lives in Kosovo, south Serbian region. In 2008 the Albanian majority carried out

[3] At the beginning of the twentieth century the Hungarians found themselves in the similar situation as the Serbs at the end of it. The demarcation that followed the disintegration of the Austro-Hungarian monarchy left the Hungarians scattered in several Middle European and Balkan states. The most numerous Diaspora in the region being in Rumania, Ukraine, Serbia, Slovak Republic, Croatia and Slovenia.

a referendum on the basis of which the partition of the territory of Kosovo from Serbia was proclaimed. Since then Serbia has been striving at the International Court of Justice to dispute the referendum insisting that the international law and the principal of unchangability of the boundaries of a sovereign state had been violated.

During the process of building the national states of Balkan peoples the status of minorities acquired the south Slovenian nations which had, up to 1991, according to the constitutional legal system of the common state, enjoyed the same rights – Croats, Slovenians, Bosnjaks, Macedonians and Montenegrins. The solving of this ethnic gallimatias in this part of the Balkans has gone, as mentioned, through several phases – from the rough ethnification policy, through ethnic conflicts, ethnic cleansing, forceful migrations and changing of borders to the institutionalisation of the high standards of minorities protection.

Albania, which, during the communist regime, had lead a severe and restrictive policy towards national and religious minorities, developing a specific kind of assimilation and creation of a unique nation, suddenly faced a revitalization of the identity of Hellenic, Slavic (Serbian and Montenegrin) and Romany minorities (Bašić, 1994, 24). Much bigger a challenge in defining the regional policy and maintaining good neighbourly relationships is the status of the Albanian minority in the region and their expectations of their kin state to carry out the proactive policy regarding their cultural and territorial links.

Bulgaria and Romania, the east Balkan states, have, in spite of their interethnic tensions expressed at the beginning of the 90ies, successfully completed the process of transition by joining the European Union. Greece, the country of "old democracy and an old member of the European Union, does not recognize collective rights of the national minorities and supports the concept of a traditional orthodox state, founded on the collective religious identity and liberal democracy regarding the ethno cultural identity of the minorities.

This short introduction suggests a stratified multicultural space which, with all its contradictions, should, in near future, fit into even more stratified social and cultural space of the European Union. At the time of Romanian and Bulgarian joining, otherwise stratified structure of population, was not considered a barrier to the development of democracy, on the contrary it was established that the achieved level of protection of the minorities fits the Copenhagen standards. As opposed to the countries of the West Balkan, which have , through the constitutional legal system, introduced and applied widely in practice Copenhagen criteria, and have passed special laws on protection of national minorities rights[4]

[4] Separate laws on the protection of minorities were passed by Croatia, 2002, Serbia, 2002, Bosnia and Herzegovina, 2003, Monte Negro, 2005. In its Constitution Serbia has included one chapter and about ten articles on the regulation of the status of the minorities. Besides the constitutional

Bulgaria and Romania have chosen the "softer" system of protection of the minorities rights. However, it should not be forgotten that the first ethnic conflicts in the region started in Tirgu Mures between ethnic Hungarians and Romanians. In 2001, after Hungary had passed the Law, according to European standards of protection of minorities' rights, on Hungarians in neighbouring countries, Kaplan's "Balkan Ghosts" swirled above the Central Europe. Hungarian neighbours, especially Romanians and Slovaks understood this Hungarian endeavour not as a law, that all the countries in JIE and CE have (except Serbia) but as a plan of restitution of the lost territories and certainly not as an legitimate attempt of establishing ties between Budapest and over two million of compatriots in the region. The suspicions were clearly expressed and the dispute was settled through the diplomatic activities, the opinion of Venice Commission, changes of the Law, its restricted use in practice and finally adding an Annex to the Bilateral agreement on neighbouring relationships which contains a special section on mutual protection of the minorities.

Let us also remember that one of the delayed conditions put up to Romania was to pass a separate law on the protection of minorities' rights, which, in spite of the debate lasting more than ten years in the Romanian political life, has not been done yet. Also Bulgaria which, though easing on the former constitutional and legal restrictions regarding the protection of religious and cultural and in some cases political rights of the Muslim population, has not as yet resolved the basic problem of a strong antagonism between the orthodox and Muslim communities. Although lessened, the ethnic distance towards Roma and Muslims is still exceptionally high (Mitev, 2004, 137).

Legal status of the national minorities in the region, but also in the other post communist states in central and east Europe is arranged in accord with the standards created by the Council of Europe and OSCE and are in compliance with the Criteria from Copenhagen. European Charter for Regional or Minority Languages and Framework Convention for the Protection of National Minorities and recommendations on education, official usage of language and media which were brought by the OSCE High Commissionaire for national minorities contributed to establishing minimum standards that the states had to achieve while creating the policy of protection of national minorities. The core of the protection consisted in the states recognizing and institutionally acknowledging different minority ethnic, language and cultural groups wishing to preserve their

law on minorities right protection, Croatia has passed laws regulating the right of education in the languages of the minorities as well as on the official usage of language and script. After the Albanian-Macedonian conflicts, Macedonia changed its Constitution by which it became a multinational state and the members of the Albanian minority group were given strong guaranties of protection of their cultural and political rights.

specific ethno cultural differences, ensuring the right conditions. Ethno cultural impartiality on which west liberal state has been created was corrected in the post communist states through the recognition of the rights to protection and preservation of the ethno cultural differences (Kymlicka, Opalski, 2001). The essence of the protection of the identity of the ethno cultural minorities matured eclectically: a) with the help of mentioned European standards which application was overseen by the European institutions; b) on the experiences which the region already had, especially on the ex-Yugoslavian participative-integrative model of protection of minorities rights; and c) on the experiences obtained from the states which have in different ways, by affirmative measures, policies of equal possibilities and by other social and political measures integrated the minorities into the social relationships (Kymlicka, 2000).

In practice it means that the Balkan states have during the transition into constitutional legal systems built in the regulations by which they had committed themselves to develop the policy of tolerance, inter-ethnic understanding, non-discrimination and protection of the identity of the national minorities[5]. The protection of the identity in most cases amounts to the acknowledgement of language, educational and cultural rights, provision of the policy and the infrastructure for the realization of these rights and, most often, integration of the representatives of the minority groups into the process of decision making when it concerns the cultural rights.

In relation to this, two institutions established in Croatia and Serbia during the transitional period, should be demarcated – cultural autonomy of the national minorities and minority autonomy (self-management) which means that the members of the minority groups elect their own minority self-management which decides independently on the questions of the protection of their ethno cultural identity[6]. Cultural autonomy of the minorities implies that through the special laws the minority self-management are given special powers in the

[5] Constitution of Serbia, 2006: art. 1, 14, 21, 75–81, 190, 199. Constitution of Croatia, 2000: art. 3, 12, 15, 82. Constitution of Macedonia, 1991: Constitution that was passed during the Yugoslav crisis did not have the support of the members of national minority groups, especially Albanians. Ethnic unrests which occurred in2001 were resolved with the help of and pressure of the international community by passing the Ohrid Agreement which goal was preservation of the Macedonian state through the acknowledgement of ethnic identity of all citizens of Macedonia. The Ohrid Agreement was transformed into Amendment No 21 of the Constitution of Macedonia, passed in the Parliament in 2002 (Škarić, 2004, 177). Constitution of Romania, 2003: 6, 16, 20, 32, 120, 128.

[6] Similar concept in the region was adapted in Bosnia and Herzegovina and in Monte Negro, but due to the different unfavorable political and social circumstances were never finalized and realized.

sphere of language, cultural and educational rights[7]. Similar Law was passed by Bosnia and Herzegovina, but its range is not long, because according to the Dayton Agreement and the constitutive system of the state comprising of equal nations of Bosnjaks, Croats and Serbs, where the minority population, except Romany, make less than ninety thousand of different national minorities. Macedonia and Romania had ensured the rights to the cultural autonomy through developing constitutions established systems of state measures in connection to educational, language and cultural policy towards minorities. As an example, in Macedonia there is a state University where all is taught in Albanian, and similarly, in Romania, there are several state universities where Hungarian is official language. Also, in both states there are numerous cultural associations, minority media and other institutions that "simulate" cultural autonomy. In practice, the survival of such system of cultural autonomy of the minorities is ensured on the basis of the fact that numerous members of the Hungarian minority in Romania, and Albanian in Macedonia, during elections mainly support their minority parties which leaders, on the basis of their coalition potentials, ensure, among other things, the protection of cultural identity. The high level of ethnic differences between majority and mentioned minorities can also explain this model of the management of the minority policy, as well as the relative ethnic homogeneousness of minorities in certain regions, which points to the segregate type of multiculturalism (Bašić, 2006). This type, as a rule, institutionalises existence of the parallel worlds or the "right of being alone" to use David Kalahari's term for the ethno cultural reticence.

3. Political Participation of National Minorities and Cultural Autonomy

The change of the ethno cultural policy of the Balkan states points to at least three hypotheses. In the first place, the policy of the protection of the rights and the ethno cultural identity of the minorities in the Balkans is not an authentic regional initiative, but it is brought into effect under the guidance of the European institutions with the help of a forehand set standards[8]. Secondly, cultural au-

[7] Constitutional law on the rights of national minorities RH (no. 01–081–02–3955/2, Zagreb, 19, December 2002) ; Law on the protection of minority rights in SRJ (February 21, 2002) and the Law on elections and jurisdiction of national councils of national minorities in Serbia (Law on the parliamentary procedures).

[8] Not wanting to go into details I shall point out two facts that confirm the supposition: the realization of the policy of the minorities is overseen by two expert bodies of the Council of Europe in charge of the application of the standards of the Framework Convention and European Charter. On the basis of state and alternative reports both bodies suggest the measures to the European

tonomy of the minorities and their self management in regard to the protection of ethno cultural identity is directly connected to the largeness of the certain national minority and, also, to the political initiatives coming from their native state. Protection of the cultural rights, as a rule, is more successful if the members of the minority group inhabit in significant numbers a relatively homogenous space. However, beside that, larger minority groups represent a significant social capital and historic heritage of other states and nations, which, each in its own way, influence the preservation of the identity of fellow-countrymen.

The third and the last, the participation of the members of the minority groups in the public life is not reduced only to the self management in regard to their cultural autonomy, but also, in most of the Balkan states, the play a significant role in their political life. In regard to the third, we can say, fact, which could be proved, it should be said that ethnically organized parties can contribute to the consolidation of the democracy if it is organized on the co social model (Lijphart, 1977), but they can also hinder it, if it concerns pure majority-minority relationships (Berghe, 1976). Walker Connor has early noticed that the national minorities have, during the process of building a nation, often been ignored by the majority (Connor, 1972), which was later confirmed by Kymlicka and other theorist of multiculturalism. In such condition the members of the minorities usually react in three ways: a) they accept the model of building the nation of the majority and "silent" assimilation; b) they close themselves into ethnically, culturally and politically homogeneous space from where they make the answers to the policy of the majority or c) they integrate without the assimilation, which implies strong cultural autonomy of the minorities and self management in regard to the questions of importance for their preservation of identity and leading of ethno cultural policy, but also effective participation of the representatives of the minorities in the social, economic and political life which is made available to them without any partitions, prejudices or discrimination[9].

All three models are present in the Balkan states and in some cases political parties of certain minorities possess a strong political capital which enables them to participate in decision making proactively. At the beginning of the transition it was believed that it would be enough to guaranty the seats in the representative and other government institutions to satisfy the interests of the minorities. Romania had, at the beginning of the transition, envisaged that national minorities whose

institutions in connection to preventive and actual protection of minorities. Secondly, the regional initiative „Decade of Roma", which was signed by nine Balkan and central European states, originated and was mostly financed from outside the region. The initiative had a goal to improve the status and control the poverty among the Roma minority.

[9] These three models are more or less similar to Kymlicka argumentation in regard to the relationship between minorities and the majority in the complex societies (Kymlicka, 2001a).

political parties, which do not pass the census for the election or do not fulfil the regulations still have each one seat in the Lower House of the Parliament. Except Hungarian political parties in Romania who had always had at least twenty terms in both Houses, all other parties and associations used that right and had their representatives in the Parliament. Croatia also envisaged that in its Parliament eight terms should go to the minority parties; three guaranteed terms for the Serbs, two for the representatives of the traditional minorities, and three more reserved for the representatives of new and smaller in number minorities. The application of the measures of the affirmative actions in the political life of the minorities contributed to the strengthening of the Balkan model of segregate multiculturalism and to the strengthening of the minority parties negotiating positions. However the problem could appear if the measures of the integrative policy were not to be applied, which, by their nature, should help overcome the primordial intolerance among the ethnic groups and support the integration of the members of minorities into the public life. If it is not the case, the ruling over the complex multicultural states, as are the Balkan states, might prove difficult and made almost impossible on the basis of the minority groups' i. e. their parties' demands for realization of the goals that do not contribute to the stability of the region.

Serbia has, regardless of all mistakes made in connection to the policy towards national minorities, established interesting model of political participation of national minorities. Cultural autonomy is, with some weaknesses, realized through election of minority self managements and through, still not regulated, system of protection of ethno cultural minority rights. (Basic, 2006a). Political participation is regulated by the system of measures of affirmative action, which were established by the Constitution, Law on elections of members of parliament, and the Law on local elections[10]. In local communities in which the minorities do not have the relative or absolute majority of the population the Law foresees some facilities by which the participation of the parties of the national minorities in the government and decision making is ensured even when they win less than 5% votes, which is the minimum for other political parties. The parliament in the autonomous region consists of one house, whereas a half of its member is elected on ground of the principle of majority and the one half is elected according to proportional principle, which together with the application of affirmative action ensures the participation of the parties of regional national minorities in the government. Strong influence of political regional parties and their coalition potential ensure their participation in other kinds of governing institutions. On Parliamentary elections the measures of affirmative action are

[10] Law on local elections, Sl. Glasnik RS, 129/2007 and Art. 40 of the Law on local elections, Sl. Glasnik RS, 129/2007

based on the natural threshold, that is, the political parties of national minorities share the term if they win number of votes necessary for one representative term. Besides the measures which ensure that members of national minorities have certain influence on the state policies and more significant role in the regional and local development, quite a few members of the national minorities groups participate in the political life in political parties that do not primarily represent the interests of minority.

This model was created after the Parliamentary elections in 2006 when, because of the high census, political parties of the national minorities did not win a single term. It seams that thief relatively well regulated model of political integration of national minorities, still lacking the measures of affirmative action for representing smaller and politically not well organized minorities, could be a cause for contemplating the improvement of the concrete and efficient minorities integration policies.

4. Balkan and Their "Minorities" in the EU

Bulgaria, Romania and Greece are the members of the EU but they all lead different policies of multiculturalism. If we compare these with the efficient models of regulating interethnic relationships and status of the minority in the other member states of the EU, we shall see that the transition, in this segment, has not contributed to the establishing of the model of international multicultural policies on the Balkans. As opposed to the states which have through the reform of political systems tried to contribute significantly to the lasting stability and removal of the causes of ethnical misunderstanding, Balkan states members of the EU, have under the cover of Copenhagen criteria, and European standards of protection of minorities rights, established and are still developing a model which over emphasises and overprotects the identity of the minorities, while the relationship between the minority and the majority, and between minorities themselves are week, non-functional and at the core does not contribute to the resolving of interethnic problems in local communities.

The effect of "floating islands" or "parallel worlds" which overlap in the sphere of civil, political and social rights, and are strictly divided in the domain of cultural rights is dysfunctional in relation to the concept of national states, which the three mentioned states, but also the rest of the Balkan states, have accepted through their constitutional legal system. Practically it means that minority communities, especially the large ones, which have native states in the region, are well politically organized and have developed institutions of minority self management and cultural autonomy,

and are referred to linking with the ethnic compatriots in regard to their cultural rights, while for everything else they are referred to the fellowmen of the state in which they live and whose citizens they are.

In the still developing political and legal system in EU such parallel relationships make sense in spite of the fact that limitations in regard of freedom of movement and choice are sporadic, mostly the cases of violation of human rights, there is a certain social dynamics which more or less efficient way contributes to the cultural differences not being an obstacle to the integration of different cultures and minorities. However, in the open community as is the EU, there have been different experiences with the policy of multiculturalism, and also there have been different answers to the challenges. The strong immigration currents from the east European members of the EU, from African and Asian countries, daily influence and change the nature of multiculturalism in Europe. Certain local communities in large west European cities have become minority areas in which the social interaction of the natives and newcomers has received a new dimension, which exceeds the Balkans, so characteristic ethno cultural mixture.

West European states contribute to these dynamic relationships their own experiences of ethnic tolerance and respect of the right of being different as well as their own answers to the arising problems. Entering those states in the EU people will get an equal chance for happiness and it will open new possibilities they have dreamt about; better jobs, better education, multiple chance, and only a few will search in the regional space. This, for the Balkan people is not so tempting solution, due to their authentic culture, language, tradition, customs, and who were always considered different.

However, this does not mean that the Balkan states will not, in the near future, become attractive to people who will search their rights on the Balkans. Who will in the conditions of free communication realize their human rights and freedoms, and will start settling among the neighbours who had not always been the best in resolving the problems of differences in the past. Will the Muslims from Asian countries be well accepted in the Orthodox Serbia, and what level of integration will the migrants or students from Africa achieve in the Catholic Zagreb, since it is well known that those countries have not always succeeded in the past to withstand the challenges of ethnic exclusivity and ethnocentrisms. Will the bleak statement, with which I did not agree at the beginning, that the "Balkans produce more history than it can take", prove to be true, or has the Balkans its own inner potential on the strength of which it will produce the answers to the challenges of multiculturalism that it will meet with in the desired European surrounding?

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MINORITY LAW AND POLICY OF POLAND

Abstract – *Poland is a specific country within the EU from the perspective of minorities. National and ethnic minorities are not very numerous, and their rights and obligations are governed by bilateral international agreements (most important ones being concluded with Germany, Lithuania, Russia, and Ukraine), and on national level by special statute on minorities (2005) with implementing governmental regulations covering use of foreign toponomical names, family names, teaching in minority languages, and scholar and educational rights. The scope of those rights is very large. The policy towards minorities is still subordinated to state interest. Gorzelik case decided by the European Court of Human Rights shows the limits of openness towards minorities, in particular the refusal to accept a subjective approach to identify minorities. Poland leads also an active policy towards Polish minorities abroad, in particular in Eastern Europe. The position of Polish minority in Ukraine is a model solution; however, there are important difficulties as to the minorities in Belarus, Lithuania and Czech Republic. Those problems show that even the EU membership does not eliminate disputes between the Member States. Poland actively supports her minorities abroad, and "Charter of the Pole" is a controversial but effective instrument in guarding rights of Polish minorities abroad after the accession to the EU.*

Key words: *Minorities, protection under international law and domestic law, European Framework Convention on Minorities, European Convention on Human Rights*

Poland is a specific country within the EU from the perspective of minorities. National and ethnic minorities are not very numerous, and their rights and obligations are governed by multilateral and bilateral international agreements (most important ones being concluded with Germany, Lithuania, Russia, and Ukraine), and on domestic level by special statute on minorities (2005) with implementing governmental regulations covering use of foreign topological

names, family names, teaching in minority languages, and scholar and educational rights. The scope of those instruments is very large.

Before presenting a current status of minority regulations in Poland, we would like to refer briefly to the past. Before the WW2, Poland was multinational state with numerous (ca. 30%) minorities: Ruthenian, Ukrainian, German and Jewish. Ukrainian minority constituted a source of permanent riots and demonstrations in Eastern Poland, however, in particular the German minority played a negative role shortly before the outbreak of war and during the hostilities. A tracing of new boundaries was connected with a transfer of population of German origin to Germany and of Ukrainian and Belorussian ethnic origin to the USSR. On the other hand dominant majority of Polish population inhabiting territories ceded to the USSR was repatriated to Poland. Jewish population was exterminated by the Nazis. Noting the negative experience involving the minorities, an exchange of populations was a right option. It was conform to international practice in the pre-war period. The notion of *ethnic cleansing* was introduced during the war in Yugoslavia 1991–1995 and could not be applied with respect to earlier conflicts, according to so-called intertemporal rules.[1]

It is not our intention to present all the solutions adopted in both international and domestic acts dealing with the minorities. We limit ourselves to refer to some of them only. According to the Polish Constitution of 1997, international agreements ratified by the President of Poland upon a prior consent by the Parliament are directly applicable, and they constitute a source of rights and obligations for the citizens of Poland.

After 1989, Poland participated actively in elaborating of political instruments in the framework of the Organization for Security and Cooperation in Europe.[2] Two meetings (in Copenhagen in 1990 and in Geneva in 1991) were devoted i. a. to development of rules governing protection of human rights, including minorities. The instruments adopted referred to a new definition of minorities, based upon subjective criteria rather than previously dominating, objective of mixed ones. According to the documents, belonging to a national minority is regarded as a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice. Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will. All these rules

[1] According to these rules, every fact involving legal issues should be reviewed and interpreted in the light of law in force at the time when it occurred.

[2] The text of the Copenhagen document see *http://www.osce.org/documents/odihr/1990/06/13992_en.pdf*. Cf. Th. Benedikter, Legal Instruments of Minority Protection in Europe – an Overview, Bolzano 1996, available at: *http*://www. gfbv. it/3dossier/eu-min/autonomy-eu. html.

were confirmed by the final document of the Geneva meeting of experts on minorities of July 1991.

In 2000, Poland ratified the European Framework Convention on Protection of National Minorities (1995). The Convention was elaborated under auspices of the Council of Europe, organization of democratic States in Europe, and it belongs to the constitutional instruments of the organization. Along with the ratification of the Convention Poland passed an interpretatory declaration précising the definition of minorities applicable; as the Convention does not contain any definition, Poland declared that she will recognize as minorities exclusively those groups of persons residing in Poland, members of which are Polish nationals. This position corresponds with a dominant view in international law, excluding so-called new minorities formed by aliens settled in the territory of the State. Similar declarations were issued by most of the parties to the Convention and referred mostly to enumeration of minorities in respective parties, in order not to allow to abuse minority status and rights against the interests of the states of residence.

Finally, we would like to refer to two other international legal sources containing guarantees for minority rights, binding for Poland. Art. 27 of the International Covenant on Civic and Political Rights (1966) proclaimed a general principle of protection of minorities.[3] However, the recognition of minorities was left to the respective states parties to the Covenant, they enjoy a wide freedom of decision, as no definition of minorities was included. Although the European Convention on Protection of Human Rights and Fundamental Freedoms (1950) does not contain direct and clear provision concerning the protection of minorities, its Art. 14 provides for a general ban on discrimination. Accordingly, Art. 1 of the Convention provides for a granting of rights provided under the Convention to every person under the jurisdiction of the states parties, and not only to the nationals.

The policy of Poland towards minorities is still subordinated to state interest. *Gorzelik* case decided by the European Court of Human Rights[4] shows the limits of openness towards minorities, in particular the refusal to accept a subjective approach to identify minorities. The case concerned an alleged Silesian minority, or in particular a right of persons claiming their Silesian origin to establish an association of Silesians. Polish court denied registration arguing that there is no Silesian minority in Poland, and the only reason of the formation of the association would be to circumvent law and to benefit from the 1993 Elections Act providing for elimination a 5% census for minorities in Poland.

[3] See a very instructive book by P. Thornberry, *International Law and the Right of Minorities*, Oxford 1991, *passim*.

[4] Application 44158/98, judgment of the Grand Chamber of 17 February 2004.

The decision of the local court was upheld by the European Court of Human Rights in Strasbourg, although we do are highly critical towards this the judgment. Notwithstanding clear statements by the Court, according to which the decision is not directed against the right to preserve cultural identity of the local population in Silesia, the judgment supported a restrictive policy of the Government in this field. The court rightly stressed that there was no definition of minorities in the Polish domestic legal order, not in international legal instruments binding upon Poland, so the authorities were free to formulate their own functional definition. In our opinion, however, such a definition should be based upon subjective or mixed criteria, but not upon a discretional decision of the authorities. The case did not concern the existence of the specific minority, but rather the freedom of association. Finally, the suggestion that the only aim of the founding of the Society was an abuse of electoral privileges did not find support in documents. In particular the statute of the Society did not provide for any form of political activity. The proposal to amend the statute by including a specific provision expressly excluding any form of political participation would be more proportional. It is clear that the government (as well as judicial authorities) feared any impulse for secessionist movements, and the issue of Silesian people is particularly sensitive because of difficult past of the region, and in the light of Polish-German relations.

The conclusion set up above as to the subordination of minority policy to the interest of the State found its expression in another judicial decision. After entry into force of the Polish-German Treaty on Neighbourhood of 1991, the Supreme Administrative Court decided on a motion of the Polish citizen of German ethnic origin who requested the modification of his first name, replacing Polish name of *Jan* by German *Hans*. The claimant based his request directly upon the Polish-German Treaty. The court denied a self-executing nature of respective provisions of the Treaty; however, found another legal basis in domestic regulations. In our opinion, the reasoning of the court was incorrect, as the treaty should have been applied directly in accordance with the constitutional rules then in force. The judges hesitated to apply international treaty in such a politically sensitive issue. The judicial practice at that time was still not enough developed in this respect. However, the effect achieved was still acceptable.

The case referred above concerned the application of the bilateral treaty concluded between Poland and FRG on 17 June 1991.[5] The Treaty contained two important provisions (Articles 20–21) providing rights and obligations of the German minority in Poland, and of persons of Polish origin and ethnicity living in Germany. The provisions of the treaty are asymmetric, as the Polish residents

[5] Dziennik Ustaw (Official Journal) 1992, No. 14, Item 56.

in the FRG are not qualified as minority. The treaty does not contain any definition of minority, referring to a subjective approach to minorities. Every person can freely decide whether he/she belongs to the specific minority. The same pattern of regulation was followed by the Polish-Lithuanian Treaty on Friendship of 26 April 1994, although there were no doubts as to the mutual use of expression "minority".[6] Provisions on minorities can be found also in other bilateral agreements concluded by Poland, some of them include specific clauses (e. g. the treaty with Russia contains provisions concerning the freedom of religion).

Poland leads also an active policy towards Polish minorities abroad, in particular in Eastern Europe. The position of Polish minority in Ukraine is a model solution; however, there are important difficulties as to the minorities in Belarus, Lithuania and Czech. In particular, Belarusian authorities try to restrict activities of the Union of Poles with the seat at Grodno, former Polish town captured by the USSR in 1939 and subsequently annexed. Notwithstanding exchange of populations in 1945 and 1956/7, there are still remaining numerous Polish minorities. The democratically elected presidency of the Union was replaced by the one appointed by local authorities, and members of the former presidency as well as editors of Polish newspapers were persecuted by the police. In Lithuania, although in theory all problems concerning the minorities in mutual relations should have been resolved by the Treaty on Friendship of 1994, the authorities still deny the right to use Polish family names in original version instead of lithuanized ones; also returning of a property confiscated during and after the 2nd world war meet enormous difficulties (supported surprisingly by the US government). Those problems show that even the EU membership does not eliminate disputes between the Member States. Poland actively supports her minorities abroad, and "Card of the Pole" is a controversial but effective instrument in guarding rights of Polish minorities abroad after the accession to the EU. This Charter offers to persons concerned important facilities

Card of the Pole has followed a pattern established by Hungary in order to help preserving links between a minority and nation-state. However, its outcome and reception abroad is a little different. Right-oriented parties in Hungary never abandoned an idea of "Great Hungary", based upon a restoration of the territory of former Kingdom of Hungary, covering at least parts of Slovakia and Romania, traditionally belonging to the core of the State.

Policy of return of persons of Polish ethnic origin to Poland was connected with an existence of Polish minorities in Central Asian States established after the fall of the USSR. In effect, the notion of repatriation was included both in nationality law (Citizenship Acts of 1951, 1962, and 2008, the most recent not

[6] Dziennik Ustaw (Official Journal) 1995, No. 15, Item 71.

yet applicable pending a decision of Constitutional Court on its conformity with the Constitution) and aliens legislation (Aliens Acts of 1997, 2001, and 2007; Repatriation Act of 2000), becoming highly probably the only stable element of the Polish migration policy.[7] The procedures of repatriation were formalized and adapted to individual repatriation rather than to group repatriation practiced before 1960. Local authorities on communal level in Poland should invite persons of Polish origin who are able to prove their ethnicity with the Polish consular officer in their state of residence. Usually the whole family is invited by local community, lodging and jobs granted, as well as a financial support. The priority is still given to Asiatic republics, because of a poor level of living. No current figures concerning the repatriated people are available; however the number of repatriates seems highly limited and almost negligible comparing to other flows of migrants to Poland, owed mostly to the shortage of means available by the communities.

Finally, we would like to present the most important elements of Polish domestic regulation. Art. 35 of the Constitution of 1997 provides for a guarantee to polish citizens belonging to national and ethnic minorities' right to preserve and develop their native language, customs and traditions, including their own educational, cultural and religious institutions, as well as right to participate in decision-making process concerning their position and situation. Law of 12 April 2001 on Elections to Sejm and Senate does not require electoral committees (presenting lists of candidates to the Parliament) established by the minorities to pass a 5% limit in order to join the Parliament.[8] The law of 7 September 1991 on a system of education confirms the rights of members of minorities to education in their own language; these rights have been repeated and précised in the 2005 law on minorities referred to below, and executive regulations thereto. Law of 29 December 1992 on Broadcasting and Television (amended later) declares that public radio and TV should take into account the needs of minorities. In fact, even though the Ministry of Culture finances a number of undertaking dealt with minority culture, the situation is far from satisfactory; in particular it is much easier to get a financing of particular events than a regular support for newspapers and periodicals. According to the law of 7 October 1999 on the Polish language, no provision of this statute infringe minority rights, including in particular the right to use geographical names in the minority language along

[7] A. Kicinger, Between Polish Interests and the EU Influence – Polish Migration Policy Development 1989–2004, CEFMR Working Paper 9/2005, Warsaw, at 24.

[8] In fact, Germans is the only minority represented regularly in the Parliament. On the other hand, other political parties often include members of other minorities (Ukrainians, Byelorussians) on their lists of candidates for elections.

with the Polish ones, in the areas densely inhabited by the respective minority. Finally, the criminal code of 6 June 1997 penalizes offences against minorities.

The statute on national and ethnic minorities and on regional language was passed by the Parliament on 6 January 2005.[9] The statute lists national minorities and ethnic minorities in Poland. As to the former ones, the notion covers a group of Polish nationals identifying themselves with the nation forming its own State, living in the territory of Poland for at least 100 years. As to the latter, the difference is that the members of the group do not identify themselves with any nation, as no state established by the ethnicity exists. The list of national minorities encompasses 9 groups, including: Lithuanian, Belorussian, Ukrainian, German, Czech, Slovak, Russian, Jewish, and Armenian. Ethnic minorities are following: Karaims, Lemkas, Romas, and Tartars. Finally, special position of the Kashubas is indicated, owe to a specific minority language. According to the census of 2002, the share of minorities in the total of population amounts to 3–4%, including i. a. 150000 Germans, 49000 Byelorussians, 31000 Ukrainians, 13000 Romas, 6000 Russians, 5000 Lithuanians.

The membership in the minorities is a matter of subjective decision. No one can be forced to prove its national or ethnic features as precondition of the membership. Members of minorities can practice their habits and language in public, and cannot be discriminated because of their use, nor can any attempt to assimilate them be undertaken. In the areas where minority groups dominate, their language can be used as an official language by the public administration. Specific acts regulate the way of writing of family names, rights to provide and receive information in own language, and rights in the field of education. In specified areas, where the percentage of minority members is particularly high, use of geographical names (localities, streets etc.) in minority language is allowed. However, there is an important dispute concerning the use of German names, as a lot of them were modified under the Nazi or Soviet rule. These names are expressly forbidden. The system of supporting of local culture and education was created. It is striking that Minorities Act does not refer to the duties of minorities, in particular an obligation to loyalty towards Poland as the state of residence. Such an obligation, as well as a prohibition of any activity aimed at destroying the unity and territorial integrity of the Polish state, can be found in international instruments binding upon Poland. In fact, it can be argued that it was not necessary to include such a duty into the Act, as all the members of the minorities are Polish citizens, and the loyalty of state's citizens is guaranteed under the Constitution.

[9] Dziennik Ustaw (Official Journal) 2005, No. 17, Item 141, with later amendments.

The rights concerning education in a native minority language are regulated in the regulation of 14 November 2007.[10] Classes for minority children encompass native language as teaching or additional (facultative) ones, as well as history of respective minority group or nation, and – if necessary–geography of neighbouring state (s) concerned. Teaching should be provided upon request by parents of minority children, at kindergartens (for a group of at least 7 children), primary schools (7 children) and secondary schools (depending upon conditions, 14 or 20 children). Because of specific situation of Roma minority.[11] special solutions applicable to Romas provide for special teaching assistance, enabling the children adaptation to regular living conditions (not to say "assimilation"), as these children are in a way neglected and disadvantaged because of the tradition and family choices. In any case, at all schools mandatory teaching of Polish language, culture and geography should be ensured.

The system of protection of minorities elaborated by Poland under both international and domestic law is complete; it contains wide scope of guarantees of rights allowing preserving the national, ethnic, linguistic and religious identity. It seems also to be advantageous for the members of minorities. The practice, however, is to a certain extent different. E. g. religious minorities, in particular orthodox one, is decisively disadvantaged comparing to the Roman catholic church.

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[10] Dziennik Ustaw No. 214, Item 1579.

[11] The specificity of Roma minority is strictly connected with the culture and way of living of this group. Romas reject any form of intervention in their affairs by the State. This leads to disputes and controversies. Some years ago a criminal proceeding against a Roma man was initiated because of a marriage to a minor Roma girl. Marriage with a girl of 13 is acceptable under Roma tradition, but forbidden under Polish criminal law. The prosecution initiated an important discussion concerning usages and customs of Romas in Poland.

Since 2004, special Governmental Program in favour of Roma Minority has been implemented.

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THE RIGHTS OF ETHNIC MINORITIES IN GERMANY

Abstract – *Modern states are characterized by pluralistic societies with ethnic or national minorities besides their majority population. Members of modern societies can belong at the same time to different ethnic or national groups without questioning the existence of the state. The preservation of the identity of ethnic or national minorities should be understood as a possibility for diversity in states and societies and not as a threat for national or state security. Starting from the criteria for ethnic or national minorities, especially the citizenship criteria, this paper pleads for providing ethnic minorities with general human rights and special minority rights mostly in the political and cultural fields as a prerequisite for a peaceful life between ethnic minorities and the majority within a state. On the example of Germany, where four recognized national minorities are residing in different lands: the Danish minority, the Friesian minority, the German Sinti and Roma and the Sorbian people, the legal status of ethnic minorities within Europe is examined. As minority rights exist on different legal levels – on the national level: constitution and laws of the federal state and/or their subjects (lands), on the European level: European Union law and international treaties of the Council of Europe, and on the universal level: international norms within the United Nations, their interrelation and application are analyzed in a globalized world. Because minority rights appear regulated in a fragmented regime, this paper demonstrates ways for improving the co-ordination between states and international organisations dealing with minority rights in order to transform this regime into an integrated one.*

Key words: *ethnic/national minorities, Danish minority, Friesian minority, Sinti and Roma, Sorbs, Germany, EU, Council of Europe, UN, citizenship, political participation, cultural life, identity, diversity, fragmented regime.*

I. INTRODUCTION

The population of the Federal Republic of Germany of around 82 million inhabitants is ethnically not homogenous. On its territory live besides Germans Danes in the land of Schleswig-Holstein (around 50,000 persons), Frisians in the region of the North Sea coast (about 60,000 persons), Sorbs (about 60,000 persons) in the lands of Saxony and Brandenburg, and Sinti and Roma (up to 70,000 persons).[1] From the ethnic composition of the population in Germany derives the need to preserve the identity of ethnic or national minorities in order to promote the diversity within the society and to maintain the stability within the state. The German state considers the existence of national minorities on its territory not as a threat for its national or state security.

The rights of ethnic or national minorities in Germany are regulated by national law – the Constitutional law of Germany, special laws on minority protection and special clauses in laws. Germany as a contracting state of the most important international treaties dealing with minority rights – the International Covenant on Civil and Political Rights (Art. 27.[2] on the universal level and the European Framework Convention for the Protection of National Minorities (FCNM.[3] and the European Charter for Regional or Minority Languages[4] on the European level, also has to comply with these international commitments.

II. DEFINITION OF THE TERM "ETHNIC OR NATIONAL MINORITY"

As in international law does not exist a generally recognized definition of the term "ethnic or national minority"[5] it is left in a great extent to the discretion of the states to determine who is entitled to minority rights and who not. Germany when ratifying the European Framework Convention for the Protection of National Minorities, which does not contain a definition of the term "national minority" either, has declared unilaterally that "National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Frisians of German citizenship and the Sinti and Roma

[1] Beate Sybille Pfeil 2006, p. 110.
[2] UNTS, vol. 999, p. 171.
[3] CETS No. 157.
[4] CETS No. 148.
[5] One of the most cited definitions is the definition of Francesco Capotorti 1979, p. 96, para. 568.

of German citizenship."[6] Germany requires the following five criteria for national minorities:

– their members are German nationals,
– they differ from the majority population insofar as they have their own language, culture and history,
– they wish to maintain this identity,
– they are traditionally resident in Germany, and
– they live in the traditional settlement areas.[7]

An exception is made as regards the last criterion with reference to the German Sinti and Roma.[8] According to this restrictive definition, migrants, immigrants and non-citizens are excluded from minority rights in Germany. This exclusion of certain groups of the population was criticized by the Advisory Committee on the FCNM.[9]

III. MINORITY RIGHTS IN THE GERMAN LAW

1. Minority Rights in the Constitutional Law

a) Basic Law of Germany

The Basic Law, the Constitution of the Federal Republic of Germany, does not regulate minority rights especially, but persons belonging to ethnic or national minorities are generally protected within the context of human rights.[10] According to article 1 paragraph 3 of the Basic Law the basic rights are binding upon the legislature, the executive and judiciary as directly applicable law. In case of a violation of basic rights, a constitutional complaint may be filed. Article 19 paragraph 4 of the Basic Law establishes the recourse to the courts by any person whose rights might have been violated by a public authority. The Basic Law contains a prohibition of discrimination clause in article 3 paragraph 3. The prohibitive criteria of race, language and origin are applicable to persons

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[6] Declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995–and renewed in the instrument of ratification, deposited on 10 September 1997.

[7] Third Report submitted by Germany pursuant to Article 25, Paragraph 1 of the FCNM (Received on 9 April 2009), ACFC/SR/III (2009) 003, p. 23, para. 005.

[8] Ibid.

[9] Advisory Committee on the FCNM, Second Opinion on Germany, Adopted on 1 March 2006, ACFC/OP/II (2006) 001, p. 8, paras. 24–27.

[10] Rainer Hofmann 1995, p. 76; Gilbert H. Gornig, 1999, p. 167; Markus Pallek 2001, p. 271 ff.

belonging to ethnic minorities. But for the preservation of the identity of ethnic minorities more than a prohibition of discrimination clause is needed.

b) Constitutions of the Lands

The Federal Republic of Germany as a federated state is composed by the so called lands, which have adopted their own constitutions. Although the Basic Law of Germany does not regulate minority rights expressively, special clauses on minority protection can be found in constitutions of several lands: article 25 of the Constitution of Brandenburg; article 18 of the Constitution of Mecklenburg-Western Pomerania; article 5 paragraph 2 and article 6 of the Constitution of Saxony; article 37 paragraph 1 of the Constitution of Saxony-Anhalt; article 5 of the Constitution of Schleswig-Holstein; and article 17 paragraph 4 of the Constitution of *Rhineland-Palatinate*. According to their special clauses on national minorities these constitutions can be classified into three groups:

– Constitutions referring to national minorities in generally: Mecklenburg-Western Pomerania, Saxony-Anhalt and *Rhineland-Palatinate*;
– Constitutions referring to special national minorities: Brandenburg (Sorbs);
– Constitutions referring to national minorities in generally and to special national minorities: Saxony (Sorbs) and Schleswig-Holstein (Danes[11], Frisians).

The most detailed and far reaching regulations contain the Constitutions of Saxony and Brandenburg, both adopted in 1992, where Sorbs[12] are residing traditionally.

Constitution of Saxony

In paragraph 1 of article 5 of the Constitution of Saxony the Sorbs are regarded not merely as a minority but rather as a special part of the people of Saxony.[13] Paragraph 2 distinguishes between national and ethnic minorities of German nationality. It is interesting to note that the term "national minorities" is referred to persons belonging to a people having their own nation-state. "Eth-

[11] The Danish minority in Schleswig-Holstein receives special protection according to the Bonn Declaration of the Government of the Federal Republic of Germany on the Rights of the Danish Minority of 29 March 1955. Jørgen Kühl 2005, p. 39 ff.

[12] The Sorbian people are protected by provisions in a protocol note to Article 35 of the Treaty on the Establishment of German Unity of 31 August 1990.

[13] Todd Foy/Carmen Thiele 1996/97, p. 70; Markus Pallek 2001, p. 557 ff.

nic minorities" on the other hand, are minorities, such as the Sorbs, having no nation-state.[14]

Paragraph 3 expands minority protection to foreign minorities, a provision which is unique in German constitutional law.[15] The protection granted to foreign minorities is, nonetheless, weaker than the granted to ethnic minorities with German citizenship. The land of Saxony guarantees and protects the rights of national and ethnic minorities, but only respects the interests of foreign minorities. While "guarantee" refers to an obligation and "protect" to a defensive right, "respect" refers only to an order of consideration.[16] Nevertheless, this provision is going beyond the Declaration made by Germany on the scope of application of the Framework Convention for the Protection of National Minorities.

Article 6 of the Constitution of Saxony corresponds to the group protection clause in the Constitution of Brandenburg.

Constitution of Brandenburg

The Constitution of Brandenburg contains a special article for the protection of the Sorbs (article 25).[17] According to paragraph 1 of this article the right of the Sorbian people to the protection, preservation and cultivation of their national identity and traditional settlement areas shall be guaranteed. Paragraph 2 mentions cultural autonomy for the Sorbs beyond state boundaries. Paragraph 3 guarantees the right to use and promote the Sorbian language and culture. These provisions constitute a so called "public aim with a special order to promote" clause.[18] By protecting the Sorbs as a group, they are granted collective rights.

Referring to the constitutional regulation of Brandenburg on the right to original settlement the Advisory Committee on the FCNM expressed its deeply concern at population displacement, triggered by the dissolution of the municipality of Horno, approximately a third of whose population belong to the Sorbian minority. The displacement of this population and the demolition of houses, church and school of this community were aimed at allowing lignite quarrying to continue in the region.[19]

In a decision on 25 May 2000, the European Court of Human Rights declared inadmissible an application of several Sorbian inhabitants of the municipality

[14] Bernd Kunzmann/Michael Haas/Harald Baumann-Hasske/Uwe Bartlitz 1993, p. 58 f., para. 2.
[15] Dietrich Franke/Rainer Hofmann 1992, p. 406.
[16] Bernd Kunzmann/Michael Haas/Harald Baumann-Hasske/Uwe Bartlitz 1993, p. 60.
[17] Todd Foy/Carmen Thiele 1996/97, p. 69; Markus Pallek 2001, p. 594 ff.
[18] Dietrich Franke/Reinhold Kier 1994, p. 175.
[19] Advisory Committee on the FCNM, Opinion on Germany, 1 March 2002, ACFC/INF/OP/I (2002) 008, p. 9, para. 30; supra note 9, p. 14, para. 61.

of Horno who objected to its dissolution to allow lignite quarrying to continue. However, the Court underlined the serious nature of the impugned interference in the lives of the Sorbs of Horno and expressly emphasized the need for special protection of persons belonging to this minority, as stated in article 25 of the Constitution of the Land of Brandenburg, which establishes the right of the Sorbian people to the protection, preservation and maintenance of their national identity and their original settlement area.[20]

2. Special Laws on Minority Protection in Saxony and Brandenburg

The first law on minority protection in Germany was adopted in 1948 by Saxony. The Law for the Safeguarding of the Rights of the Sorbs was finally replaced by the Act on the Sorbs' Rights in the Free State of Saxony of 31 March 1999.[21] Brandenburg passed, in 1950, its first statute for the support of the Sorbian people, a law, which incorporated the Saxon Law of 1948.[22] This statute was replaced by the Act on the Specification of the Rights of the Sorbs (Wends) of the Land of Brandenburg of 7 July 1994[23], which serves as the implementing act for article 25 of the Constitution of Brandenburg. Although the Sorbs are considered to be a people they are protected as an ethnic minority by these special laws.

Section 1 of the Saxon Act and section 2 of the Brandenburg Act provide that a member of the Sorbian people is whoever acknowledges his or her affiliation with the Sorbian people, and that such declaration shall be free. Additionally, it is expressly provided that it shall be neither contested nor verified. The identification with a national minority is not registered by the executive German authorities.[24]

The Acts grant the Sorbs extensive rights with respect to their culture, language, education, and mass media and mandates that the government actively support them in their pursuits. Both Acts regulate the establishment of a Council for Sorbian Affairs, one in Brandenburg (section 5 of the Brandenburg Act) and one in Saxony (section 6 of the Saxon Act). The Councils are elected by the respective parliaments of the lands. They deal with all parliamentary matters of

[20] ECtHR, Noack and others v. Germany, Application No. 46346/99.
[21] SächsGVOBl. 1999, No. 7, p. 161.
[22] Erste Verordnung zur Förderung der sorbischen Volksgruppe, GVOBl. 1950, p. 417.
[23] GVOBl. I 1994, p. 294.
[24] Third Report, supra note 7, p. 50, para. 03007.

importance to the Sorbian people, including legislative proposals, and submit comments.

According to section 13 of the Brandenburg Act and section 15 of the Saxon Act the lands support a co-operation between the two lands. In 1991 the Foundation for the Sorbian People with the federal state and the lands of Brandenburg and Saxony as the providing bodies was established with the aim to organize the interests of the Sorbs residing in the two lands.[25]

3. Special Law Clauses on Minority Rights

Apart from constitutional regulations and special laws on minority rights there are special clauses in laws referring particularly to ethnic minorities on the federal level and on the land level. In the field of political participation the Federal Electoral Act (section 6 paragraph 6.[26] has to be mentioned, which exempts political parties of national minorities from the five-percent in regards to elections to the parliament (German Bundestag).[27] This provision on the federal level is also applied on the level of the land for parties of the Sorbian minority participating in land elections in Brandenburg (section 3 paragraph 1 of the Electoral Act of Brandenburg.[28] and for parties of the Danish minority participating in land elections in Schleswig-Holstein (section 3 paragraph 1 of the Electoral Act of Schleswig-Holstein).[29]

In the fields of education, language and culture to the following laws of lands can be referred. The Saxon Act to Promote Children in Day-Care Institutions of 27 November 2001 (section 20.[30] and the Children's Day-Care Centers Act of Brandenburg of 10 June 1992 (section 3 paragraph 2.[31] form the legal basis for the teaching and cultivation of the Sorbian language and culture at Sorbian and bilingual day-care institutions in the German-Sorbian area. The Saxon Schools Act of 3 July 1991 (section 2.[32] and Brandenburg Schools Act of 12 April 1996 (section 5.[33] guarantee the right of pupils to learn the Sorbian language and, at some schools, the right to instruction in the Sorbian language in specific

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[25] With the conclusion of an Inter-State Treaty signed by the lands of Brandenburg and Saxony on 28 August 1998 the Foundation was transformed into a legally autonomous foundation.

[26] BGBl. I 1993, p. 1288, 1594.

[27] Gilbert H. Gornig, 1999, p. 170; Burkhard Schöbener 2008, p. 455 ff.

[28] *GVBl.I/04, [No.02]*, p. 30.

[29] GVOBl. 1991, p. 442.

[30] SächsGVBl. 2001, No. 1, p. 2.

[31] *GVBl.I/04, [No.16]*, p. 384.

[32] SächsGVBl. 2004, No. 15, p. 298.

[33] *GVBl.I/02, [No.08]*, p. 78.

subjects. The Children's Day-Care Centers Act of Schleswig-Holstein of 12 December 1991 (section 5 paragraph 8.[34] regulates, that the work of day-care centers shall "bring together children of different national or cultural origin". Similar provisions are contained in the respective laws of other lands.[35]

IV. INTERNATIONAL PROVISIONS ON MINORITY RIGHTS

Rights of ethnic minorities in Germany are protected also by international treaties, ratified by Germany. On 17 December 1973 Germany has ratified the International Covenant on Civil and Political Rights. The Human Rights Committee has expressed in its Concluding Observations to the state report of Germany according to article 40 ICCPR its concern that the definition of minorities as "ethnic or linguistic groups who have a traditional area of settlement in particular regions", as understood by Germany[36], is too restrictive in terms of article 27 of the Covenant[37] – the only universal legally binding norm dealing with minority protection until now.

On the regional level Germany ratified the European Framework Convention for the Protection of National Minorities of the Council of Europe on 10 September 1997. The term "framework" indicates that the Convention contains 'programme-type' provisions, instead of provisions with detailed rights for minorities. As the Council of Europe was unable to define the term "minority", due to disagreement between the participating states, it is left to the member states to determine the minorities. According to the German Declaration the Framework Convention applies to Danes with German nationality, the Sorb people, the Friesians in Germany and the German Sinti and Roma.

The European Charter for Regional or Minority Languages of the Council of Europe, which protects and promotes the traditional regional or minority languages spoken in a member state as a threatened part of European cultural heritage, was ratified by Germany on 16 September 1998. The states can determine themselves to which of the regional- or minority- languages spoken on their territory they apply in part III mentioned "Measures to Promote the Use of Regional or Minority Languages in Public Life in accordance with the Undertak-

[34] GVOBl. 1991, p. 651.

[35] Third Report, supra note 7, p. 111, para. 06041.

[36] Fourth periodic reports of States parties due in 1993, Germany, 22 February 1996, CCPR/C/84/Add. 5, p. 60, para. 244.

[37] Concluding Observations of the Human Rights Committee, Germany, 8 November 1996, CCPR/C/79/Add. 73, p. 3, para. 13.

ings entered into under article 2, paragraph 2". Minority languages within the meaning of the European Charter in Germany are the Danish, Upper Sorbian, Lower Sorbian, North Frisian and Sater Frisian languages and the Romany language of the German Sinti and Roma; a regional language is the Low German language.[38]

With the entry into force of the European Union Reform Treaty of Lisbon of 13 December 2008 the rights of persons belonging to national minorities will be considered as values of the EU (article 2.[39], which will be binding for Germany too.

Apart from these legally binding commitments Germany as a member state of the Organization for Security and Co-operation in Europe (OSCE) is guided by the political documents on the human dimension especially the Copenhagen Document on the Human Dimension of 29 June 1990[40], which contains a catalogue of minority rights.

V. CONCLUSION

Germany still parts from a restrictive definition of the term ethnic or national minority by requiring the citizenship criterion. While citizenship is no any longer understood as a precondition for the membership of an ethnic or national minority on the universal level, it still remains to be a requirement for some European states.

Rights of ethnic or national minorities exist on different levels. On the national level the Basic Law does not contain provisions on minority rights. The constitutions of various lands have special clauses on national minorities but by following different approaches: referring to national minorities in generally, to special national minorities or to both. There is no uniformity regarding the law of the land dealing with minority rights either. Different ethnic or national minorities are thus protected by different law provisions and even the same minority (the Sorbs) by different provisions of two lands.

On the European level minority rights are established by international treaties of the Council of Europe, the European Union, and the political documents of the OSCE; and on the universal level by international norms within the United

[38] Declarations contained in a letter from the Permanent Representation of Germany, dated 16 September 1998, handed to the Secretary General at the time of deposit of the instrument of ratification, on 16 September 1998.

[39] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal C 306 of 17 December 2007.

[40] www. osce. org.

Nations. Because minority rights appear regulated in a disperse way and in a fragmented regime it is necessary to transform them into a unified or integrated regime.

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ENDANGERED MINORITY CULTURE AND LANGUAGE – THE CASE OF CSANGOS IN ROMANIA

Abstract – *For an ethnic or national minority there are two crucially important domains to preserve its identity: education in the mother tongue and religion services, including religious education in their mother tongue. The experience shows that a number of Council of Europe (CoE) member states are not ensuring in adequate way human rights and minority rights to some small ethnic groups living in their territories, which are impeded in preserving their cultural and linguistic identity. A high number of CoE parliamentarians supported the motions, aimed at elaborating specific approach towards the endangered minorities. One of them is the Csangos in Romania. They are a relic from the Middle Ages who survived in the eastern part of Romania. Their identity is based on the Roman Catholic religion and the archaic Hungarian language is still spoken in a number of villages and families. Four case studies are in preparation on the efforts of local people, supported by private persons and institutions, to safeguard the unique Csàngò (Ceangai in Romanian) culture. The aim is to protect the Csangòs´ archaic linguistic peculiarities, the Csangos´ instrumental music as well as their rich system of dances. The intention is to preserve the Csàngòs´ ancient traditions and their great diversity of folk art. A number of measures must be taken by the Romanian Authorities to guarantee the living future of Csàngòs.*

Key words: *cultural minorities, Romania, Csangos, religious minorities, cultural tradition*

The Csángós are one of the best examples of the beneficial effects of cultural diversity. This ethnic group has for centuries been living isolated from other areas, where Hungarian is spoken, in an area with a Romanian majority. This resulted in the development of an ethnic isle with an individual, most specific

culture, interacting with elements of Romanian culture. This is best illustrated with folk songs and ballads, which are living and developing even today. They show Hungarian as well as Romanian elements.[1]

They live in western Moldavia, near the eastern slopes of the Carpathians, in villages around the cities of Bacau (southern group) and Roman (northern group), along the rivers Siret, Bistrita, Trotus and Tuzlau, where they preserve traditional European methods of agriculture, body of beliefs, and mythology, as well as the most archaic dialect of the Hungarian language. Their number ranges, depending on the definition, from as many as 260 000 (which corresponds roughly to the Catholic population in the area), even if more than two thirds of them cannot speak the language, to as few as a couple of tens of thousands (based on the fact that in the last official census only less than 3000 persons declared themselves as Csángós).[2]

1. ENDANGERED ETHNIC GROUP

For centuries, the self-identity of the Csángós was based on the Roman Catholic religion and the Hungarian language spoken in the family. This, as well as their archaic life-style and world-view, may explain their very strong ties to the Catholic religion. It is not unusual that the Csángó, to the question "What nationality are you?" would answer: "I am a Catholic". In spite of this, there appear to be influences from the surrounding Romanians even in the practice of religion. Thus, for example, the Catholics of Moldavia follow their dead in an open coffin to the grave – an Orthodox tradition. Their religious life has preserved many elements of the Middle Ages. Even elements of pagan rites may be discerned, such as traces of the sun-cult. Their body of beliefs and superstitions is extremely rich, with many archaic features. The independent Romanian State, established in the second half of the 19th century, granted them an independent Roman Catholic Bishopric in the town of Jászvásár / Iasi. Despite the Changoes demands, all divine services being held obligatorily in the Romanian language.[3]

The ethnic conscience of the Csángós is much weaker than that of other Hungarian-speaking ethnic groups. This may have several causes. It may reflect the weakly developed concept of nation among the settlers of the Middle Ages or the fact that their settlements are geographically dispersed, but an important factor has been the self-conscious, policy of assimilation practised over the cen-

[1] András Barta, Bacau. Source: Financial Times. com.

[2] More about the history and contemporary status and characteristics of this ethnic group see in Wikipedia, the free encyclopedia undr the label „Csangos".

[3] András Barta, Bacau. Source: Financial Times. com.

turies by the surrounding society and in particular the Catholic Church. This culture is today on the verge of extinction. Out of the maximum figure of 260 000 Csángós only 60 000 – 70 000 speak the Csángó dialect.[4]

The Csángó live almost exclusively in villages. Only 1% of them are intellectuals. 10% of them are illiterate and 40% are half illiterate. About 10% of the young people graduate from high school and every 10th of them continue their studies at the different departments of universities/colleges.

Csángós generally live on a law level of civilisation and they have to face many social problems too, because more than 60% of the active men are unemployed. There are 3–6 children in an average chango family. The women generally work in and around the house in a patriarchal system. The families live mostly on farming but the soil is poor and life is a struggle for surviving, which results in a significant migration rate among the Csángós usually to a Romanian majority area (promoting assimilation of the Csángó Hungarians to the Romanian majority).[5]

The ethnic group has been isolated from the Hungarian cultural development. While the Hungarian language went through a renewal in the 18th-19th centuries, this did not affect the language of the Csángós. Their oldest sub-dialect, northern Csángó, preserves numerous elements of the Hungarian language of the late Middle Ages. It also contains new elements (including lexical elements of the Indo-European Romanian language), specific to this language area.

The Csángó ballads, folk tales, religious songs, funeral rites etc. are surviving items of the medieval Hungarian culture, which in Hungary got overprinted by an intentional modernisation of the language and customs in the 18–19th centuries. The material culture of the Csángós: architecture, costumes, husbandry etc. also has preserved medieval features. All these are very valuable not only for the Hungarian culture in particular, but also for the European folklore in general.

A particularly fascinating and well-studied element of the Csángó culture is the popular music, in particular the folk songs. Since 1929 a high number and a very great variety of songs have been collected. In comparison with other areas of the region populated by Hungarian-speaking people, in Chango land the different sorts of old-style songs are more numerous both in absolute numbers and proportionally, while the new-style songs became widespread only during the past few decades. Most of the ballade date back to the Middle Ages, while the religious songs mainly to the 16th-17th centuries. Also the manner of pres-

[4] The Csángó Minority Culture in Moldavia , Preliminary draft report PA of the CoE, Committee on Culture, Science and Education. Rapporteur: Mrs Tytti Isohookana-Asunmaa, Finland AS/ Cult (2001) 06, 2 March 2001.

[5] András Barta, Bacau. Source: Financial Times. com.

entation is archaic, full of ornamentation, testifying to the vivacity of tradition. With regard to their position (surrounded by ethnic Romanians) considerable Romanian influence has been recognized in their instrumental music and in their dances: a remarkable case of cultural interaction.[6]

2. THE TEACHING OF LANGUAGE IS A PREREQUISITE FOR PRESERVATION

Though the Csángós are documented to have inhabited Moldova for seven centuries, they have never had the opportunity to learn their Hungarian mother tongue in school, except for a short period (1946–58). In Moldavia, the language of the school and the church is exclusively Romanian. Correspondingly, almost all Csángós are illiterate as regards the writing of their mother tongue. The Hungarian language survived for centuries as the language of the family and the village community. We witness now the speedy emasculation and extinction of the Csángó dialect. The authority of the Romanian language, learned in school, is much higher among young people, than that of the impoverished Hungarian, used in the family. Out of the maximum figure of 260 000 Csángós only 60 000 – 70 000 speak the Csángó dialect.[7]

After 1989 they started to study Hungarian language in informal ways. Csángó parents teach their and other children at home, since the local scholar authorities do not allow to teach the Hungarian language in schools. In spite of their repeated written requests submitted from 1996 on, and in spite of Article 32 of the new Romanian Constitution, the 36/1997 modification of the Law of Education no. 84/1995 and the 3113/31–01–2000 Ministerial Decree, they still have not obtained any kind of mother-tongue education in the primary schools of their own villages. Instead of implementing the instructions received from the Ministry of Education in Bucharest[8], the local authorities keep on exerting psychical pressure (intimidation) on the parents to withdraw their formally registered requests to obtain Hungarian-language teaching for their children.[9] Today in Moldavia, the language of the school and the church is Romanian. There is local teaching in Ukrainian and the study of Polish, Roma and Russian

[6] Ibidem

[7] The Csángó Minority Culture in Moldavia , Preliminary draft report PA of the CoE, Committee on Culture, Science and Education. Rapporteur: Mrs Tytti Isohookana-Asunmaa, Finland **AS/ Cult (2001) 06,** 2 March 2001.

[8] Order of the Ministry of National Education nr. 3113/31 January 2000 and Methodology for the application of the instruction on the study of the mother tongue by the pupils belonging to national minorities that attended Romanian schools nr. 30257/06.04.2000.

[9] András Barta, Bacau. Source: Financial Times. com.

as mother tongues. Despite the provisions of the Romanian law on education and the repeated requests from parents there is no teaching of Csango language in the Csango villages. As a consequence, very few Csangos know how to write their mother

3. PROPOSALS FOR THE PRESERVATION OF THE CSÁNGÓ CULTURE

The Parliamentary Assembly has in 1981 considered the situation of Csango ethnic group on the basis of the report prepared by Mrs Tytti Isohookana-Asunmaa from Finland.[10] The Assembly asserted that diversity of cultures and languages should be seen as a precious resource that enriches our European heritage and also reinforces the identity of each nation and individual. The Assembly recalls the texts which it has adopted on related matters, notably Recommendation 928 (1981) on the educational and cultural problems of minority languages and dialects in Europe.[11] Recommendation 1203 /1993) on Gypsies in Europe.[12]Recommendation 1283 (1996) on history and the learning of history in Europe.[13] Recommendation 1291 (1996) on Yiddish culture .[14] Recommendation 1333 (1997) on the Aromanian culture and language[15] and Resolution 1171 (1998) on the endangered Uralic minority cultures in Russia.[16]

Assistance on the European level, and in particular from the Council of Europe, is justified to save any particular culture and is needed in the case of the Csangos. The Assembly therefore recommends that the Committee of Ministers of the Council of Europe encourage Romania to ratify and implement the Euro-

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[10] See The Csángó Minority Culture in Moldavia , Preliminary draft report PA of the CoE, Committee on Culture, Science and Education. Rapporteur: Mrs Tytti Isohookana-Asunmaa, Finland **AS/Cult (2001) 06,** 2 March 2001.

[11] see Doc. 4745, report of the Committee on Culture and Education). Text adopted by the Assembly on 7 October 1981 (18th Sitting).

[12] See Doc. 6733, report of the Committee on Culture and Education, Rapporteur : Mrs Verspaget). *Text adopted by the Assembly* on 2 February 1993 (24th Sitting).

[13] See Doc. 7446, report of the Committee on Culture and Education, rapporteur: Mr de Puig). Text adopted by the Assembly on 22 January 1996 (1st Sitting).

[14] Text adopted by the Standing Committee, acting on behalf of the Assembly, on 20 March 1996. See *Doc. 7489*, report of the Committee on Culture and Education, rapporteur: Mr Zingeris.

[15] See *Doc. 7728*, report of the Committee on Culture and Education, Rapporteur: Mr de Puig). Text adopted by the Assembly on 24 June 1997 (18th Sitting).

[16] See Doc. 6733, report of the Committee on Culture and Education, Rapporteur : Mrs Verspaget). Text adopted by the Assembly on 2 February 1993 (24th Sitting).

pean Charter of Regional or Minority Languages[17] and to support the Csangos, particularly in the following cases:

- the possibility to be educated in the mother tongue should be ensured in accordance with the Romanian Constitution and the legislation on education. In the meantime classrooms should be made available in local schools and teachers working in the villages teaching the Csango language should be paid;
- Csango parents should be informed of the Romanian legislation on education and instructions should be issued on how to apply for its provisions concerning languages;
- there should be an option for Roman Catholic services in the Csango language in the churches in Csango villages and the possibility for the Csangos to sing hymns in their own mother tongue;
- all Csango associations should be officially recognised and supported. Particular attention should be paid to the correct registration of the Csango minority at the next official census;
- access to modern mass media facilities should be promoted. Financial support should be given to Csango associations in accordance with the availability of funds, in order to help them to express actively their own identity (in particular through the issuing of a monthly publication and the functioning of a local radio station) ;
- specific programmes should be set up for the promotion of Csango culture in the context of raising awareness of and respect for minorities. International discussions and seminars of experts should be organised to study the Csangos;
- an information campaign should be launched in Romania concerning the Csango culture and the advantages of co-operation between the majority and minorities;
- the unique linguistic and ethnographical features of the Csangos should be appropriately recorded;
- the economic revival of the area should be encouraged, for example, through the establishment of small and medium-sized enterprises in Csango villages.[18]

The political changes after 1989 brought some improvement in the civil society. The Changoes have their own journal (Moldvai Magyarság, Hungarians of Moldavia), a Chango civil society has been established in Bacau, (Association of Chango Hungarians in Moldavia), young Changoes have their own organi-

[17] European Charter for Regional or Minority Languages, 11 November 1992, CETS No.: 148

[18] See Cuncil of Europe, Parliamentary Assembly, Recommendation 1521 (2001) Csango minority culture in Romania.

zation (Via Spei) and several private foundations (Szeret-Klézse Foundation) serve their educational and cultural aims. Young Changoes also have the possibility to get fellowships for higher studies in Hungarian language, in the Transylvanian region of Romania, or in Hungary.[19]

Nevertheless the main responsibility for preservation and development of this endangered ethnic group living in the European Union lies on the Romanian state. The state authorities should first of all assure the minorities' rights, as they guaranteed by the constitution and the internal legislation, by the instruments and norms in the field of the Council of Europe, OSCE and UN and by the relevant resolutions of international organisations as well.

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[19] András Barta, Bacau. Source: Financial Times. com.

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PROTECTION OF ETHNIC MINORITIES IN ITALY – ACHIEVEMENTS AND DILEMMAS

Abstract – *In 2005 the Italian parliament discussed and approved a law concerning the legal protection of Slovenian minority, enacted the same year by the Regional Council of Friuli Venezia Giulia. The new law fostered great hopes concerning these legal issues, despite the traditional scarce attention of Italian politics towards linguistic minorities, despite the fact that there is still no a national law concerning the protection of minorities. Some of the main ethnic minorities present in Italy today are: Albanians, Jews, Greeks, Germans, Occitans, Slovenes, Romas, Croats, Carnics etc. The legal status of these population is also granted by a number of international conventions signed by Italy concerning the protection of human rights and the rights of minorities (the European Convention of the Council of Europe on Human Rights (1950) ; the Strasbourg framework Convention on the Protection of Ethnic Minorities (1995) etc.) ; and by some documents issued by EU institutions, mainly not binding for member States, as the Resolution of the EP concerning the Protection of cultural and linguistic minorities in EC. Obviously all these documents and legal provisions, the national and the European one, base their effectiveness on some fundamental principles already stated in the Universal Declaration on Human Rights in 1948. It is possible anyway to affirm that in Europe and in Italy in particular actually exist a plurality of instruments concerning the protection of human rights in general and the protection of minorities in particular. This paper is dedicated to deepen and understand the common principles regulating this protection, giving some attention also to some sociological and political aspects related to the concept of minority.*

Key words: *ethnic minorities, linguistic minorities, Slovenian minority, protection of minorities, human rights*

1. Introduction: minorities and protected minorities

A large number of minority groups are actually living on the territory of the Italian Republic, these groups are very different for what concerns the level of juridical protection recognized by the authorities. All in all there are about 2,5 million people belonging to different linguistic minorities (about 4,5% of the

population of the country), these minorities are divided between at least 12 different linguistic groups[1]. Italy is the EU member country which has the largest number of linguistic minorities. Owing to this situation Italy is one of the few EU countries which expressly provided for a protection of minorities on a constitutional level, conceived as a primary duty of the State.

Although the relevant presence of linguistic minorities from the unification of Italy (1861.[2], the question of minorities clearly emerged only after the end of World War One, on account of the annexation of South Tyrol and Istria, which leaded to the forming of two consistent minorities. However, only after the fall of the fascist regime the protection of minorities became one of the main objectives of the new Republican State.

The Italian Constitution intentionally resorts to the linguistic principle as distinctive element of ethnic-national minorities, owing to the ideologically based choice to found the belonging to the Italian State (and therefore to the Italian Nation) on the objective criterion of citizenship. Even though the adjective "ethnic" appears in some regional statutes[3], the intention of the Constituent Assembly has been clearly expressed in order to limit the protection of minorities to the linguistic-cultural aspects, eliminating references to political-national or ethnic-racial aspects[4].

In this sense, the present contribution intends to study minority's issues in Italy only referring its analysis to linguistic minorities.

However it is not automatic that all the linguistic minorities present in Italy (with all the defining problems related) are protected by the legal framework. Also in Italy is more correct to speak about protected minorities, which have been recognized in specific legal provisions, especially in the Regional statues, and non protected minorities.

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[1] Ministero dell'Interno (Ministry of Interior), Ufficio centrale per i problemi delle zone di confine e delle minoranze etniche (Central Office for the problems of border regions and ethnic minorities), *Quinto rapporto sullo stato delle minoranze in Italia*, Roma 2007.

[2] It is possible to remember here the French speaking minority in Valle d'Aosta or the Occitans in the alpine valleys of Piemonte. These groups where already partially protected by the first Constitutional Charter of Italy, the „Statuto Albertino", enacted in 1848 by the Regno di Sardegna and then extended to the newly constituted Regno d'Italia in 1861.

[3] See artt. 2 e 56 c. 1 Statute Trentino-Alto Adige („ethnic and cultural charachteristics"), art. 3 Statute Friuli-Venezia Giulia, art. 4 Statute Molise.

[4] See Atti dell'Assemblea Costituente (acts of the Constituent Assembly), pp. 5315 ss. and Alessandro Pizzorusso, *Commento all'articolo 6*, in: Giuseppe Branca (edited by), *Commentario alla Costituzione*, Bologna-Roma 1975, vol. I, pp. 296 ss. (304 ss.).

2. The legal framework

2.1. The Constitutional level

In order to understand the limits of the recognition and of the protection granted in the Italian constitutional system to minorities, it is necessary to keep in mind the fundamental distinction between linguistic minorities and other minorities. To the linguistic ones the Constitution consecrates a specific provision (art. 6), whereas the other minorities, not explicitly indicated with the term "minorities", find their protection in another wide series of legal provisions, in addition to the general provision of prohibition of sexual, racial, linguistic, religious, political, personal or social discrimination stated in the art. 3 c. 1 of the Constitution.

The present paper cannot deep the topic of the so called "new minorities", which are mainly a product of the migration flows. We will mainly concentrate our attention on autochthonous minorities.

According to the pluralistic principle on which the republican system is grounded, the Constitution imposes the improvement of all social structures which are useful to realize the personality of individuals (art. 2), including linguistic minorities, which are therefore worthy to be protected by constitutional provisions first of all as social structures (art. 2), then on the ground of the principle of substantial equality (art. 3 c. 2), and finally as linguistic minorities (art. 6.[5].

The territorial criterion is the one used to identify the protected minorities: the belonging of an individual to a linguistic minority is intended as minority belonging and therefore is able to produce (if the minority is protected) to a number of juridical situations only because is linked to the territory. The rights connected to minority protection are not personal rights, specially because they are recognized more to a determined territory than to the individuals who are living in the same territory: for example a Slovenian speaking Italian citizen whose right to use the Slovenian language is recognized in the territory of the Friuli Venezia Giulia region cannot use it for the same purposes (political, administrative etc.) in other Italian regions he is eventually living in. Moreover (with the important exception of the Province of Bolzano) the belonging to a linguistic minority is mainly based on the will of the individual, and is not automatically and officially recognized by the authorities if the will is not clearly expressed.

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[5] See Bartole Sergio, *The linguistic minorities in Italy: juridical protection*, Rome, 2000.

Resuming what has been said till now, it is possible to affirm that the constitutional protection of linguistic minorities in Italy is based essentially on three criteria: first of all the linguistic criterion, then the necessity of recognition and finally the territorial linkage of the recognized rights[6]. However the provision stated in the art. 6 of the Italian Constitution does not specify if the minority protection has to be realized through a national law which should be applied to all the different linguistic minorities present in Italy or through different measures for each protected minority. It must be immediately pointed out that in Italy politics chose to follow a multilevel kind of protection, promoting a deep differentiation of the juridical position of the different groups, adopting different measures for each minority and in this sense probably violating the general principle of the equal treatment for social groups of the same type[7]. This situation is in some way checkable in all the legislative systems worldwide[8], due to the fact that minority problems depend mainly from meta-juridical elements as the numerical consistence of minority groups, their political cohesion, their territorial distribution and the influence of other national States, but in Italy the differences between the juridical status recognized to different minorities are particularly intense. For this reason, Italy is at the same time one of the most advanced countries with respect to minority protection and a State in which many small minority groups are in danger of being definitively assimilated in the near future. There are many possible explanations for this situation, not least the economic feature (some affirmative rights, like for example the linguistic ones, are very expensive for the State budget), but the result is that this situation even works against the survival of the smaller groups. In any case, the relevance in a legal perspective is that the Constitutional Court not only invited the Parliament to establish at least a minimum standard for all the groups, but in fact also recognised (i. e., accepted) the different protection of minority groups as an unavoidable element of the Italian 'minority Constitution' (pronunciation Nos. 28/1982, 62/1992 and 15/1996).

The briefly described constitutional principles should be concretized through ordinary laws. Under the laws recognising the concrete minority rights of certain groups the following should be mentioned: the articles of the civil and criminal procedure code with respect to the right to use one's own language in legal proceedings (usually with the aid of an interpreter, with the exception of the

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[6] Roberto Toniatti, *La rappresentanza politica delle minoranze linguistiche: i ladini fra rappresentanza „assicurata" e „garantita"*, nota a Corte cost. n. 261/1995, in: Le Regioni 1995, pagg. 1271 ss.

[7] Sergio Bartole, *Minoranze nazionali*, in: Novissimo Digesto Italiano, Appendice, V, pag. 45.

[8] Alessandro Pizzorusso, *Il pluralismo linguistico tra Stato nazionale e autonomie regionali*, Pisa 1975, pagg. 76 ss.

Province of Bolzano, where it is possible to conduct proceedings in the German language), the laws which guarantee political representation for some minority groups (for instance in the European elections for South Tyrol and Aosta Valley, Article 12 (9), Law of 24 January 1979, No. 18), the possibility to constitute schools in the language of the minorities (in South Tyrol, Friuli-Venezia Giulia and Aosta Valley, Articles 4 and 9, Law of 30 July 1973, No. 477), special provisions for the media (for the German, the French and the Slovene minority), and many others[9]. Nevertheless, all these measures only recognize the diversity in the legal status of the various minorities, providing legal recognition to a pre-existing factual situation.

The best example to demonstrate how Italy only creates an asymmetrical minority protection system, is the case of the framework law on minority issues. The small minorities always request a framework law on this matter, which ensures a minimum standard of protection, as a consequence of the disposal of Article 6 of the Constitution, and even the Constitutional Court on some occasions stressed the utility of such a law (Pronunciation No. 312/1983). In spite of many attempts to pass a framework law, which indicates the recognized minorities and provides a minimum standard of protection (the most important and concrete was Proposal No. 612/1991), this law has never been enacted.

The most important criterion adopted by the Italian Constitution for minority protection is the territorial autonomy of the regions where such groups live. Obviously, the more developed the self-government, the easier the recognition and the protection of the minority groups at a local level, because small groups at a national level can become, in a local governance perspective, numerically more significant, or even the majority in its territory, such as in South Tyrol and in the Aosta Valley. This criterion is in fact very efficient in the cases of larger and territorially compact minorities, whereas for smaller and more scattered groups it is an inadequate protection instrument. As a consequence, the most safeguarded (protected) minorities in Italy are the larger linguistic groups, living in border areas adjacent to the respective national States: German speakers along the Austrian border, French speakers along the French border, Slovene speakers near Slovenia.

Since 1970, when Regions with ordinary autonomy were set up, some smaller minorities have also slowly become more safeguarded. Nowadays, many Regions have laws on the protection of minorities living in their territory: Piemonte has passed a law in favour of the French-provençal and the Walser speaking group, Veneto for German and Ladin speakers, Molise for Albanians and Croats,

[9] For example, the regional law of Friuli Venezia Giulia on the protection of the Slovene minority, which is has been approved by the Parliament in December 2007. (AC 229) *http://www.camera.it/_dat/leg13/lavori/stampati/sk0500/frontesp/02290a.htm*

Basilicata for the Albanians, Calabria for the Provençal speaking minority. In most of these cases, these laws have shown their ineffectiveness, containing too general and even utopian provisions which the Region could never be able to apply for economic and political reasons. Obviously, not every Region where linguistic minorities are living has passed laws for their protection, so that many groups do not have any legal instrument to safeguard them: French-provençal speakers in Liguria, Albanians in Abruzzo, Campania and Puglia, Greeks and Provençal speakers in Puglia. As a last point of general information it is important to stress that almost all municipal basic statutes (merely administrative rules) where non-Italian speaking groups live, mention as a municipal duty safeguarding and improving the situation of these groups. After these brief but necessary general remarks on the Italian constitutional minority protection system, it should be easier to understand the legal and historical background to the Draft Bill on the protection of minorities.

3. Conclusions

A lot of attempts have been made in order to classify and organize the linguistic minorities present on the Italian territory, starting from the "historical" criterion (ancient minorities and new minorities) to the "geographical" one (minorities located on national borders or elsewhere). However on the juridical plan the element which immediately emerges is the strong difference existing between the protection regimes; so the accent of a juridical analysis has to be focused on the aspects of the quality of protection, in this sense in possible to speak about strong (Germans, Ladins, Francophones, Slovenes) and weak (Albanians, Croats, Greek) minorities, owing to the fact that both categories include different shades and gradations of protection.

Despite that is possible to express a synthetic evaluation of the different realities, it seems to be necessary to try to individuate some common and basic aspects. First of all the creation of strongly different systems in the protection of minorities in Italy is justified by a number of elements, both of socio-political (international obligations undertaken in order to preserve certain minorities and regional competencies for the safeguard of the local cultural heritage) and economical nature (very high costs to grant some minority rights, especially linguistic ones).

On the second hand it must be considered that the minority protection, being realized in forms of positive discrimination, has to be evaluated in the perspective of a balancing of the different interests playing their role in the game (possible differences in treatment – for example in the recruitment in the public sec-

tor -, possible limitation of some individual freedoms – for example the request for a long term residence for the exercise of the administrative vote right-), so that in this topic it is hardly possible to give certain answers. For what concerns the case of Italy it seems anyway possible to identify two different tendencies. Where a strong minority protection system is present (for example in the Province of Bolzano and from 2005 in the Region Friuli Venezia Giulia) it seems to be established a tendency near to separatism between different linguistic groups, but on the contrary where the element of non separation has been privileged the protection seems to be weaker and the risk of assimilation is fostered by this situation, as is demonstrated in the case of the great number of non protected minorities present in Italy. The only model which appears to be partially different from these two situation id the one adopted in the Valle d'Aosta Region, anyway this model seems to be adaptable to the needs of that reality but it could be adopted in a really difficult way in other Italian regions where the presence of linguistic minorities is remarkable.

The arrangement of an organic national law for the recognition and the protection of all minorities groups could be a possible attempt in order to outline a quite reliable juridical framework in order to grant the functioning of a correct balancing of the different interest concerning the protection of minorities. The reason why such a result has not been reached yet is that in Italy, very often, the strongest minority groups prefer to foster a differentiated protection and have not interest to commit themselves in favour of the weakest minorities.

It is also useful to remember the impact that on this topic could have the possible transformation of Italy in a truly federal State or however in the direction of a strengthening of the regional autonomy[10]. An increase in the competencies transferred from the national on the regional level and especially a development in the political autonomy of the regions could have direct influence on the situation of the minorities living in these regions, especially for what concerns the less protected ones.

As final statement it must be said that the juridical aspect of minority question in general (and linguistic in particular) is a fundamental and indispensable aspect of a peaceful society, but it is sterile if there is not the cooperative will by all the interested parties. There is no juridical measure which could "ensure the attainment of the objectives it has been elaborated and adopted for if it is not applied with 'bona fide', with a vision of human relations which has to be inspired to the principles of equity and tolerance"[11] .

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[10] Sergio Bartole, *The linguistic minorities in Italy: juridical protection*, Rome, 2000, p. 185.

[11] Alessandro Pizzorusso, *Minoranze e maggioranze*, Torino 1993, p. 204.

This statement is moreover true for what concerns the protection of minorities, in reference with the sad examples we can see in the past and also in the present.

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THE CARTESIO JUDGMENT: EMPOWERING LOWER COURTS BY THE EUROPEAN COURT OF JUSTICE

Abstract – *Under European Union law a national court is free to refer questions for a preliminary ruling to the European Court of Justice if the court thinks that a decision on the question is necessary to enable it to give judgment. Since the Bosch case there has always been a tension between this right of the national courts to refer and the appealability of the reference order to national superior courts. The paper focuses on the Cartesio case in which the European Court seems to put an end to the uncertainty by interpreting the Treaty as permitting the appeal from such orders but excluding such national legal rules which allow appeallate courts to set aside or modify the reference by quashing or varying the order. In doing so, the Court provided the national lower courts with a powerful procedural tool by which they can challenge by reference the authoritative national caselaw established by superior courts on the interpretation of EU legal rules ("Rheinmühlen setting").*

Keywords: *preliminary ruling procedure, Cartesio, appeal from the order of reference, national courts' right to refer.*

Article 267 of the Treaty on the Functioning of the European Union (TFEU) covers a reference-based preliminary ruling procedure which is the principal procedural link between the Member States' courts and the European Court of Justice (hereinafter: Court or European Court) within the EU legal system. According to this provision, the Court has jurisdiction to give preliminary ruling on the interpretation or validity of certain EU legal measures which the referring

national court seeks to apply in the main proceedings.[1] In a preliminary ruling procedure a national court makes a decision to request a preliminary ruling from the European Court on matters of EU law arisen in the national proceedings. By clarifying such legal matters the European Court may ensure uniform application of the EU law throughout the Member States and offer useful guidance to the referring courts in particular cases on correct interpretation of EU law.

The right and in some cases the duty of national courts to refer questions for a preliminary ruling follows directly from the TFEU and it is independent of the existence of any national legal rule. This is a *sui generis* procedure based on the Treaty. National legal rules can supplement but cannot restrict these rules of the TFEU.[2] It follows that the national court can initiate a reference for a preliminary ruling even if its own domestic law does not regulate it or its procedural framework. The domestic law of several Member States does not contain separate procedural legal provisions about referring for a preliminary ruling (with the exception of, for example, Scotland, England and Wales, Austria).[3] The absence of domestic legal regulation does not impede preliminary references.[4]

The possibility of an appeal against the decision to refer for a preliminary ruling is a very important question in light of the fact that the appeal essentially restricts the national court's right to refer based on the TFEU. The Court of Justice has stated in several cases: Article 267 TFEU (earlier Article 177 EEC, then Article 234 EC) makes it possible for national courts to make preliminary references freely and to weigh its necessity.[5] However, according to the Court, Article 267 TFEU does not preclude the possibility of an appeal against the ruling to refer if the domestic law so provides. The Treaty seems not to give full autonomy to the referring court in the case when domestic law provides

[1] With the Lisbon Treaty of 2007 coming into force on the 1st of December, 2009 and restructuring the European Union we may only speak about law of the European Union or EU law (with the exception of the European Atomic Energy Community). Looking back to earlier cases and legal practice I may still use the term of Community law according to the then existing terminology and usage. Naturally the earlier conclusions relating to the Community law equally apply to the EU law in the present circumstances.

[2] See e. g. Case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA (II) [1978] ECR 0629, paras. 20–22., Case C-348/89 Mecanarte–Metalurgica da Lagoa Lda v Chefe do Serviço da Conferencia Final da Alfândega do Porto [1991] ECR I-3277, par. 45.

[3] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. 18th colloquium in Helsinki, 20 and 21 May 2002. *General report*, p. 15. Source: <*http://www.juradmin.eu/en/colloquiums/colloq_en_18.html*> (accessed: July 31, 2010).

[4] For a general overview see Anderson, D. Demetriou, M.: *References to the European Court*. Sweet and Maxwell, London 2002, pp. 1–5., 23–26.

[5] E. g. Case 166/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (III) [1974] E. C. R. 0033, paras. 3–4. or Case C-261/95 Rosalba Palmisani v Istituto nazionale della previdenza sociale (INPS) [1997] E. C. R. I-4025, par. 20.

ordinary legal remedies against the reference.[6] Naturally, in such circumstances it is up to the parties to the litigation whether they will question the reference by raising an appeal. The judgment the European Court gave in the *Cartesio* case has brought significant turn in the Court's position on the question of appealing the national courts' decisions of reference. In what follows I am to highlight the importance of this turn.

The *Cartesio* case substantively concerned the compatibility of Hungarian law preventing the Hungarian companies from transferring their seats to another Member State of the Union with Articles 43 and 48 EC (now Articles 49 and 54 TFEU) relating to the freedom of establishment. In this respect, the judgment of the European Court has not brought significant change in the prevailing caselaw.[7] However, the national court making the reference (the Regional Court of Appeal of Szeged) referred some questions for a preliminary ruling addressing the procedural conditions of preliminary references including the appealability of national courts' decisions to refer. The European Court's answer to the third question referred by the national court implied real novelty in dealing with the problem and on the merits the Court substantially modified its forty-year caselaw. In the following I endeavour to show how it did it.

1. Useful answer to a hypothetical question?

The third question referred by the Regional Court of Appeal of Szeged to the Court runs as follows: "Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [presently Article 267 TFEU] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?"[8] Though this question raised one of the fundamental problems of preliminary ruling procedure, unfortunately it seemed to be hypothetical in nature. In the particular proceedings no appeal was brought against the Regional Court's order making the

[6] Case 13/61 Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn [1962] ECR 0089, Case 146/73 Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (II) [1974] ECR 0139, par. 3.

[7] See e. g. Szydlo, M.: Case C 210/06, CARTESIO. 46 *Common Market Law Review* (2009) No. 2., pp. 703–722.

[8] Cartesio, *supra*, par. 40.

reference, so any question relating to the appealability of the decision could be seen as irrelevant to the solution of the dispute in such circumstances.

The answer to a hypothetical question is not determinative of the case pending before the referring court and does not affect its outcome. As Article 267 TFEU (ex Article 234 EC) explicitly provides that a preliminary ruling should enable the referring national court to give judgment in the dispute brought before it, hypothetical questions are not admissible in preliminary ruling procedures and the Court refuses to deal with the request for answering such questions. Article 267 TFEU has no purpose to make the European Court to entertain abstract questions of EU law and give purely advisory opinions that have no chance to determine more or less the outcome of the particular dispute.[9] Deciding by the Court on hypothetical questions does not belong to the proper administration of justice and judicial function. As the Court puts it in *Foglia (II)* : "It must in fact be emphasized that the duty assigned to the Court by Article 177 [later Article 234 EC, now Article 267 TFEU] is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. It accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it [. . .] in order to induce the Court to give its views on certain problems of Community law which do not correspond to an objective requirement inherent in the resolution of a dispute."[10]

In the proceedings of the *Cartesio* case no appeal was lodged against the order of reference. A question concerning the limits of an appellate decision to be made by a higher court on an appeal from an order of reference which actually has not been brought is clearly hypothetical in nature. In light of Article 267 TFEU the answer to the question is not necessary (or even useful) for the referring court to determine and settle the legal issues which have arisen on the facts of the dispute.

The admissibility problem has been solved in an interesting way. The Court did not conclude that the question was hypothetical, but instead it was of the view that the hypothetical nature of the question could not be ascertained because nothing in the file permitted the conclusion that there had been no appeal against the order to refer or that there could no longer be any appeal against it.[11]

In light of the Hungarian civil procedural rules which were applicable in the case this reasoning is not convincing. In accordance with 236. § of the Law No. III of 1952 on civil procedure an appeal against an order to refer has dilatory

[9] Case C-83/91 Meilicke v ADV/ORGA [1992] ECR I-4871, par. 25.

[10] Case 244/80 Pasquale Foglia v Mariella Novello (II) [1981] ECR 3045, par. 18., Case 149/82 Stephanie Robards v Insurance Officer [1983] ECR 0171, par. 19., C-415/93 Union royale belge des sociétés de football association v Bosman [1995] ECR I-4921, par. 60.

[11] Cartesio, *supra*, par. 85.

effect on the implementation of the order, i. e. it suspends the effectiveness of the decision of reference**.** And this being so, it is clear that no appeal had been lodged before the referring court actually executed the order and sent its questions and the relevant part of the file to the European Court. Otherwise, the pendency of an appeal would have prevented the court from conveying the reference to the Court under the Hungarian procedural rules. The transmission of the reference would have been delayed until the determination of the appeal at second instance. On the other hand, pursuant to 231. § of the same law, until it has become final this kind of order is not executable, (i. e. the court may not send the questions and the relevant part of the file to the European Court). In addition, an appeal filed after the end of the appeal period would be dismissed as untimely without examination on the merits of the issue. So, such an untimely appeal would have no relevance whatsoever to the preliminary ruling procedure, or generally, to the case.

However, it must be stressed that the Court did not take into attention these two provisions of the aforementioned Hungarian law in setting up the relevant national legal context for the purposes of its preliminary decision.[12] This was all the more surprising, because Ireland and the Commission maintained that the question was hypothetical for the reasons I have mentioned above, and AG *Poiares Maduro*–in his opinion–following another path dealing with this problem made explicit mention on the dilatory effect of the appeal against an order to make reference for a preliminary ruling in Hungarian civil procedure, and provided a separate set of reasons for the conclusion that the Court should deal with the third question despite its hypothetical nature.[13] However, the reasons set forth by the Advocate General were not truly convincing and would have run against the *Foglia–Robards–Dias* line of cases concerning the handling of hypothetical questions referred to the Court by national courts.[14] So I am bypassing the review and analysis of these reasons, as the Court did not seem to approve this line of arguments of the Advocate General and relied on other considerations in establishing the admissibility of the third question of the Regional Court of Appeal of Szeged.

All in all, the Court paying great deference to the referring court relied on and maintained the presumption, that the question referred by the national court was relevant to the facts of the particular case and some uncertainty relating to this relevance was not enough to reject the answer (presumption of relevance). So, it was a matter for the national court to see that the preliminary ruling be

[12] Cartesio, *supra,* paras. 3–10.

[13] Cartesio, *supra*, per AG Poiares Maduro, paras. 11. and 13–14.

[14] Foglia (II), *supra*, par. 18. ; Robards, *supra*, par. 19., Case C-343/90 Manuel José Lourenço Dias v Director da Alfândega do Porto [1992] ECR I-4673, par. 17.

useful for its decision in the case. Naturally, it is hard to imagine what role the Court's answer to the third question could have played in the determination of the particular legal dispute and how it could have been useful for the particular decision of the referring court. However, it was useful in another sense: rewriting the *Bosch–Rheinmühlen-Düsseldorf* caselaw (see the following points) it had an important effect on the legal rules which allow appeal against the orders to make reference for a preliminary ruling.

2. Appeal from an order to refer–the basic problem

Under Article 267 TFEU a national court is free to decide on the initiation of a preliminary ruling procedure. Of course, the conditions provided by the Treaty provision may restrict this right to refer. This right of the national courts to make reference for a preliminary ruling has been explicitly asserted by the Court in the *Rheinmühlen-Düsseldorf* cases[15] and later has been affirmed in several other cases.[16] The fundamental question in this respect is that the national law might limit this right of the national courts, and if it might, how and to what degree. Such typical restriction is when the national law allows appeal from an order initiating preliminary ruling procedure. The appeal is an ordinary legal remedy which, however, limits the the national court's competence to refer EU legal issues to the European Court under Article 267 TFEU, if the higher court to which the appeal lies quashes the order for reference thereby making the lower, referring court to continue the case without reference.[17]

The *Bosch* case, in which the first preliminary ruling has been given by the European Court, already confronted the Court *per tangentem* with the issue. Here, the Court concluded that the Treaty did not prevent the national court of cassation from entertaining the appeal against the decision to refer, but left the admissibility of such appeals to the national law and the decisions of (higher) national courts.[18] Nevertheless, this problem touching upon the very essence of the relationship between national courts and the European Court, the relations of superior and lower national courts' competences in EU law matters and, after all, the basis of the functioning of the Community legal order needed a more principled and elaborated solution. The European Court seemed to find such so-

[15] Rheinmühlen-Düsseldorf (II), *supra*, par. 3., Rheinmühlen-Düsseldorf (III), *supra*, paras. 3–4.

[16] E. g. Simmenthal (II), *supra,* paras. 20–22., Mecanarte, *supra*, par. 45.

[17] For an overview see e. g. Bermann, G. A. *et al*.: *European Union Law*. West Group, St. Paul 2002, pp. 380–381. or Blutman, L.: *EU-jog a tárgyalóteremben – az előzetes döntéshozatal.* [EU Law in Courtroom: Preliminary Ruling Procedure] KJK-KERSZÖV, Budapest 2003, pp. 292–302.

[18] Bosch, *supra*, point A.

lution in the *Rheinmühlen-Düsseldorf* cases of 1974. As we will see in the next section the solution provided by the *Rheinmühlen-Düsseldorf* judgments proved to be somewhat ill-matched, and only the *Cartesio* judgment brought changes in the issue thirty years later. In fact, the answer given by the Court to the referring court's third question in the *Cartesio* case belongs to those line of judgments which have formed the basic conditions of the co-existence and relationship of EU (Community) law and laws of the Member States. Now, at this point it may be useful to refer very shortly to this line of judgments widening the legal effects of the EU law within the Member States' legal systems.

At the very beginning of the 1960s, in the *van Gend en Loos* case the European Court has successfully prevented the national legal systems from being boxed up against the Community law and made the way free for the Community law to the interior of Member States' municipal law thereby ensuring that in various contexts the Community law have legal effects on various legal relations within the municipal law.[19] In a series of judgments the Court did that by deriving rights from the EU law for the actors of national legal systems (ie. subjects of law and the authorities) which they could invoke as legal grounds against each other pursuing their interests in national legal proceedings. The outcome of this caselaw can be summed up very succintly in the following way:

(1) a private party may challenge under Community law an administrative measure taken by a Member State's administrative authority (*private party versus administrative authority*) ;[20]
(2) in deciding a legal dispute a national court may set aside or exclude any national legal rule contrary to EU law (*national court versus national legislator*) ;[21]
(3) a private party may claim damages for any national legal rule contrary to EU law (*private party versus national legislator*) ;[22]
(4) a private party may demand compensation for a national court's decision contrary to EU law (*private party versus national court*) ;[23]
(5) for the protection of the rights based on EU law a private party may raise a claim against another private party (*private party versus private party*).[24]

In this way the Community law has become a powerful device in safeguarding the interest of various groups of legal subjects. By each of the abovemen-

[19] Case 26/62 van Gend en Loos v Netherlands Inland Revenue Administration [1963] ECR 0003.
[20] *Ibidem.*
[21] Simmenthal (II), *supra*.
[22] Joined Cases C-6/90 és C-9/90 Francovich and Bonifaci v Italy [1991] ECR I-5357.
[23] Case C-224/01Köbler v Austria [2003] ECR I-10239.
[24] Case 43/75 Defrenne v Sabena [1976] ECR 0455, Case 152/84 Marshall v Health Authority [1986] ECR 0723.

tioned judgments the European Court has multiplied the number of those legal actors which may control and enforce the implementation of Community law against another legal subject or authority within the Member States' legal systems. The two *Rheinmühlen-Düsseldorf* and *Cartesio* judgments, where the European Court enlarged the scope to act of the national lower courts against the national superior courts, joined this line of important cases.

3. The "*Rheinmühlen setting*" or lower courts versus superior courts

The two *Rheinmühlen-Düsseldorf* cases of 1974 are well-known, which excuses me from expounding the facts and legal issues they raised. However, it is expedient to set forth the heart of the legal problem arisen in these cases in connection with the preliminary ruling procedure. Here, the *Bundesfinanzhof* (Federal Court of Finances) as appellate court quashed the judgment of the *Hessisches Finanzgericht* and sent back the case to the court of first instance for a new procedure. In reconsidering the case the *Finanzgericht* had doubts about the appellate court's reasons in light of the relevant Community rules and sought to clarify the import of these rules by referring questions for a preliminary ruling to the European Court notwithstanding the fact that under the provisions of the German *Finanzgerichtsordnung* the lower court was bound by the decision of the superior court. In its reference the *Finanzgericht* asked whether a court of first instance retained its right to refer disputed questions to the Court in these circumstances, and the *Bundesfinanzhof* acting on the plaintiff's appeal against the *Finanzgericht's* order for reference also put up a similar question to the Court in a separate reference for a preliminary ruling.[25] To put it in a more general way, the question lay in that whether the inferior court had any right to make a reference to the European Court if the legal issue relating to the Community law constituting the subject matter of the reference had already been authoritatively decided by a superior court. In this case the reference would have amounted to a challenge by an inferior court to a binding authority of a superior court.

Taking account of the tendency of the caselaw outlined in the previous section the Court's conclusion did not come as a surprise. It pointed out that a rule of national law whereby a national court was bound on points of law set forth in the decision of a superior court could not deprive the inferior court of its power to refer to the Court such questions of Community law that had been determined

[25] See Steiner, J. Wood, L.: *Textbook on EC Law*. Oxford University Press, Oxford 2003, pp. 560–561. ; or Bermann, G. A. *et al*.: *op. cit.* pp. 380–381.

by the superior court's ruling.[26] It follows, that if an inferior court considers the previous, authoritative caselaw of the superior courts contrary to the EU law or has doubts in this respect, it remains free to refer the question to the European Court and thereby effectively challenging the prevailing legal position on this question in the national legal practice.[27]

The European Court thus prevented a national judicial practice on a point of law from being frozen or firmly established in a manner inconsistent with EU law by the caselaw of superior courts of a Member State. The Court therefore provided the inferior courts of the Member States with a powerful procedural tool based on Article 267 TFEU by which they can control and shape indirectly the interpretation of EU law within the Member States' legal systems–even against the authoritative and prevailing practice of the superior courts. That is what happened in the *Placanica* case where the Italian lower courts used their right to refer for challenging the legal position of the *Corte Suprema di Cassazione* on the issue of the licensing conditions relating to the pursuit of cross-border organising activities in the gambling sector.[28]

This procedural tool derived from Article 267 TFEU for the inferior courts may become illusory, if the national law allows appeal against the orders to refer for a preliminary ruling by which these inferior courts seek to dispute the views of those superior courts which will determine these appeals. In disposing of the appeal at the second instance the superior court may put the necessity of reference in question by pointing to the fact that previous decisions of the national superior courts on the point of EU law at issue authoritatively settled the question, dispelled any doubt as to the correct interpretation of the EU measure and provided sufficient reason not to refer the question to the European Court depriving the reference of the necessity condition set forth by Article 267 TFEU.

An appeal against an order of reference may practically defuse the procedural weapon which the European Court gave into the hands of the lower national courts in the two *Rheinmühlen-Düsseldorf* cases of 1974. However, neither in the *Rheinmühlen-Düsseldorf* cases nor later in other cases did the Court question the lawfulness of national legal remedies against the orders to refer and it has always stopped short of declaring that the appealability of the orders for reference in some of the national legal systems of the Member States would be inconsistent with the national courts' discretion to refer for a preliminary ruling pursuant to Article 267 TFEU. This caution is understandable. As could be seen in the previous section the Court has already comitted itself in 1961 in the

[26] Rheinmühlen-Düsseldorf (II), *supra*, par. 3. ; Rheinmühlen-Düsseldorf (III) *supra*, par. 4.

[27] Rheinmühlen-Düsseldorf (III), *supra*, par. 4.

[28] Joined Cases C-338/04, C-359/04 and C-360/04 Placanica, Palazzese and Sorricchio [2007] ECR I-1891.

Bosch case to the view that Article 267 TFEU (then Article 177 EEC) does not preclude national legal rules allowing appeal against an order of reference.

4. *Cartesio* judgment: restriction on legal remedies in determining an appeal

In the two *Rheinmühlen-Düsseldorf* cases the Court established a powerful procedural weapon for the inferior national courts, but permitted the Member States to defuse this weapon by allowing appeal or other legal remedies from the orders to refer questions to the European Court for a preliminary ruling. However it has been persistently viewed that the possibility of such appeals may infringe Article 267 TFEU by restricting the national courts to avail themselves of the right to refer laid down in the said provision of the Treaty.[29] (The practice in the Union is diversified, a number of the Member States do not allow an order for reference to be appealed, e. g. Belgium, Ireland**,** Italy).[30] In *Cartesio* the third question of the Regional Court of Appeal of Szeged pointed precisely towards the tension between the national courts' right to refer for a preliminary ruling based on EU law and the appealability of orders to refer based on national procedural rules. So, after having declared the question admissible, the Court had to deal with the problem on its merits.

The *Cartesio* case has not revealed the "*Rheinmühlen setting*" because no difference appeared between the views of the referring court and the previous Hungarian legal practice or caselaw as to the conditions of the transfer to another Member State of seats of companies incorporated in Hungary. In this case the referring court did not use the reference for a preliminary ruling to change the legal practice or have its own views on the issue endorsed by the authority of the European Court against the position of other national courts. (The referring court itself is a superior court in the Hungarian judicial system.) Notwithstanding this fact the third question of the reference confronted the European Court with a problem which the Court had not addressed explicitly for more than thirty years: is the appealability of the orders to refer compatible with the national courts' right to refer questions for a preliminary ruling to the Court under Article 267 TFEU?

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[29] See *AG Warner's* opinion in the *Rheinmühlen-Düsseldorf (III)* case, or the ruling of the Irish Supreme Court in the *Campus Oil* case (Campus Oil v. Minister for Industry and Energy [1983] IR 82, as quoted by Bermann *et al.: op. cit.* 380–381., see also e. g. Dauses, M. A.: *Az előzetes döntéshozatali eljárás az EK szerződés 177. cikke szerint.* [Preliminary ruling procedure under Article 177 of the EC Treaty] Országos Igazságszolgáltatási Tanács, Budapest 2000, p. 79.

[30] Anderson, D. Demetriou, M.: *op. cit.* 215.

The solution the Court found illuminates some characteristics of the interpretational technique of the body. The Court refused to reverse its caselaw on this point originated in the *Bosch* case and practically maintained that the possibility of appeals provided by national procedural rules against the orders for reference was not precluded by the Treaty. However, its attention was focused on the question of what kind of legal remedies could be provided by the appellate court determining the appeal from an order to refer. The most important returns of the *Cartesio* judgment are that the Court narrowed down the permissible domain of the legal remedies in such a way that the appeal essentially become aimless or useless. The critical part of the judgment runs as follows: "[. . .] where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC [now Article 267 TFEU] is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings."[31]

Consequently, the order initiating a preliminary ruling procedure may be appealed to a superior court, but cannot not be varied or quashed by the court of second instance without infringing the Article 267 of the TFEU. The point lies in that even in case of an appellate procedure the referring court of first instance retains its freedom to decide on maintaining the reference or withdrawing it, with knowledge of the appellate court's opinion. It is worth noting that it has been firmly established in the Court's caselaw that the assessment of the relevance and necessity of the question referred for a preliminary ruling is the responsibility of the referring court alone, subject to some limited exceptions.[32] But the conclusion that the appellate court may not put aside or modify the reference by varying or quashing the order of reference was first explicitly deduced by the Court in the *Cartesio* case.

In *Cartesio* the Court practically eliminated the restriction by appeal on the national courts' right to refer for a preliminary ruling to which it had turned a blind eye for thirty years and gave the lower courts free hand to avail themselves of this right. (The holding incurs as a consequence that in the cases where the "*Rheinmühlen setting*" occurs the internal procedural rules cannot restrain

[31] Cartesio, *supra*, par. 98.
[32] Cartesio, *supra,* par. 96.

the lower courts' activity against the settled and authoritative caselaw of national superior courts relating to the interpretation of EU legal rules.)

The *Cartesio* judgment implies important consequences for those legal systems of Member States which allow an order for reference to be appealed. It seems clear that the national procedural rules of the Member States are not in accordance with the abovementioned conclusions of the *Cartesio* decision inasmuch as they permit the appellate courts to set aside or modify the reference by quashing or varying the order for reference appealed by one of the parties to the dispute. Under this position, the appeal against orders of reference has lost its point. The appellate court' decision may not be binding on the referring court regarding the reference itself, because "[…] Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it."[33] As the referring court may maintain the reference even if the appellate court declared the reference unfounded or unlawful, in this respect the decision made at second instance becomes only advisory in nature.

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[33] *Ibidem.*

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ABOUT MEDIA POLICY OF EUROPEAN UNION AFTER THE DIRECTIVE 2007/65 EC ON AUDIOVISUAL MEDIA SERVICES[1]

Abstract – *The "Paper" includes the author's ideas about new goals and fields of regulation that were created by development of information and communication technologies observed in the European audiovisual policy in the past years. The European media regulation was revised by Directive 2007/65/EC on audiovisual media services because involving new platforms made necessary to fundamentally think over the provisions of 89/552/EEC. Nowadays independently from technologies used to deliver the content all media service providers are subject to the Directive, consequently linear and non linear (on-demand) media services are differentiated. Generally the new rules are liberalized and modernized compared to formers. They allow new advertising styles (e. g. product placement) and technologies (split screen) and they revised the advertising rules that existed so far. In spite of more flexible regulation, one of strict goals of the Directive, the requirement of effective consumer protection towards all media service providers can be observed from beginning to end. Besides it in the following years the most significant challenge for European Unoin's media policy will be to make the European audiovisual media industry competitive. The "Paper" wishes to call the attention to the specific aspects of these fields.*

Keywords: *audiovisual media services, media pluralism, commercial communication, consumer protection, competitiveneness*

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1. Introduction

The fundamental condition of media regulation of European Union was laid down by the Article 10 of European Convention on Human Rights that declares "Everyone has the right to freedom of expression". As basic right it "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers". The main points of historical development of media policy in the European Union based on this Article. There are the followings: the Green Paper on the establishment of a common market in broadcasting presented in 1984, then The Television without Frontiers Directive (89/552/EEC) adopted in 1989 that was revised in 1997 (97/36/EC) and in year of 2007. The last version renamed it to Audiovisual Media Services Directive (2007/65/EC). The audiovisual regulatory framework in codified version was accepted by Directive 2010/13/EU of the European Parlament and the Council (Directive).[2]

The European Union's media regulation policy set itinerary the course by approval of Directive (2007/65/EC) that represents new approach being market – and competition – centred. The main reasons of liberalism and flexible policy are the challenges created by development of information and communication technologies, claims for more effective consumer protection, furthermore to provide the regulatory conditions to European broadcasters that promote a competitive European media industry againts overseas market too. The new approach can be observed in the regulatory framework and taking into consideration the area without frontiers national authorities have to implement the rules in accordance with the Directive in order to realise the main goals. The past experiences show that after the Directive came into force the two mostly preferred segments of this field in national transposition process are to create a competitive European media industry and to guarantee the effective consumer protection level because of their complexity and sensitivity.

2. To create competititon oriented and competitive media industry

2.1. The Directive covers *all audiovisual services*, its scope includes the non-linear (television) and linear (on-demand) services. Besides the television

[2] DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version)

broadcast the on-demand services are regulated which main character is that user can access to them at his individual request on the basis of a catalogue of programmes selected by the media service provider at the moment chosen by himself (on-demand). "The characteristic of on-demand audiovisual media services that they are 'television-like', i. e. that they compete for the same audience as television broadcasts."[3] Analysing the legislative intent the Directive's main goal is creating a single, liberalized market that contains all media services. The new rules promote the media market and encourage the competition in the interest of enhancing the marketing approach. In this way according to the starting point of new Community regulation it is needed to adopt *common minimum rules* to all audiovisual media services taking into consideration of avoiding the distortions of competition, improving the legal certainty, promoting the single market.[4]

2.2. Since all Community audiovisual media services are subject to the new rules, it could be the question which common features were emphasized during passing the concerning normative concept. The following characters can be found in the general concept relating to *media services*:

– which is under the editorial responsibility of media service provider
– the principal purpose of which is provision of programmes to general public
– in order to inform, entertain or educate
– by electronic communications networks.

Significant element of the media services is the editorial responsibility of media service provider and according to the Article 1 (c) it means the *exercise of effective control* both over selection of programmes and over their organisation – in case of television broadcast organisation of the chronological schedule, in case of on – demand audiovisual media services organisation of the catalogue. A service can be considered audiovisual media service in case of somebody takes editorial responsibility for it. Likely the editorial responsibilty (or activity) is the normative element which decides the service may be considered media service or not–and we have tipically the on-demand services in mind. If editorial activity does not link to the service consequently there is not editorial responsibility and the service can not be regarded as media service. Since the editorial responsibility is serious distinctive element of categories of services, therefore it is needed to think over and identify exactly by the member states.

In Preamble besides above mentioned normative elements further specalities of media services can be read: they are such economic and cultural mass com-

[3] Preamble (24)
[4] Preamble (11)

munication services offered to significant proportion of general public and they have clear impact on it. This concept includes all services that are in competition with television broadcast, namely services the principal purpose of which is the broadcast.[5]

2.3. New platforms to deliver content are provided to the television and on – demand services by development of information and communication technologies. Since the digital switch over eliminates the limitation of access to the market gone hand in hand with frequency necessity, it provides field to diverse and plural media market. The *principal of pluralism* guarantees the democratic operation of media, in this manner the pluralism of information sector and cultural content together with transparency and independence of media are the principal goals of the Directive.[6] Viviane Reding, the **Member of the European Commission responsible for Information Society and Media in year of 2009 in the Press Release entitled** Europe's Magazines and the new media-way a head stated that the pluralism requires persistent control but no regulation. (Therefore it is necessary to establish an uniform and effective system that tests the mediapluralism on the same indicators.[7] Based on this requirement of European Union the member states have to find such regulatory means and methods that can promote completely the mediapluralism.

3. Building guarantees of consumer protection

3.1. The audiovisual services as mass communication cultural services offered to general public can satisfy variaty of ways consumers' needs for information and entertainment by creating mediapluralism. Service diversity and free enter to market are provided by digital platforms. But at the same time with this process significant market mechanism and rules have governing roles during fights for remaining on market. And since in extensive service scope it will be more difficult to create the own cunsomer base for the operators, fights for consumer

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[5] From media services should exclude: private websites, websites the principal purpose of which is not provision of programmes, any audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest, furthermore the private correspondence, gambling, on-line games and search engines, electronic versions of newspapers and magazines. See: Preamble (21) - (29) and Gellén Klára: The Main Legal Instituations of the Audiovisual Media Service Directive freom the Aspects of the Member State's Scope for Action regarding the Implementation (Az audiovizuális médiaszolgáltatásokról szóló irányelv főbb intézményei a tagállami jogalkotó implementációs mozgástere tükrében) *Infocommunication and Law,* 36/2010.

[6] See i. e.: Preamble: (4), (5), (7), (94)

[7] Reding, Viviene: Europe's Magazines and the new media–way ahead. Press Releases Rapid SPEECH/09/452. Brussels, 7 October 2009.

will be more relevant. Media service provides will seek seriously to satisfy the consumer needs but the basic guarantees in connection with consumer protection adopted by the Directive are needed to take into consideration by them.

The Directive expressly declares that the media services are either cultural and economic services.[8] As cultural services they have clear impact on general public, so the constitutional values and general interest as cultural diversity, right to information, media literacy, mediapluralism, protection of minors and consumers are fundamental requirements that are needed to provide by regulation and effective control mechanism. They can be quaranteed by high level and thorough mesaures approved at national and at Community level. The Preamble (24) declares the most important requirement towards consumer protection in European Union: "the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive." Users may expect the appropriate protection regardless of nature of service and means of access. In this way searching the main content specialities of European media regulation we have to realise that its one of fundamental points is creating sufficient legal certainty to protect consumers. (To create and maintain the competitiveness, the national regulation does not lead to over-limitation and over-regulation of media service as economic services.) The Directive's goals in field of consumer protection can be observed in editorial responsibility, obligation of identification of media service provider, informing consumers in case of commercial communication and particularly in emphasized protection of consumer groups.

3.2. The *editorial responsibility* creates transparent obligation towards service providers. In order to make users aware of the person responsible for content, it is significant requirement for taking editorial responsibility. In this manner service providers are obliged to make information accessable about them to keep count of editorial decision makers. These information have to be easily and directly accessable to consumers. Besides the obligatory content elements, the regulation of the method of publication, as well, fall in the competence of the member states.[9]

3.3. Consumer protection is necessray to provide in particular in case of commercial communications. The Directive creates the *concept of audiovisual commercial communication* that is more than the advertising, all direct or indirect commercial representations in return for payment are included in this concept. (According the Directive the sponsoring, product placement, television advertising and the teleshopping.) To create a plural European media market it is

[8] Preamble (5)
[9] Article 3a.

important to provide the necessary income sources to all commercial service providers. It can be observed in liberalized and flexible advertising law at level of regulation. The new rules means less limitation and obligations to service providers but emphasize the consumer protection: for example it is needed to inform consumers in case of commercial communication, relating to advertising content to generale (i. e. surreptitious audiovisual commercial communication shall be prohibited;) and to specific issues (i. e. prohibition of cigarettes and other tobacco product) are existing the limitations and prohibitions.

The main reason of amendment of rules applied to advertising the danger of avoiding them on new platforms by users. Therefore the Directive promotes to apply new advertising technologies (split screen, interactive advertising), makes the restrictions lighter relating to television advertising, sponsoring and new forms of audiovisual commercial communication are allowed to use such the product placement. The controversial nature of latter (prohibition and permission at the same time.[10] leads to the conclusion that we consider it strange however as a good technology it is used oversea. So if we want to make competitive the European industry all over the global world it is not possible to deprive the producers of European works and programmes of such a good profitable income source. As Christina Angelopoulos offers an opinion the Directive's "symbolic prohibition sets off liberal exceptions". "The rationale behind of using product placement is full liberalisation in order to strenghten the position of European audiovisual industry towards foreign partner even the contradicts among editorial and commercial contents are ingrained as taboos."[11]

3.4. Since protecting consumers is such an emphasized general interest that member states are not able to manage independently, it is necessary full harmonization at national and Community level. The scope of consumer protection shall be defined at two levels: there are general rules applied to all media users (for examle the above mentioned commercial communication) and there are specific provisions concerning to protected groups as people with visual or hearing disability or minors. According to the Directive in order to provide the right to information of elderly and visual or hearing disability people it is neccessary to make all, also the on-demand services accessable.[12] The means to achieve it are sign language, subtitling, audio-description. The Directive does not include any normative regulations but it is requirement towards the member states to encourage the service providers under their jurisdiction. This requirement is performed by different means and provisions chosen at national level.

[10] Article 11.

[11] See: Angelopoulos, Christina, Branded New World? Product placement under the new AVMS Directive. *IRIS Plus* 2010/3

[12] Preamble (46)

The European Commission analysed the measures in 20 member states that are available: the adopted and existing rules show variable approaches.[13] Up to the present some countries passed few provisions applied to this issue but other member states as Italy or the United Kingdom emphasized to make easier the situation of disabled people. It is in evidence that the these requierments are defined generally at statutory level, unfortunatelly in the most cases to the public service broadcasters and the voluntary initiatives are missing.[14]

On the basis of the revised Directive in 1997 which aims to protect minors the transposition of provisions regarding to the classification of television programmmes was performed by the member states (classification according to the danger of television programmes to minors and the rules in connection with its appropriate communication). The Directive's Preamble 59–60 include the new general goals regarding to minors: it is necessary to adopt such rules that taking into consideration the freedom of expression protect the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications.

Since the availability of harmful on new platforms is increased danger member states shall take appropriate measures to ensure that on-demand audiovisual media services which might *seriously impair* the physical, mental or moral development of minors are only made available in such a way as to ensure that minors will not normally hear or see such on-demand audiovisual media services. The Directive's Preamble include the possible measures to on-demand services (PIN codes, fyltering system, labelling) in order to protect the minors from these content.

3.5. An important preventive measure of consumer protection is the *media literacy*. It refers to skills, knowledge and understanding that allow consumers to use media effectively and safely.[15] In the future in relationship of users versus broadcasters the most effective mean of protecting consumers is providing people shall be informed, are able to manage and understand information. However creating it and the education are under the national jurisdiction the European Commission follows with increased attention the media literacy in the member states. The Communication on media literacy adopted at the end of 2007 is

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[13] *Measures concerning access of visually and hearing-impaired people to television programmes–Answers from Member States. http://ec.europa.eu/avpolicy/reg/tvwf/access/measures/index_en.htm.09/09/2010.*

[14] In several cases there are strict rules as in Cyprus where according to „The Disabled Act" all nation-wide television broadcasters are obliged to provide a daily-five minute news bulletin in sign language or the Communication Act in United Kingdom that requires the application of above mentioned forms in detemined per cent from the public service and commercial broadcasters too.

[15] Preamble (47)

concered a significant building block to the audiovisual policy. According to it media literacy shall present in the commercial communication, in the field of audiovisual works (increase the interests towards European films, encourage media creativity) and in connection with online contents too (information related tot google and the other search engines).[16] Then in Recommendation on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society adopted in 2009 encourages all member states and media service providers to promote the media literacy.[17]

4. Freedom of establisment and to provide services

To create single media market the Directive's correct transposition is basic requirement towards the member states. The stricter rules – these are the means of regulation of contents of cultural services in order to protecting general interests – and over-regulation are needed to avoid because it is a seroius reason of leaving the member state by media service providers. In the area without frontiers the *country of origin principle* and the *freedom of establisment* are applied to these economic services. Within internal Community market all services can be spred that are appropriate to law of an origin country. In means that a media service provider falls under only one member state's jurisdiction. On basis of latter the media service providers have the right to choose the member state where they establish and in this way the country that has jurisdiction over them. The Directive determines exactly when the media service providers are considered established in the member state.[18] The cultural policy reasons may lead to restriction.[19] In this way the Directive makes possible to use preventive measures. The one of them is *prevention of avoidance of jurisdiction*. It can be observed if the member state adopted stricter and detailed rules to general interest and it is evidence that a *television broadcaster* to avoid them (so this restriction is not applied to on-demand services) – whose service is wholly or

[16] See: Media literacy: do people really understand how to make the most of blogs, search engines or interactive TV? Press Released Rapid. IP/07/1970. Brussels, 20. /12. /2007., Council Conclusion on European approach to media literacyin digital environment (2008/C 140/08), Commission sets new information sociaty challenges: Becoming literate in new media. Press Release Rapid. IP/09/1244. Brussels, 20. /08. /2009.

[17] Recommendation on media literacy in the digital environment for a more competitive audiovisual and content industry and an inclusive knowledge society Brussels, 20.8. 2009 C (2009) 6464.

[18] Article 2

[19] Judgment of the European Court of 16 December 1992. Case C-211/91. European Court reports 1992 Page I-06757

mostly directed towards its territory – established in other member state' jurisdiction. The member state is entitled to take mesaures compliance with Community Law referring to avoidance of jurisdiction after cooperation procedure without results. In this way any measure may be based on avoiding stricter rules applied to general interests, economic reasons do not lead to intervention by member state. *Restriction of freedom of reception and transmission* can be used againts both of two types of media service as preventive measure. The Directive in order to protect underage and after the amendment in 2007 because of content that conflict with the prohibition of incitement to hatred allows to take national measures againts the broadcasters. While in case of television broadcast restriction of freedom of reception can be used in order to protecting minors and prohibition of incitement to hatred, in case of on-demand services it can be applied with reference to wider content reasons. Member states have the right to take measures to protect fundamental rights, general interests, public policy objectives (public order, public security, consumer protection). Before their use – except the possibility to free process in case of urgent event– member states are obliged to cooperative procedure.[20] "It is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole."[21]

5. Challenges after laying down the bases of new media policy

In the future the competitiveness of media industry will be considered the field (and the effective consumer protection) that member states are not able to manage independently and the Community harmonization is needed. By continual modernization of rules the Eropean Union's policy measures have the greatest impact on this field. The legal regulation is only one of the means to create competitive media industry. To develop such an European market having appropriate economic power and finance sources other solutions are needed too. One of them is to establish wide international relationships, deeper and closer cooperation with other parts of the world which aims international markets. To promote it several new and renewed initiatives are existing (Enlargement strategy, Dialogue and cooperation with European neighbouring countries,

[20] Article 2a
[21] Preamble (8)

Media International Programme[22], to create market relationship with third countries or the Media Mundus on cooperation with media professionals from third countries.[23].[24].

The promotion of European works is significant together with the cultural diversity that the audiovisual industry can become international. According to the Lisbon Strategy audiovisual industry plays significant role in delivering cultural values and establishing economic based on knowledge. The main problem is the low level of distribution of European works.[25] In this field the appropriate share of programmes can be provided by promotion of European producers' works and by quotas being attentitive to the principle of gradation.[26] The Council in the "Conclusions on the promotion of cultural diversity and intercultural dialogue in the external relations of the Union and its Member States" taking into consideration the principle of subsidiarity called the Commission and the member states to promote policies and programmes in order to strenghten culture and to support the European cultural activities, products and services.

During 2007–13. the goals of European Union's media programme are the followings: promotion of Europea media industry and strengthening European cultural and language diversity as audiovisual heritage. Furthermore it is necessary to support the cooperation among member states, to take European and third countries involved in the programme and to promote the spread and major aiudence of European audiovisual products in Europe and outside.

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[22] *http://ec.europa.eu/culture/media/international/index_en.htm*

[23] COMMISSION STAFF WORKING DOCUMENT on the External Dimension of Audiovisual Policy Brussels, 14.7. 2009 SEC (2009) 1033 final

[24] Decision No 1041/2009/EC of the European Parlament and the Council of 21October 2009 establishinga an audiovisaul cooperation programme with media professioanls from third countries (Media Mundus) *Official Journal* L 288. /10.4. 11.2009.

[25] See: Judgment of the European Court of 5 March 2009. Case C-222/07

[26] See also: Mcgonagle, Tarlach: The promotion of Cultural Diversity via New Media Technologies: An Introduction to the challenges of Operationalisation. *IRIS plus.* 2008/6.

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DECENTRALIZACIJA I JAČANJE LOKALNE SAMOUPRAVE

Sažetak *– Procesi decentralizacije i jačanje lokalne samouprave, kao i iskustva modernih država sa razvijenom lokalnom samoupravom, primenjiva u našoj praksi, u određenoj meri komparirana sa iskustvima Srbije, tema su ovoga teksta.*

Ključne reči: *decentralizacija, lokalna samouprava, Srbija (iskustva)*

„Za političku autonomiju nije samo važno da se interesi, potrebe i uverenja participanata afirmišu kao deo javnog dijaloga, već i da postanu predmet javnog prosuđivanja koje zahteva i određeno shvatanje političke validnosti."
(Đorđe Stojanović)

Lokalna samouprava ima dvostruku funkciju: prvo, ona predstavlja politički entitet, kroz koji grupa ljudi ostvaruje svoje primarne socijalne ciljeve, i drugo, ona je jedinica državne uprave, utvrđena zakonom, koja vrši određene poslove, posebno u najrazvijenijim industrijskim zemljama, primorana da radi u skladu sa vrlo visokim standardima koje postavljaju građani u lokalnim zajednicama, te da u svome radu bude izuzetno efikasna.

Očigledno je da politička priroda lokalne samouprave opravdava njenu autonomiju, nezavisno od autonomije koju ona uživa. Autonomija lokalne samouprave ima svoju zastupljenost u mnogobrojnim zemljama i političkim konceptima, ali je ona u svim prilikama garantovana ustavom i zakonima.[1]

[1] U SR Nemačkoj – „Selbstverwaltung" (član 28. Osnovnog zakon SRN), u Francuskoj – „Libre administration" (član 72. Ustava), u Velikoj Britaniji – „Self-government", itd.

Ekonomski gledano, snaga i uticaj lokalnih vlasti, njihova moć i stepen autonomije, koju oni uživaju su direktna posledica ekonomskog razvoja lokalne zajednice. U skladu sa ekonomskom teorijom federalizma, optimalni stepen decentralizacije se sprovodi na taj način što jedinica državne organizacije biva sposobna da razreši osnovne zahteve svojih građana, te da ekonomski bude u stanju da finansira sprovođenje odluka koje lokalne vlasti donose.

Tokom XX veka polje angažovanja državne mašinerije je enormno poraslo, posebno u odnosu na liberalno shvatanje o državi XIX veka, koje je državu videlo kao instrument za donošenje zakona i osiguranje poretka. Potrebe modernog društva, posebno poslovnog sveta, izražavaju specijalizovane zahteve za tehničkim, kulturnim i admistrativnim službama države, postavljajući državi sve komplikovaniji dnevni red za njihovo rešavanje. U te zahteve spadaju: razvoj infrastrukture sposobne da prati vitalne potrebe razvoja modernih država (železnice, auto-putevi, aerodromi i drugi transportni sistemi), zdravstveno i socijalno osiguranje stanovništva, naučna istraživanja, obrazovanje i priprema kadrova. Naravno, posle 2001. godine ovome treba dodati i naglašenu potrebu, zahtev, da moderne države dodatno preuzmu mere bezbednosti za svoje građane, prvenstveno od terorističkih napada, ali i od sve mnogobrojnijih bezbedonosnih iskušenja. Nemajući mogućnost da sva ova pitanja reši na efikasan, zadovoljavjući, kao i štedljiv način, moderna centralna država deo svojih funkcija/nadležnosti/ovlašćenja prenosi na niže organe – organe lokalne samouprave. Pri tome se ima u vidu da državna podela mora osigurati slobodnu fluktuaciju ljudi, roba i ideja. Osim ovog principa, lokalne samouprave treba da ostvare dva uslova:

– sposobnost pribavljanja sredstava za ostvarenje planiranih aktivnosti u lokalnoj zajednici;
– struktura lokalnih vlasti mora biti takva da uspešno rešava zahteve i potrebe građana u lokalnoj zajednici.

1. Pretpostavke podele nadležnosti unutar državne zajednice

Sve moderne države imaju višestruko naraslu administraciju na svim niovoima.[2] Struktura i rang organa, te njihova dužnost, razlikuju se od države do države. Autonomija lokalnih organa vlasti je takođe različita od države do države, imajući u vidu različiti stepen ekonomske snage, istorijski i tradicionalni stepen pojedinih lokalnih samouprava. Na jednom mestu imamo federalne države, kao što je slučaj Savezne Republike Nemačke, Švajcarske i SAD, sa visokim stepenom decentralizacije, dok su sa druge strane visoko centralizovane zemlje kao što su Francuska

[2] Vidi: D. Radosavljević, 2008.

i Velika Britanija.[3] Struktura lokalnih samouprava u Evropi je dosta različita, sa različitim stepenom odgovornosti i autonomije lokalnih organa.[4]

2. Devolucija i decentralizacija

Sve države imaju područje delovanja koje centralna vlada čvrsto drži u svojim rukama. To su poslovi spoljne politike, nacionalne odbrane, finansijske i poreske politike i očuvanja nacionalne infrastrukture. Druga grupa poslova pokriva delovanje administrativnog i represivnog aparata – policija mora da ima iste standarde delovanja i isti kvalitet službe u celoj zemlji.

Ostale administrativne poslove mogu obavljati i vlasti na lokalnom ili regionalnom nivou, a tipični primeri su: lokalno planiranje i izgradnja, podizanje i održavanje sportskih terena, škola, dečijih vrtića, zaštita prirodne sredine, komunalni poslovi, javni saobraćaj i putevi, prostorni planovi, javna bezbednost i sigurnost, obezbeđenje električne energije, gasa, vodovod i kanalizacija, čišćenje i odvoženje smeća, deponije za smeće, bolnice, socijalni rad, kulturne ustanove – biblioteke, domovi kulture, pozorišta, te podsticanje lokalnog i regionalnog ekonomskog razvoja.

Tendencija je u savremenim državama da se centralna država – vlada, ne meša u ove poslove, čak su ove oblasti sve ređe predmet problematike nacionalnih zakonodstava i regulative, te su kao takva prepuštena lokalnim i regionalnim mogućnostima. Ovo je posebno vidljivo u nastojanjima centralnih vlada da se sva ova pitanja podvrgnu kontroli organa postojeće lokalne samouprave. Najbolji način za to je decentralizacija odgovornosti i prepuštanje iste u ruke nezavisnih lokalnih/opštinskih ili regionalnih vlasti.

3 Veličina lokalne samouprave i moć lokalnih vlasti kao faktor odgovornosti koji im se prenosi

Stepen autonomnosti lokalnih vlasti igra veliku ulogu u utvrđivanju faktora odgovornosti lokalnih samouprava. U slučajevima veće samostalnosti lokalnih

[3] Ovde moramo napomenuti da je laburistička vlada Tonija Blera, nakon pobede 1997. godine, pokrenula vrlo opsežan proces davanja ovlašćenja tradicionalnim britanskim zemljama, Škotskoj, Velsu, te traženju mirnog rešenja za Severnu Irsku; ovlašćenja nisu ista za sve delove Ujedinjenog kraljevstva, već zavise od lokalnih osobenosti, kao i od stepena zahteva koji u tim delovima zemlje postoje. Za sada taj proces najviše koriste Škotlanđani.

[4] Francuska sa populacijom od oko 60 miliona stanovnika ima nešto oko 36.000 opština, većinom malih, dok je bivša SR Nemačka, pre ujedinjenja 1990. godine, sa populacijom od oko 65 miliona stanovnika, imala oko 8.500 opština. Republika Srbija ima manje od 200 opština.

organa vlasti, a posebno u slučajevima njihove bolje organizovanosti, može se govoriti o odgovornosti koju su oni preuzeli za obavljanje određenih državnih poslova. Na ovaj način dolazimo do zaključka da je decentralizacija najveća u slučaju gde je lokalna samouprava najveća. Tamo gde je široka devolucija državne organizacije nemoguća, lokalna samouprava je slabo razvijena. Funkcije lokalne samouprave su međuzavisne sa različitim faktorima. Jačanje lokalne samouprave zavisi od rasta same lokalne zajednice, kako u materijalnom, tako i u populacionom smislu. Naravno, mora postojati i politička volja nosilaca najviše državne vlasti, da bi se polje delatnosti lokalne samouprave proširilo. Pored te volje, potrebna su i materijalna sredstva za izvršenje odluka lokalnih vlasti. Ako je finansijska pozicija lokalne samouprave povoljnija, to će i stručne službe biti specijalizovanije i bolje plaćene. Takođe, manje lokalne zajednice će imati manji broj službenika, primeren broju stanovnika i materijalnim mogućnostima lokalne samouprave.

Idući dalje, frekvencija specijalizovanih administrativnih akata direktno zavisi od rasta populacije. Takođe, i broj visokoobrazovanih službenika raste sa višim stepenom državne organizovanosti. Možemo reći da na mogućost prenošenja odgovornosti sa centralnih na lokalne organe vlasti presudno utiče veličina samoupravne jedinice. Veća samoupravna jedinica, po broju stanovnika, pretežno je sposobnija da preuzme vrlo kompleksne i skupe državne i administrativne funkcije.

Decentralizacija državne vlasti, kao politički proces, ne može se ostvariti bez postojanja čvrste i efikasne lokalne samouprave. Federalni i regionalni organi su forme decentralizacije, ali ne mogu biti zamena za lokalne samoupravne organe. Samo jaka samoupravna lokalna vlada može osigurati jednake životne uslove svojim građanima, koji se zasnivaju na regionalnom planiranju uz uvažavanje ekonomskih principa. Lokalne vlasti moraju imati stabilne izvore finansiranja, pomoću kojih će obrazovati neophodne službe za pomoć i službu građanima. One ne mogu, niti smeju biti, obične ispostave državne uprave, zbog toga što su one i društvene, kulturne i civilizacijske zajednice, formirane u prošlosti, i gde .demokratija mora da se *„proba”* i upražnjava direktno. Svakako da opštine, kao najniži oblik samouprave građana, moraju da imaju one funkcije koje bi im davale formu lokalne vlasti.

Lokalne samouprave ne bi smele da u svojoj organizaciji kopiraju rešenja iz državne organizacije. Umesto toga, mnogo je značajnije da se okrenu rešenjima i iskustvima zemalja sa razvijenom lokalnom samoupravom.[5]

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[5] Velika Britanija, SAD, Švajcarska, SR Nemačka, koje su pokazale da jačanjem lokalnih samouprava i decentralizacijom državne vlasti mnoga pitanja nekadašnje *„visoke politike”* bivaju mnogo bliža običnim građanima i mnogo jednostavnija za rešavanje.

4. Iskustva Srbije

Jedan dosta dobro teorijski osmišljen koncept lokalne samouprave, koji je sa određenim problemima, solidno funkcionisao u Srbiji i celoj Jugoslaviji pre 1990. godine, poništen je Ustavom Republike Srbije[6], po kome je ona postala unitarna, centralistička država. To je vidljivo iz razrade prava i dužnosti koje su u nadležnosti republičkih organa. Oni utvrđuju politiku, donose i izvršavaju zakone i druge propise i vrše ustavno-sudsku i funkciju sudske vlasti. Isključivo nadležnost izvršenja zakona i drugih akata može se poveriti drugim organima i organizacijama, ali republički organi ostaju odgovorni za to. Nadležnosti republike, prava i dužnosti, sačinjava lista od 11 grupa društvenih odnosa. Ova prava i dužnosti, sledeći ustav, raspoređena su republičkim organima, u skladu sa principom podele vlasti.

U ovom ustavu, u okviru jedinstvene države, Republike Srbije, predviđeno je postojanje AP Vojvodine i AP Kosova i Metohije. Zanimljiv je fenomen da, prema ovom ustavu, autonomna pokrajina nema svoju definiciju, pa tako ne znamo da li je ona politička, ekonomska, kulturološka, društvena, . . ., zajednica[7], ili samo (ne) uspešan pokušaj ostvarivanja političkih profita u sutonu ex-Jugoslavije.[8]

Ustav je za njih predviđao određene nadležnosti, ali se taj spisak nadležnosti radikalno razlikovao od prava i nadležnosti republike – države. Šest tačaka je obuhvatalo odnose koje pokrivaju pokrajinski organi, s tim da oni nemaju političku i zakonodavnu funkciju, već samo mogućnost donošenja podzakonskih akata, dok je funkcija izvršnih organa pokrajine svedena na izvršenje marginalija. Za izvršenje zakona republike se traži posebno ovlašćenje, kao uslov da ga vrše pokrajinski organi.[9] Država može poveriti pokrajini vršenje pojedinih poslova iz okvira svojih prava i dužnosti, dajući joj za to i određena finansijska i materijalna sredstva. Isto tako, u članu 112. Ustava, stoji i stav da republički organ može neposredno obezbediti izvršenje određene odluke, ako je ne izvrša-

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[6] Ustav je donet 28. septembra 1990. godine, na zajedničkoj sednici svih veća SR Srbije, od strane jednostranačke skupštine; SR Srbija je u tom trenutku bila federalna jedinica SFR Jugoslavije!

[7] U članu 108. Ustava R Srbije se samo govori da su *„Autonomne pokrajine obrazovane u skladu sa posebnim nacionalnim, istorijskim, kulturnim i drugim svojstvima njihovih područja"*!

[8] Po Ustavu SFRJ iz 1974. godine, važećem u trenutku donošenja Ustava R Srbije, 28. septembra 1990. godine, predstavnici autonomnih pokrajina su bili članovi Predsedništva SFRJ, kolektivnog šefa države.

[9] Tako je 2002. godine, u Narodnoj skupštini R Srbije usvojen Zakon o prenošenju određenih nadležnosti autonomnoj pokrajini, tzv. „Omnibus zakon", kojom je donekle popunjena pravna praznina u ovoj oblasti. Zakon se neposredno primenjivao samo u AP Vojvodini, zato što je AP Kosovo i Metohija od sredine 1999. godine, pod protektoratom međunarodne zajednice.

va, ili je pogrešno izvršava, pokrajinski organ.[10] Autonomne pokrajine nemaju nadležnosti u vezi sa sudskom vlašću. Ovako koncipirane autonomne pokrajine u Ustavu Republike Srbije iz 1990. godine navode na tri zaključka: 1. Iskazan je bazični strah i nepoverenje u ideju pokrajinske samouprave kao političke i društvene zajednice; 2. U Ustavu je pobedio koncept jedinstvene i visoko-centralizovane državne zajednice, koja na silu ujednačava svoje, u osnovi vrlo raznolike regione; i 3. Održava se forma, bez bitnijih elemenata pokrajinske samobitnosti, isključivo u cilju pridobijanja političke koristi, te taktičke prednosti, u okvirima Yu-federacije.

Opština je po ovom ustavu utvrđena kao teritorijalna jedinica lokalne samouprave, a kao posebna jedinica se utvrđuje grad Beograd, glavni grad republike. Prava i nadležnosti opštine svode se na klasične komunalne delatnosti, te onoliko izvršne vlasti koliko se to zakonom ili drugim propisom republike poveri opštini, što je daleko od nadležnosti koje savremene lokalne samouprave obavljaju širom Evrope, a, koje smo pominjali u prvom delu teksta. Zakonska i druga normativna regulativa, koja će u godinama posle donošenja ustava, *„pokrivati"* ovu oblast, neće biti blagonaklona prema lokalnoj samoupravi, niti će je bitnije menjati nabolje. Naprotiv, tako će već 1992. godine Uredbom vlade biti uvedene nove teritorijalne jedinice – okruzi. Predviđeni kao detaširani organi ministarstava, u praksi su dobili karakter regionalnih organa centralizovane vlasti, nadređenih organima lokalne samouprave. Ova protivustavna i protivzakonska uredba, ostala je na snazi sve ove godine, dodajući još jedan argument onima koji tvrde da proces decentralizacije države i optimalizacije lokalne samouprave u Republici Srbiji još nije zbiljski započeo.

Optimizam koji je krasio mnogobrojne učesnike u javnom i političkom životu, posebno poklonike liberalno-demokratskih i proevropskih shvatanja, i njihova visoka očekivanja o stvarnoj demokratizaciji društvenih odnosa, koji sa sobom pretpostavljaju i suštinsku decentralizaciju države, nakon Oktobarskih događanja 2000. godine, vrlo uspešno je poništio proces donošenja Ustava Republike Srbije iz 2006. godine, u svim svojim fazama. Ovde nećemo ulaziti u mnogobrojne, a evidentne slabosti, ovoga na brzu ruku napisanog i usvojenog, te za jednokratnu upotrebu primenjivog akta[11], nego ćemo se samo zadržati na

[10] Autor ovoga teksta ima lično iskustvo, kada je u razgovoru sa tadašnjim ministrom prosvete R Srbije, upravo ova odredba bila spomenuta kao način da se *„poništе"* odluke Pokrajinske skupštine vezane za sektor visokog školstva.

[11] Najveća *„vrlina"* ovoga dokumenta, po rečima najvažnijih političkih činilaca države, u tom trenutku, DSS-a, DS-a, G17 plus, SRS-a, beše *„laka mogućnost promene istog"*, te put za prevremene izbore. U takvoj situaciji, svako je za sebe uzeo, u ustav ugradio, svoju projekciju političkih stavova. Nedorečenosti toga dokumenta su posebno vidljive, sa stanovišta naše teme, u položaju autonomne pokrajine, sa skandaloznim rešenjem od 7% budžetskih sredstava, koji se određuju za funkcionisanje organa i aktivnosti samouprave u AP Vojvodini; međutim, ovde mo-

našoj temi. Tako, po ovom ustavu, država proširuje svoje nadležnosti sa 11 na 16 oblasti, dok se, dodatno, limitiraju prava i nadležnosti autonomnih pokrajina.[12] Nada da će se ovim aktom uspostaviti diskontinuitet sa tzv. „miloševićevskim" režimom izjalovila se, a učesnicima u javnom i političkom životu, kao i analitičarima odnosa u društvu, dodatno je utvrdila stav o prevazi retrogradno-konzervativnih činilaca i političkih elita u Srbiji, odnosno njihovih stavova o daljem razvoju društva.[13]

5. Umesto zaključka

Napred opisana teritorijalna organizacija je zasnovana na principima visoke centralizacije državne vlasti, sa isključivom pretpostavkom nadležnosti u korist republičkog centra. Ovakva centralizacija je, možda, imala određeno opravdanje u glavama nosilaca političkog mandata Republike Srbije, početkom raspada SFR Jugoslavije, te može biti, i imati određenu prednost u uslovima velikih društvenih poremećaja. Međutim, više je nego izvesno da ona već duži niz godina ispoljava forme ograničavanja demokratije, te bitno ugrožava interese građana Republike Srbije i njihovih slobodnih asocijacija. Koncepti i provođenja decentralizacije vlasti, kao osnov za demokratska odlučivanja, ne samo da nisu suprotstavljeni integraciji, nego su nužnost za efikasno rešavanje lokalnih pitanja, u modernoj lokalnoj samoupravnoj zajednici! Takođe, sve ovo je preduslov za zbiljsku demokratizaciju, te dalje korake Republike Srbije u procesu uključenja u tokove evro-atlantskih integracija.

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ramo naglasiti da je cela koncepcija i izvedba ustavnog teksta i materije više nego problematična, da će, i da već koči razvoj društvenih odnosa u državi, ali i razvoj i aspiracije Srbije da se aktivno uključi u procese evro-atlantskih integracija.

[12] U članu 182. pravi se razlika između autonomnih pokrajina, što možemo tumačiti samo političkom, odnosno, politikantskom strategijom, da se na kakav-takav način, pitanje AP Kosovo i Metohija apsolvira na, relativno bezbolan način.

[13] To se najbolje ispoljilo u procesu potvrđivanja Statuta AP Vojvodine, procesa koji je nepotrebno trajao preko godinu dana, u kojem se o ovom dosta benignom političkom dokumentu, zasnovanom na minimalističkim odredbama Ustava iz 2006. godine, govorilo rečnikom sa početka 90. -ih godina, a pokrajinska vlada žigosana kao separatistička!

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DECENTRALISATION AND STRENGHTENING OF LOCAL SELF-GOVERNMENT

Summary

The paper deals with the processes of decentralization and strengthening of local self-government. It discusses the experiences of modern states with developed local self-governance applicable in our practice and to some degree compared with the experiences in Serbia.

Key words: *decentralization, local self-governance, Serbia (experiences)*

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SKRAĆENICE U JEZIKU PRAVA

Sažetak *– rad je posvećen prikazu i detaljnoj analizi skraćenica u jeziku prava, i šire: u jeziku administracije, telekomunikacija i drugih domena stručnih jezika. Radi se o aktuelnoj problematici koja je u svim naučnim, stručnim i udžbeničkim obradama neopravdano zapostavljena, a u sistematizaciji svoje mesto nalazi na samom kraju izlaganja. Sada se skraćenice postavljaju u centar istraživanja, predstavlja se njihova višestruka klasifikacija i prateće pojave koje se javljaju uz upotrebu skraćenica – veoma rasprostranjene na svim nivoima komunikacije. Autor vrši kritičku analizu te osim raznih podela skraćenica daje i relativno opširno predočenje njihovih pozitivnih i negativnih osobina. A kao krucijalan zaključak stoji konstatacija da je interpretacija skraćenica obavezna, što u praksi nije uvek slučaj.*

Ključne reči: *akronimi, inicijalizmi, abrevijacije, interpretacija, polisemija.*

1. Skraćenice[1] kao pastorčad nauke

Istraživačica[2] sa žarkim zanimanjem za ovu temu, ljubiteljica i negovateljica skraćenica je rezignirano ali objektivno ustanovila da se ovaj domen – uprkos njegovom izdvojenom značaju – u sistematizaciji stručnih priručnika neumitno tetura na začelju obrade. Radi dokazivanja važnosti izabrane teme i teoreme, pisac ovog rada je marljivom istrajnošću zbrojao i sabrao abrevijacije na jednoj jedinoj strani dnevnog lista „Magyar Szó"[3], pa s nevericom objavljuje ishod:

[1] Autor će u ovom radu upotrebiti kao sinonime i sledeće termine: skratice, kratice, abrevijacije

[2] Ajduk, Milica: *Linguistic economy in the internet bussiness environment – Cyber acronyms*, Škola biznisa, VPŠ, Novi Sad, 4/2006., s. 131–133.

[3] *„Magyar Szó"*, 13–14. febr. 2010., s. 6.

tu se našlo ništa manje no 156 skratica, pretežno bez ikakvog objašnjenja ili interpretacije.

Nepokolebljiva je činjenica: gore skicirana količina ne samo da nas opravdava, nego štaviše, obavezuje da težimo ka ponovnom analiziranju i produbljenom ispitivanju ove teme. Ne možemo biti površni i da ne uočimo nemilosrdnu navalu skraćenica koja, doduše, želi da ublaži negativne posledice odrona aktuelnih i ažurnih informacija, ali u zanesenjaštvu nasilnog, prekomernog i nesavesnog skraćivanja, čestim mimoilaženjem tumačenja to činimo na uštrb razumljivosti.

2. Prethodno pitanje: normativa pravopisa i njen odnos prema skraćenicama

Na samom početku, kao odgovor na svojevrsno prethodno pitanje, neka stoji malo objašnjenje uz naslov ovog rada. Po krutoj normativi pravila kritički sagledavanog mađarskog pravopisa[4] skraćenice se poimaju na najuži mogući način, pa se u ovu kategoriju ubrajaju isključivo skraćeni oblici zajedničkih i vlastitih imenica (npr. Beograd – Bg), dok se do druge klasifikacione grupe dolazi već proširenim tumačenjem ovog lingvističko-ortografskog fenomena, gde se svrstavaju slovne skraćenice, tj. početna slova ili slogovi višeelementnih, multimorfemskih izraza (npr. Narodna banka Srbije – NBS). Slobodnijom interpretacijom se, međutim, sve kratice kvalifikuju kao opšti pojam u koji spadaju svi mogući oblici ispoljavanja proizvoda operacije skraćivanja reči. Ovaj „slobodarski" pristup je draži, logičniji, simpatičniji i prihvatljiviji za autora, stoga će se prilikom davanja definicija pri klasifikacijama poći od ovog osnovnog stava.

Kao svaki naslov, i ovaj naš aktuelni valja da se proširi. Postupkom ekstenziviranja preciznije možemo izložiti područje istraživanja našeg članka, valjanije osvetliti suštinu, sve ono o čemu želimo da raspravljamo. Dakle: **Skraćenice (abrevijacije), akronimi, inicijalizmi u jeziku prava, u opštem jeziku, u stručnim i službenim jezicima, u jeziku medija, u jezičkom izražavanju sredstava telekomunikacija**. Vrste pojava skraćivanja reči će prevashodno naći svoja mesta u ovom napisu u posebnim podnaslovima, pa neka bude dozvoljeno da izrazim svoju nadu da ću bar u određenoj meri utemeljiti pravo na egzistenciju skraćenica u postavljenoj posebnoj, subjektivnoj sistematskoj strukturalizaciji, jer će se sa sigurnošću dokazati da mnoge, prvenstveno polisemične kategorije skraćenica znače „sumrak" nesumnjivosti saopštenja, pa se zbog njihove dvosmislenosti i nejasnosti – nekada i nerazumljivosti, nemogućnosti dešifrovanja – svrstavaju u negativne lingvističke fenomene.

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[4] *A magyar helyesírás szabályai*, Akadémiai Kiadó, Budapest, 1984.

Već tri duge decenije se bavim negovanjem, lektorisanjem, popravkom prvenstveno stručnog pravno-jezičkog sloja, ali i opšteg jezika. Tek sam se, međutim, u bližoj prošlosti suočio sa zaprepašćujućom istinom da je naš svakodnevni, ali i stručni, pa i službeni jezik u ogromnoj meri poplavila lavina nepoželjnih skratica koje su često izgovarane, napisane, saopštavane bez ikakvih objašnjenja i tumačenja, tako nedvojbeno otežavajući, štaviše sprečavajući i onemogućavajući svakodnevnu opštu, stručno-, službeno- i naučnojezičku komunikaciju. Osnovni cilj ove rasprave je da se bar u maloj meri stvori red u kijametu skraćenica različitih kategorija, klasa i vrsta prezentovanih na srpskom, ali i na drugim jezicima. Nastojaćemo da nakon sistemske obrade konstatujemo koje skraćenice će svoja mesta naći u kategorijama neopravdanih (tzv. nemotivisanih), a koje u krajnjoj liniji ipak u grupi opravdanih (tzv. motivisanih).

Ako se još na tren zadržimo kod uvodnih napomena, učinićemo nespornim: skraćenice poseduju podobnost da postanu samohodne i da se skoro neprimetno ustále i puste svoje korene u svakodnevnoj jezičkoj upotrebi. Često čak ni ne uočavamo da smo pribegli korišćenju skraćenica, sastavljenih inicijalnih slova, slogovnica na raznim nivoima gramatičke tačnosti sa namerom sažimanja i primene načela jezičke ekonomičnosti. Ko bi pomislio, pri običnoj jezičkoj upotrebi, da je *traktor*, reč koja jednosmisleno spada u leksičko blago srpskog jezika, nastala kao ishod procesa specifičnog spajanja jednosložne engleske reči *truck* i skraćivanja, odnosno preuzimanja drugog sloga reči *motor*. Uzgred budi rečeno: svakako se radi o stranoj reči, tj. o tuđici, pozajmljenici, no ovaj fenomen sada nije tema našeg rada. Važno je utvrditi: niko se ne bi setio da se upusti u etimološko ispitivanje prilikom označavanja i korišćenja naziva za poljoprivredne mašine koje neretko – vraćajući se sa svog zadatka obavljenog na vojvođanskim oranicama – debelo nagomilavaju blato na kolovozu i predstavljaju opštu opasnost za učesnike u saobraćaju. Ne bi nam, dakle, palo na pamet, da ga svrstamo u „skraćenički razred" motorističke terminologije. Isto tako ne verujem da bi umorni putnik prilikom odabira pogodnog mesta za noćni odmor i smeštaj u ambijentalnom konačištu lociranom tik pored puta, želeo da se prepusti problematici porekla i raščlanjavanju reči *motel* koja je izvorno bila znatno duža i označila prenoćište za motorizovane putnike. Na izraz *motor hotel* nalećemo još i dan danas u nekim zabačenijim krajevima Amerike ili Kanade, a skraćenica-složenica *motel* nastala je iz elemenata *mo (tor-ho) tel* i našla svoju punopravnu egzistenciju uspešno prebrodivši jezičke barijere i univerzalno se rasprostranila širom celog sveta. Često „briznemo u plač" zbog štetnih uticaja globalizacije, no ipak moramo naglasiti: procesi jezičke univerzalizacije su započeli pre dugih decenija i neodoljivo se šire kao neko naddržavno i prekogranično jato. Slična je situacija i sa skraćenicama.

Sa gledišta sistematizacije naučno-stručnog izlaganja celishodno je ako naša razmatranja pokrenemo iz pravca opštega i polako se približavamo posebnim i pojedinačnim napomenama. Čini se opravdanim da debatu sprovedemo prvenstveno u domenu opšteg govornog jezika, pa ćemo tek nakon tih promišljanja preći na analizu skraćenica iz oblasti stručnog pravnog, pa i službenog jezika i drugih jezičkih slojeva, npr. izražavanja u telekomunikacijama i štampi. Nadam se da u strpljivom auditorijumu neću izazvati grimase zbog groženja, ali ću u središte ispitivanja postaviti primer izuzetno pogodan za demonstratorske svrhe. Idem na „vece". Ova „nužnička" stvar spada u okorele skraćenice: WC takođe kao i gornji primeri, jeste engleskog porekla, *water closet,* stvoren iz početnih slova dvaju elemenata engleskog zahoda, on je ustaljen u blagu našeg jezika i jezika drugih naroda bližeg i daljeg okruženja, a postao je ukorenjen i u skraćenom obliku živi svoj samostalni život.

Pristigli smo i do mogućnosti kritičkog pristupa skraticama obilato korišćenim u instrumentima javnih telekomunikacija. Ovde ćemo imenovati „medijsku kutiju" u koju često buljimo uz mentalno i psihičko otuđenje: gledam TV, a nisam ni svestan činjenice da upotrebljavam globalno rasprostranjenu skraćenicu za televiziju. Preuzimajući rizik da će se za trenutak stvoriti diskrepancija u sistemskoj strukturi i klasifikacionoj shemi rada, ipak ću malo odložiti prelazak na teren stručnog, a pobliže pravnog i službenog jezika. Prvo ću ispitati stanje koje nastaje najezdom SMS[5]-poruka i njihovim neodoljivim ulaskom u jezik svakodnevnice, pa čak i u jezičko izražavanje beletristike. I na ovom primeru se može dokazati da se radi o skraćenici preuzetoj iz engleskog jezika, generalno rasprostranjenoj širom sveta i na mnogim nivoima jezičke upotrebe, koju svi subjekti u primeni dostignuća savremene tehnike svakodnevno koriste. Stvari su se do današnjeg dana u toj meri razbuktale, da je znameniti institut „Balaši"[6] za istraživanje nauke o literaturi u Mađarskoj raspisao književnički konkurs za stvaranje „SMS-dela". Poznati naučnici su se pozivali na činjenicu da je praotac predmetne književne vrste, kongenijalni i nenadmašivi virtuoz, Ištvan Erkenj već pre nekoliko decenija, svojevremeno napisao delo koje je namerno vrvilo od skraćenica. Po dubokom uverenju pisca ovog rada sám Erkenj je namerno pribegao zastrašujućoj šali, ne bi li ukazao na monstruoznost ovog prešturog načina izražavanja. Siromah nije ni pomislio da je i po tom pitanju ispoljio svoje sposobnosti vidovnjaka. Po mom pristrasnom nahođenju, „dela" koja su pristigla i takmičila se povodom dotičnog konkursa se ni sa najvećom dozom blagonaklonosti ne mogu nazvati književnošću. Ova poplava abrevijacija može da zauzme svoje eminentno mesto samo na planu oskrnavljenja jezika, dakle ja

[5] SMS – *Short message service* – usluga kratkih poruka

[6] *Hadarva írok*, SMS irodalmi pályázat, Balassi Intézet (*Brzorek u pisanju*, književni konkurs Instituta Balaši)

bih ovde konstatovao vinost subjekata koji su nameravali da u meritumu razgovaraju o tobožnjim mentalnim i humanim umnim proizvodima. Naravno, Vaš autor nije književni kritičar, čak i na polju negovanja jezika ima samo amaterske pretenzije, no ipak veli: što je mnogo, mnogo je. Ove fenomene SMS-poruka okvalifikovati kao egzistencijalno opravdane produkte književnojezičkog sloja – da se „netokratski" nastrojeni stručnjaci ne uvrede – jeste deplasirani poduhvat.

3. Podele skraćenica

Prilikom rezimiranja rezultata mojih istraživanja, došao sam do zaključka da analizirana pojava pruža mogućnost stvaranja podela koje su u lingvistici u manjoj ili u većoj meri poznate i prihvaćene. Ovo poglavlje ću započeti prikazivanjem najrasprostranjenije klasifikacije, dodajući konstataciju da sam nastojao na subjektivan i originalan način izbeći preklapanja pridavanjem novih značenjskih sadržaja pojedinim tehničkim terminima.

3.1. Skraćenice u užem i u širem smislu

Slovo Matice srpske, tj. njene Pravopisne komisije kao normativnog tela za stvaranje ortografske regulative jeste zakon.

U prvu vrstu skraćenica po našem ortografskom propisniku[7] spadaju skraćeni delovi pojedinih reči ili skupova reči: č. (čitaj), l. (lice), čl. (član), st. (stav), t. (tačka) itd. To su skratice u užem smislu tretiranja tog pojma.

Na veoma celishodan način, gore imenovano regulativno telo je propisalo i drugu vrstu (klasifikacionu grupu), u koju se ubrajaju forme nastale spajanjem početnih slova ili početnih slogova pojedinih složenih naziva. UN (Ujedinjene nacije), RS (Republika Srbija).

Pošto je piscu ove studije dobro poznat i stav Mađarske akademije nauka, neće biti na odmet da ga sada ozbiljno iskritikujemo. On je krut i zauzima usko stanovište, pa u zamišljeni „džak" pojmljene problematike dozvoljava uliti samo one osnovne kratice, kao što su u. (ulica), km (kilometar), Bp. (Budimpešta) itd., pa su naučnici lingvisti bili primorani da se prihvate posla ekstenziviranja tumačenja i putem uopštavanja pojma proširili su kategorizaciju, u grupu ubrajavši ne samo prvu vrstu nego i skraćenice u širem smislu. Dakle, pravopis srpskog jezika je – sledeći dobro uhodanu praksu koja je započela Vukom Stefanovićem Karadžićem i Ljudevitom Gajem – i u aktuelnoj ortografiji današnjice prihvatio jednostavno, ali ipak razborito, za svrhe stručnog i naučnog istraživanja najsvr-

[7] *Pravopis srpskohrvatskoga književnog jezika*, Matica srpska – Matica hrvatska, Novi Sad – Zagreb, 1960. s. 125–129.

sishodnije, eorijsko-praktično šire stanovište, na taj način olakšavajući posao autora ovog napisa, koji će se u svojim izlaganjima držati tog polaznog načela.

3.2. Skraćenice-mozaici i njihove vrste

Svestan sam okolnosti da u naučnoj literaturi srpskog jezičkog područja ovaj naziv za abrevijacije ne samo da nije uobičajen, nego je uopšte nepoznat, ali smatram da se radi o veoma slikovitom nazivu, stoga sam ga pozajmio iz lingvističke terminologije mađarskog jezika.

U ovoj podeli rvo i istaknuto mesto zauzima modifikovana varijanta najzastupljenije naučne klasifikacije.

3.2.1. Akronimi, inicijalizmi i mešovite skraćenice

a) Skraćenice nastale putem spajanja slogova reči, slogovnice (akronimi)
b) Skraćenice stvorene iz početnih slova reči (inicijalizmi)
– Verzalne skraćenice
– Skraćenice stvorene pomoću malih početnih slova reči
c) Mešovite skraćenice

a) Ako internacionalizam kojim se označavaju najčešće skraćenice podvrgnemo terminološkom i sadržinskom prosuđenju, možemo zaključiti da postoji neka nedoslednost u izvorima gde se prikazuju objašnjenja suštine skraćenica, ne bismo pogrešili, dakle, ako iskažemo: ima nedostatka u jasnom, preciznom i jednosmislenom razgraničenju pojma. Prvenstveno ovde mislim na definiciju akronima, jer se u teoriji bez striktne separacije pojavljuju inicijalne skraćenice i one koje nastaju putem spajanja slogova. Ako se u istoj skupini nađu npr. JŽ (Jugoslovenske železnice) i Nama (Narodni magazin, piše se nedosledno i kao NAMA i NA-MA), ova kategorizacija je – priznajmo – na žalost, polovična. Možda to na prvi pogled nije evidentno, ali JŽ forma je nastala sastavljanjem početnih slova institucije čiji naziv se skraćuje. Istovremeno pak NA-MA je primer sastavljanja početnih slogova reči. Stoga je pisac ovih redova stao na stanovište da stvori sledeću definiciju: **u kategoriju akronima spadaju slogovnice, dakle „mozaici" stvoreni spajanjem slogova, sastavnih elemenata izraza**.

b) Po ustanovljenju gore iznetih, čini se jednostavnim rešenje da inicijalne skraćenice nastaju tako što se početna slova elemenata izraza sastavljaju, stvarajući novu abrevijaciju. Ako ćemo gornjima dodati još jedan tipičan primer: SANU jeste skraćenica od Srpske akademije nauka i umetnosti, a uprkos opštim pravopisnim pravilima, piše se velikim slovima. Nećemo dakle pogrešiti ako utvrdimo: sastavljanje inicijala jeste najčešći vid stvaranja skraćenica. Što

se tiče podgrupe, najučestalije su verzalne srkraćenice, tj. mozaici stvoreni od velikih početnih slova reči.

Da ponovim, stvara izvesnu nekonsekventnost činjenica da ova „verzalna" varijanta u nekoj meri krši pravopisna pravila srpskog jezika, jer je opšte poznato: valja pisati npr. Ministarstvo unutrašnjih poslova, a prihvaćena je skraćenica MUP. Stoga nije do kraja izdiferencirano i nedorečeno je zašto su se ustalile verzalne skraćenice i u onim slučajevima kada se puni višeelementni nazivi institucija pišu po šemi: prva reč – veliko početno slovo, ostale reči – mala početna slova. Eventualno bi se mogla pokrenuti inicijativa da se na višim unifikatornim jezičkim forumima stavi na dnevni red rasprava o ovom problemu, mada – priznajem – ima logike i u upotrebi iznetih prihvaćenih i ustaljenih oblika datih izraza. Protivargument bi bio da se bezuslovno pokorimo uhodanoj, generalnoj ortografskoj praksi. Dvojbu, proizvoljnost i nedoslednost prouzrokuje neujednačenost u donošenju odluke, kada se primenjuju skraćenice sastavljene od malih slova. Često zavisi od diskrecione ocene vršioca operacije skraćivanja koji modalitet će da odabere, npr. TANJUG (Telegrafska agencija nove Jugoslavije) ili – sem početnog – malim slovima: Tanjug.

c) Gornjim primerom smo se već dotakli sledeće podgrupe, tj. mešovitih skraćenica, „polovičnih" verzija, dakle – slučajeva kada je jedan element jezičkog derivata početno slovo, dok će drugi sastojak predstavljati slog. Ako se (ponovo) poslužim primerom „mađarske konotacije", moja teza će se dokazati: kada skraticu za međunarodno označavanje mađarske nacionale valute podvrgnemo ispitivanju, videćemo da se ona sastoji iz dva elementa od kojih je prvi „Hungarian" slog (HU), dok je drugi početno slovo „florin, ili forinta" (F), a finalni produkt je HUF.

3.3. Potpune i nepotpune skraćenice

Pošto su percipijenti ovog napisa prvenstveno pravnici, čini se celishodnim da se kod ove grupe skraćenica prvenstveno poslužimo nazivima zakona, delom aktuelno važećih, a delom iz bliže istorije naše pravne regulative.

Ako naslov opšteg pravnog akta: Zakon o osnovama bezbednosti saobraćaja skratimo u formi: ZOOBS, onda se radi o potpunoj skraćenici, jer su sva početna slova svih elemenata naslova zakona našla svoja mesta u „verzalnom sažetku", čak je i prefiks „o" preuzet i upisan. Međutim nasuprot gornjem primeru ZUP jeste nepotpuna, ili nekompletna abrevijacija. Opšte je poznato da se radi o Zakonu o opštem upravnom postupku. Njegova potpuna skraćenica bi glasila ZOUP ili još celovitije ZOOUP. No, kako sam konstatovao, ne bi trebalo da se oholo i tvrdoglavo suprotstavimo skamenjenoj praksi. Zna se: ZUP je generalna,

čak i bez tumačenja i objašnjenja opšterazumljiva skraćenica, naročito pri jezičkoj komunikaciji unutar jedne tj. iste struke, u jezičkom sloju pravnika.

Lep primer za nepotpune, ali opšteprihvaćene skraćenice nudi nam mađarski jezik. Zakon o parničnom postupku (A polgári eljárásról szóló törvény), Zakon o krivičnom postupku (A büntető eljárásról szóló törvény), u mađarskoj pravničkoj i široj upotrebi se skraćuju kao Pe. i Be. Nasuprot tim formama njihove potpune skraćenice bi bile PESZT i BESZT, pa ću ovde biti slobodan da iskažem i oštru kritiku na postignuti nivo valjanosti umnih proizvoda naše prevodilačke struke u višejezičkoj sredini. Neprihvatljivo je i strano od duha mađarskog jezika, uostalom i od normirane prakse potkraćivanja, kada se prilikom prevođenja nazivlja tih zakona – zbog neznanja – upotrebljavaju neprihvaćene potpune skraćenice u gore navedenom, čudnovatom obliku.

3.4. Maternjejezičke i međunarodne skraćenice

U ovaj podnaslov ulazi ogromna empirijska građa. Mada je srpski jezik sklon širokogrudnom prihvatanju pozajmljenica i tuđica, što se kao pojava može prepoznati i u sadašnjoj odabranoj temi, ipak nećemo pogrešiti, ako – pomažući se sredstvima statistike – utvrdimo da u domenu kratica najveći broj predstavnika ove klasifikacione grupe spada u srpske, maternjejezičke skraćenice: ZUP, ZKP, ZOOBS, MMF itd. Namerno sam kao poslednji „prelazni termin" upotrebio skraćenicu Međunarodnog monetarnog fonda jer tu „u aktivnoj miroljubivoj koegzistenciji" paralelno žive jedan pored drugoga oba oblika: kako srpska prevedenica, tako i IMF, dakle opštepoznata međunarodna skraćenica za ovu finansijsku instituciju, od koje smo trenutno vrlo zavisni, a u takvom podređenom položaju se ne nalazimo samo mi, žitelji i podanici Srbije, nego je i šire okruženje u sličnom nemilom statusu. No, vratimo se našim abrevijacijama, da se ne bi izgubili u beskorisnim terenskim vežbama na klavijaturi stilske ornamentike.

Međunarodne skraćenice su još UNESCO[8], UNICEF[9], UNCITRAL[10], OECD[11], EBRD[12], nabrajanje se može nastaviti do beskonačnosti, no ne želimo

[8] UNESCO (*United Nations Educational, Scientific and Cultural Organization*), Organizacija za obrazovanje, nauku i kulturu Ujedinjenih nacija

[9] UNICEF (*United Nations Children's /Emergency/ Fund*), Fond Ujedinjenih nacija za decu, kao što se iz engleske verzije vidi, ranije, od osnivanja do 1953. godine je važio duži naziv, on se kasnije skratio, međutim na tradicionalistički način zadržana je izvorna skraćenica

[10] UNCITRAL (*United Nations Commission on International Trade Law*), Komisija Ujedinjenih nacija za međunarodno trgovinsko pravo

[11] OECD (*Organisation for Economic Co-operation and Development*), Organizacija za ekonomsku kooperaciju i razvoj

[12] EBRD (*European Bank for Reconstruction and Development*), Evropska banka za rekonstrukciju i razvoj

da dovedemo u iskušenje uvažene čitaoce i zloupotrebimo njihovo strpljenje. Ipak moramo još da pomenemo u današnjem modernom bankarskom svetu platnih kartica rasprostranjenu šifru, tzv. PIN[13]-kod koji se od nas često traži, pa ako ga zaboravimo, u velikoj smo nevolji. Vredni su pomena zatim u kriminalističkim filmovima često sretani, od strane lokalnih američkih policajaca i ne tako voljeni, savezni agenti, čija organizacija je kratko nazvana FBI[14], i (kontra) obaveštajna služba CIA[15], naziv alijanse NATO[16] koja je našu zemlju besramotno bombardovala… Neću da mimoiđem ni saopštenje jezičkih napomena: na zanimljivi način je srpski jezik ispoljio kreativnu intelektualnu samostalnost prilikom sačinjenja – doduše originalu nevernog – prevoda ovog naziva, pa je naglasak stavio na vojno-savezničku prirodu tj.: Savez. I na kraju da pomenemo još i oboljenje AIDS-SIDA[17], tehnički termin, doduše, nije pravni, ali je jednosmisleno stručnojezički, naime jezik medicine u horizontalnoj podeli stručnih jezika zauzima jedno od najeminentnijih mesta.

Rezimirajući gore izneto, da utvrdimo: ove međunarodne skraćenice – ne treba posebno naglasiti da je njihov najveći broj engleskog porekla – redovno žive samo u njihovoj originalnoj formi, pa je jasno da ih ne treba, a nije ni običaj prevoditi. Malom količinom rigidnosti možemo iskazati da je njihovo prevođenje čak i zabranjeno. Mada, uzgred budi rečeno, bio sam prinuđen da sprovedem stručnu debatu sa kolegom, prevodiocem za engleski jezik koji je JMBG (jedinstveni matični broj građana) sa kreativnom snalažljivošću preveo na engleski jezik u formi CPRN[18], umesto da je odabrao svetski prihvaćenu formu PIN. Tako smo o tom problemu lepo prodiskutovali, no na kraju smo se i usaglasili da je ta internacionalno adekvatna verzija globalno zastupljena.

3.5. Lokalne, regionalne i globalne skraćenice

Po kriterijumu teritorijalne razatrtosti, po mom viđenju razlikujemo mesne, oblasne i svetske, univerzalno poznate skraćenice.

U grupu kratica koje u pogledu svog dejstva i razumljivosti imaju ograničeni uticaj, tj. podobne su za komunikaciju samo na mesnom nivou, spadaju npr. kratki nazivi udruženja u manjim gradovima, naseljima. Asocijacija biznismena ZREPOK, Udruženje preduzetnika Zrenjaninski poslovni krug, ili: USRK, me-

[13] PIN (*Personal Identification Number*), Lični idenfitikacioni broj
[14] FBI (*Federal Bureau of Investigation*), Federalni istražni biro
[15] CIA (*Central Intelligence Agency*), Centralna obaveštajna agencija
[16] NATO (*North Atlantic Treaty Organization*), Severno-atlantski Savez
[17] AIDS-SIDA (*Acquired Immune Deficiency Sindrome – Syndrome d'immunodéfience acquise*), sindrom stečenog imunološkog deficita
[18] CPRN – *Citizen's Personal Registration Number*

štani će znati da se radi o Udruženju sportskih ribolovaca Kamenjar, u naseljudelu Novog Sada, ali od šire javnosti se ne može očekivati poznavanje mesnih zrenjaninskih ili novosadskih prilika. Moramo, međutim, naglasiti da mnoge institucije i njihovo nazivlje imaju ambicioznu tendenciju da „izbiju" iz isključivo lokalne poznatosti, pa teže ka prihvatu većih razmera. Naročito bi se ovo moglo odnositi na sportska i kulturno-umetnička društva pa i šire, a ovaj postulat ćemo pokušati da dokažemo pomoću naziva NOMUS (Novosadske muzičke svečanosti) koja po svom kvalitetu i organozivanošću nesumnjivo može izvojevati u najmanju ruku regionalnu poznatost, prihvaćenost i interesovanje.

U aktuelnoj državno-političkoj situaciji naše zemlje nedvosmisleno regionalni karakter poprimiće dva skraćena naziva: KiM ili češće upotrebljavana slogovnica Kosmet (početna slova ili početni slogovi oblasti Kosova i Metohije). Takođe, po mom sudu samo regionalne pretenzije može imati skraćenica SPC (Srpska pravoslavna crkva), pa ako ovom ustanovljenju dodamo da izvađeno iz konteksta „SPC" jeste polisemična/homonimična abrevijacija (kojom pojavom ćemo se detaljnije baviti u posebnom naslovu br. 4.), veoma joj sliči skraćen oblik „sportskog poslovnog centra": SPC, pa nije na odmet da njenom korišćenju pristupimo sa potrebnom posebnom obazrivošću.

U globalne (planetarne, mundijalne, svetske) skraćenice spada: USA (*United States of America*). Ona je nepotpuna (izostavljen „of") ali generalna, opštepoznata, međunarodna, stalna, dugoročna i jednoznačna. Može biti predmet diskusije, da li da je uvrstimo u prevodljive ili neprevodljive skraćenice, jer u srpskom jeziku ona se nedvosmisleno ustalila u formi SAD (*Sjedinjene Američke Države*), dok se npr. u mađarskom jeziku uopšte ne prevodi nego se uvek upotrebljava u izvornom obliku, a kao problem za rešavanje javlja se dilema izgovaranja (mađarski: uša, usa, ili uesa, odnosno po engleskom „spelovanju" ju-es-ej). Tema je, kao što se vidi, neiscrpna.

Kao mali kuriozitet dodaću da nije redak ni način skraćivanja po engleskom „spelling"-u, našoj slavnoj teniserki Jeleni Janković, sa „anglificiranim" početnim slovima se u nadnacionalnim međunarodnim krugovima tepa samo sa „Džej-Džej".

Nakon ove, i ne suviše naučne digresije, da se vratimo na teren rasprostranjenih internacionalnih skraćenica.

Kao italijanski primer iz opšteg govornog jezika u današnjem motorizovanom svetu može nam poslužiti firma velike auto-kompanije FIAT (*Fabbrica Italiana Automobili Torino*), koja i u Srbiji ima – nadamo se, na bilateralno zadovoljstvo i prosperitet – zamašna ulaganja. Ali da se vratimo na domen lingvistike, ova skraćenica, kao uostalom i mnoge druge, je u tolikoj meri postala deo opšteg leksičkog blaga da je prilikom svakodnevne upotrebe govornik pri izgovaranju reči potpuno nesvestan okolnosti da u stvari kazuje skraćenicu.

Koristeći pretpostavku da i dame, u temperamentnom slaganju sa muškim svetom, vole fudbal, i pošto se pomoću ovog primera može s lakoćom dokazati teorema permanentnog prisustva opštih, međunarodnih, neprevodivih, stalnih skratica u našoj svakodnevnoj jezičkoj upotrebi, neka ovde stoji stanoviti primer: FIFA (ovaj put ćemo se poslužiti jezikom diplomatije, dakle francuskim: *Fédération Internationale de Football Association*). Nećemo pogrešiti ako utvrdimo da prosti čovek nije ni svestan punog značenjskog sadržaja ove reči, a ipak je izgovara, piše i upotrebljava.

U zaključku ćemo razlagati i činjenicu da je hrpa skraćenica proizvod zahteva za kratkoćom saopštavanja u svetu ubrzane razmene informacija, a u ovom podnaslovu neka stoji već pomenuti primer jednog od najvećeg krivaca prekomernog jezičkog oštećenja putem skraćivanja, a to je SMS.

3.6. Istorijske i savremene (aktuelne, kurentne) skraćenice

Večita dilema sistematizacije redigovanja zbirki, zbornika i rečnika[19] skraćenica jeste koju koncepciju da prihvatimo prilikom sastavljanja „spisaka" odrednica, jer je jednosmisleno da pojedine natuknice – zbog svoje istorijske prevaziđenosti i neaktuelnosti – ne moraju obavezno da se nađu u rečničkim zbirkama.

Što se konkretne klasifikacije tiče, lako je ustanoviti: postoje stare, danas već nevažeće kategorije, koje su iščezle u sumraku iskonskih epoha, takve su npr. AVNOJ (*Antifašističko veće narodnog oslobođenja Jugoslavije*) ili FNRJ (*Federativna Narodna Republika Jugoslavija*) itd.

Pošto se građa naših izlaganja skoro bez izuzetaka sastoji iz kurentnih skratica, neka na ovom mestu bude dovoljno napomenuti da njihova ogromna većina potiče iz „pozitivne" empirijske materije.

Nakon brižljive analize sa temeljnim sagledavanjem barijera u pogledu obima, možemo postaviti osnovna sistematizaciona načela po kojima sa manje-više doslednosti možemo obaviti požrtvovani rad na području sastavljanja rečnika.

3.7. Familijarno-šatrovačke i službeno-jezičke skraćenice

U teškom sam sada položaju. U manjim zajednicama, u intenzivnoj, u *inter partes* jezičkoj upotrebi takođe postoje skraćenice nepoznate za širu javnost. Moram mimoići njihove vulgarne oblike, jer ovo nije prostor za senzacionalistički prikaz neukusnih, stoga za analizu nepodobnih primera, doduše, ima ih na pretek. Treba se i dalje pridržavati apsolutnog principa bezuslovne interpretacije, pa ću se ovde pozabaviti u prijateljsko-familijarnom ambijentu šaljivim

[19] Gyurgyák János: *Rövidítés-szótár*, Osiris Kiadó, Budapest, 2005, s. 9.

tumačenjem internacionalne skratice VIP (*very important person*, ili *Vojvodina Invenstment Promotion*), što je u slobodnom tumačenju – presađivanjem u jezičko okruženje današnjice – poprimilo značenje „veza i poznanstvo".

Ako pogrdno ime korišćeno u podzemnim krugovima „Mile Džukela" vidimo u skraćenom obliku MDž, biće jasno kao dan i nije potrebno posebno sprovesti „dokazni postupak" da se ovde uopšte ne radi o opštepoznatoj, niti službeno-jezičkoj skraćenici, mada nije isključeno da bi u nekim sudskim spisima mogla da se pronađe ispunjena rubrika sa nadimkom imaginarnog ili stvarnog kriminalca.

Terminologija žute štampe takođe ne može da živi bez abrevijacija. Autor ovih redaka se ne može pohvaliti temeljnom informisanošću na ovom polju, ipak je za napomenu: sa velikim zaprepašćenjem smo uzeli k znanju da je došlo do neverovatnog, ali nepopravljivog (?) raskida između glumačkog para iz snova Breda Pita i Anđeline Džoli. Stavljena je van snage brižljivo slagana složenica „Brangelina", neutešivi su ne samo fanovi, nego i siročad koja više nema šanse da bude usvojena od strane ovih superzvezda. Da senzacija bude potpunija, slavni imenovani su u slozi i ljubavi nedavno posetili Sarajevo i nastavili sa svojim dobrotvornim radom pomažući i dalje ugroženima, tako da do tragičnog raskida nije ni došlo, pa će ova divna skraćenica beskrajno živeti.

Hrvatski emigranti, sada već Amerikanci i Kanađani, su za večnu slavu Bogorodice Marije u zabačenom malom mestu poimenice Kastavu kod Rijeke podigli hram, a na ulazu istakli mramorsku ploču „Posvećen BDM". I ne samo tu, vani, nego i u unutrašnjosti crkve, u nekoliko navrata, ponovljeno: BDM, BDM. Blažena Djevica Marija, jer o njoj se radi. Sigurno, ova oznaka je nadahnuta dubokim štovanjem ali po nahođenju pisca članka koji se citira[20], kao i po saglasnom stanovištu autora, ovo nije celishodno. Štaviše, radi se o monstruoznom versko-šatrovačko-jezičkom skrnavljenju, prostom ruganju, jezičkoj rugobi, koja nedvojbeno spada u „obiteljske", za širu javnost nepoznate i neobjašnjive, nerazumljive kratice.

Kad smo već zastali kod analize crkvene terminologije, neka ovde stoji „lep" primer nemogućnosti dešifrovanja skraćenice CT. U medicinskom stručnom jeziku, zna se, to su inicijali za kompjutersku tomografiju, mada običan čovek nije dužan da bude u posedu tih specijalnih znanja. Međutim ako se ova stavka „ct"[21] nađe na fakturi o troškovima sahrane izdate od strane nadležnog svešteni-ka, ne daj bože na mađarskom jeziku, onda stvarno mora da bude sposoban prevodilac i povrh toga ljubopitljivi radoholičar, ne bi li ovu enigmu razrešio. No, istraživanje je urodilo plodom i slučaj je rešen: „ct" = crkvena taksa, čije

[20] Várady, Tibor: *A határok és a nyelvek valóságáról,* Magyar Szó, Üveggolyó, 2010. január 4.

[21] Fejős Györgyi: *Egy bírósági tolmács tapasztalatai és észrevételei*, Predavanje na seminaru „Službena upotreba mađarskog jezika u upravnim organima i u pravosuđu", Palić, 2009.

je izmirenje bilo preduslov za sahranu preminulog sa adekvatnom religijskom liturgijom.

Službeno-jezičke skraćenice (npr. ZKNJ /Zemljišne knjige/, KO /Katastarska opština/, GSP /Gradsko saobraćajno preduzeće/, IV APV /Izvršno veće Autonomne pokrajine Vojvodine/, itd.) su po svojoj prirodi istovremeno najčešće i stručno-jezičke. Središnja su kategorija ispitivanja prikazana u ovom radu. Njihova analiza je više nego prisutna u svim drugim segmentima članka.

3.8. Stalne i *ad hoc* skraćenice

U razred ustaljenih skraćenica prvenstveno spadaju međunarodne standardizovane abrevijacije: prihvaćene oznake država, imena gradova, registarske oznake automobila, internacionalne, u bankarskoj komunikaciji i poslovanju stalne skraćenice deviza i valuta, nazivi svetskih berzi i deonica koje se na njima promeću, a na domaćem planu skraćeni nazivi poznatih ustanova, ministarstava, itd.

Poštovani čitalac će biti u prilici da utvrdi vremenski period u kojem je ovaj rad pisan. Skroman autor je kao pristalica sporta, na teletekst stranama televizijskih programa naleteo na frapantnu „reč": ZOI, pa je nakon mukotrpne analize i raznih posebnih konkluzija došao do odgonetke: radi se o „Zimskim olimpijskim igrama". Verujem da ne treba posebna veština niti mudrost da se ovaj produkt ljudskoga uma uvrsti u jednokratne, *ad hoc*, provizorne skraćenice koje ne bi smele da uđu u širu jezičku upotrebu, jer to nije ništa drugo do besramno, bezobzirno sakaćenje jezika.

3.9. Ćirilične i latinične skraćenice

Pre svih konkretnih i primeričnih napomena želim otkloniti svaku sumnju. Smatram da je srpski jezik bogatiji od svih ostalih jezika koji poseduju i koriste samo jednu vrstu pisma. Imatniji je dakle od engleskog, mađarskog, ali i od ruskog, grčkog itd. jer u svom pismenom izražavanju – u službenom ili manje oficijelnom iskazu – može upotrebiti (nekada na normirani način, a nekada po odabiru i raspoloženju saopštioca), ili ćirilično ili pak latinično pismo. To je jedna strana medalje.

Da li je naličje, ili pak samo druga strana medalje, zavisi od konkretnih slučaja. Međutim nije na odmet da u ovom delu rada podvrgnemo kritičnoj analizi dvosmislenosti koje potiču iz činjenice jednoobličnosti, ali različitog izgovaranja određenih reči, izraza, fonema, morfema na nivou ćiriličnog, odnosno lati-

ničnog azbučnog ili abecednog izražavanja, koje će, naročito pri izlasku na šire evropske terene i komunikacione prostore, izazvati u najmanju ruku nedoumice, ako ne i nerazumevanje ili kriva tumačenja. Razumljive su pobude nacionalnog samopoštovanja ako ambleme, memorandume, logoe naših državnih ili regionalnih televizija PTC, PTB[22] istaknemo u ćiriličnoj formi, ali moramo biti potpuno svesni okolnosti da će gro evropskih građana ovo pročitati i (fonetički) izgovoriti kao „pətəcə", „pətəbə" (ПТЦ, ПТБ), pa možda nije za zameranje stav autora ovog napisa, da je u supranacionalnom opštenju ipak svrsishodnije koristiti latinicu, kojim pismom bi se otklonila svaka dilema (radi se o RTS, RTV). Ako ugledamo skraćenicu CPC (Srpska radikalna stranka), nacionalne manjine u Vojvodini će to pročitati kao „cəpəcə" (ЦПЦ), a četiri slova „C" u srpskom grbu koja su podignuta na državni rang (Samo sloga Srbina spasava) takođe kao „cəcəcəcə" (ЦЦЦЦ) …

Istorijski naziv nekadašnje sovjetsko-ruske države takođe podleže ovom pomalo neuobičajenom tumačenju: CCCP, izgovoreno „cəcəcəpə" (ЦЦЦП). Mislim da je problem postavljen na ovako prezentiran način rešen, ili je rešenje bar ponuđeno. U međunarodnom jezičkom saobraćaju valjalo bi u najneuralgičnijim momentima i tačkama prihvatiti latinicu zbog sprovođenja osnovnog načela jednosmislenosti u razumevanju.

4. Polisemija u upotrebi skraćenica

Nije teško dokazati da višeznačnost intenzivno remeti upotrebu skraćenica u raznim domenima, s jedne strane u opštem jeziku, a s druge strane u slojevima stručnih jezika.

Da započnemo prikazivanje ovog fenomena jednim veoma prostim primerom: AS (ako sledimo mađarsku ortografiju: ÁSZ.[23]. U terminologiji kartaških igara označava najjaču kartu, u tenisu je neodbranjivi početni udarac. Isto tako može značiti i prvaka u sportu, starorimski sitan novac i jedinicu za težinu, a u muzici: hromatski sniženi glas A, u hemiji znak za arsen, u avijaciji pilot lovac koji se ističe svojom veštinom i u vazdušnim bitkama i oborio je mnogo neprijateljskih aviona („zračni as"), da bi se na kraju pozvali i na skraćenicu a. s. *alejh iselam*, doslovno „neka je blagoslovljen", dodatak imenu muslimanskih proroka… Uz brižljivu interpretaciju teksta najčešće nije problem otkloniti nedoumice koje značenje „as" skriva, ali mnogoznačnost je svakako prepoznatljiva.

Autor se još živo seća svojih pustolovnih studentskih dana, kada je u žurbi brzopisa prilikom hvatanja beleški sa predavanja sročio skraćenicu MPP koja

[22] Radio Televizija Srbije, Radio Televizija Vojvodine

[23] ÁSZ – *Állami Számvevőszék*, Državna institucija za finansijsku reviziju

može izazvati ekstrakontekstualni nesporazum (Međunarodno privatno pravo ili Međunarodno privredno pravo?!).

Takođe je eklatantan primer kada uz samo malu nedoslednost u pravopisu ne razlikujemo BTK (mađarska skraćenica, u prevodu znači Filozofski fakultet) ili Btk. (opet mađarska skratica sa značenjem: Krivični zakonik). Teško je u svakodnevnoj pismenoj upotrebi razgraničiti ova dva veoma slična oblika i može dovesti do poteškoća u raspoznavanju pojmova naziva univerzitetske institucije, odnosno kodeksa krivičnog prava.

Nivo, odnosno sloj komunikacije koju ispitujemo je stručnojezički, a ako se jezik nekih društvenih skupina sagledava razdvojeno, i jezik određenih grupa (ljudi sa zajedničkim hobijem, zabavom /npr. obožavaoci alternativne muzike[24], kartaši[25]/, odnosno načinom vođenja života /sportisti[26], đaci[27], navijači[28], vragolani[29]/) može poslužiti kao polazna osnovica. Ako se pak ima u vidu horizontalna podela stručnih jezika, onda treba pojmiti da se pravna, sportska, kartaška, hemijska itd. terminologija može razgraničiti, međutim nećemo biti daleko od istine ako kažemo da ova pojava može stvarati zablude i nejasnoće u jednosmislenoj komunikaciji. Jer, ako „narukvicu" odredimo kao ukras lepe ženske ruke, onda to može biti zlatarska terminologija ili govornojezički modalitet, ali u jeziku lopova, robijaša radi se o oznaci lisice, kao policijsko-stražarskog rekvizita za lišenje slobode (da se tu odmah vratimo na skraćenice) npr. u KP, tj. u kazneno-popravnom domu, dok se KP u nešto drugačijem kontekstu može polisemično upotrebiti kao oznaka za „kulturno-prosvetnu" sferu u javnom životu.

Ali, da pristupimo prezentaciji i nekih dodatnih primera: NIP znači Nacionalni investicioni plan, ali istovremeno može biti i Novinsko izdavačko preduzeće. Dalje, nadovezujući se na izneto o ćiriličkim i latiničkim skraćenicama iz prethodnog odeljka, izgovaranje PC može da bude „personal computer", tj. lični računar, ali čitajući ćirilično, to je Republika Srbija, odnosno prošireno na komšijsku, bratsku državnopravnu formaciju, entitet u Bosni i Hercegovini: Republika Srpska…

Višeznačnost se, dakle, može uočiti s jedne strane na nivou istog jezika (relacija srpski-srpski, mađarski-mađarski itd.), odnosno na ravni dvaju ili više jezi-

[24] CK „Crna kuća" kao popularno mesto održavanja koncerata u Novom Sadu ali u jeziku političara „Centralni komitet".

[25] PIK – u jeziku kartaša jeste vrsta karte, a kao skraćenica iz privrede znači „poljoprivredno-industrijski kombinat".

[26] BBB „Berlin Brandenburg Bicycle" ili poznata firma za proizvodnju biciklističke opreme

[27] BBB (*treble black*) – slova za oznaku mekoće grafitnog uloška za olovke.

[28] BBB – skraćenica za navijačku grupu „Bad Blue Boys", u svetu uslužne i poslovne delatnosti jeste „Better Business Bureau", „Bed and Breakfast in Barcelona",

[29] BBB – u žargonu ovde valja podrazumevati „bla-bla-bla", tj. praznorečje, brbljanje, blebetanje, ćeretanje.

ka (npr. srpski-engleski, francuski…), a takođe i na razini više pisama (ćirilica-latinica).

Ako ćemo razmišljati o posledicama svih prikazanih mogućnosti razdvajanja značenja istovetnih skraćenica, videćemo da se neretko radi o nedvosmislenim situacijama semantičke diskrepancije, lingvističke interferencije, ojalovljenja osnovne funkcije jezičkih saopštenja[30], jer ako smatramo da smo udovoljili funkciji *contactus inter partes* mora se dodati i *interpretatio erga omnes*, radi postizanja cilja opšterazumljivosti. Nadalje ćemo zaključiti da se radi o pojavi hermeneutičke disonancije, dakle odstupanja teorije i prakse tumačenja, jer upotreba skraćenica će u nauci biti znanje, umeće, pa čak i umetnost valjanog razumevanja odgovarajuće jezičke forme, postavljeni cilj pravilnosti razumevanja će biti promašen, a skraćenica će zbog svih tih širokoznačnosti izgubiti svoju prvenstvenu funkciju, a to je rasterećenje teksta, jezgrovitost izražavanja i sažetost uz jednosmisleno saopštenje. Objašnjenje pojmova je uvek neophodno.

5. Semantičko osamostaljivanje skraćenica, značenjske promene

Skraćenice imaju svojstvo da mogu postati i autonomni nosioci značenja koje se odvojilo od prvobitnog i živeti svoj samostalan život.

SPENS (Svetsko prvenstvo u stonom tenisu). Sportski i poslovni centar u Novom Sadu koji je kršten po uzoru svojevremeno organizovano svetskog sportsko takmičenje je nakon proteka izvesnog perioda počeo da znači nešto sasvim drugo u narodnom jeziku: kompleks, konglomerat, zgradu sa pratećim objektima, dakle na neki način i tržišno-sportski centar, a sa lingvističkog aspekta to jeste fenomen semantičkog osamostaljivanja skraćenica uz nuspojavu značenjske, pojmovne modifikacije i novuma.

Autor ovih redova smatra da upravo izneto ne ide u prilog sve većoj rasprostranjenosti upotrebe skraćenica, pa bi valjalo – podvucimo to još jednom – uvek snabdeti tekst odgovarajućim objašnjenjima na način kako ćemo to izložiti u sledećem odeljku rada.

U telegrafskom stilu, a u vezi problematike promene značenja, treba naglasiti da kreativno ili manje nadahnuto stvorene skratice, slogovnice, mogu da se odvoje od semantičke sadržine potpunog naziva tako što će odenuti novo ruho,

[30] Npr.: u sudskim spisima smo se do najbliže prošlosti susretali sa tipičnim polisemičnim skraćivanjem OJT. Bez svestranog sagledavanja je bilo teško (nekada nemoguće) razlučiti, da li imenujemo opštinskog ili okružnog javnog tužioca. Nije jezičarska zasluga što se ta dilema otklanja reorganizacijom i promenom naziva pravosudnih organa. Od sada će se na sveopšte zadovoljstvo razdvojiti OJT i VJT (osnovni i viši javni tužilac).

pa će u svom složeničkom biću postati nosioci modifikovane, nove suštine, koje međutim često mogu izazvati ambivalentne asocijacije sa opasnošću obmanjivanja, dovođenja u zabludu primalaca. Nekadašnja politička partija kontraverzne Mirjane Marković, JUL (Jugoslovenska udružena levica) može da znači i letnji mesec, a u mađarskom prevodu „vuče na psovku", izaziva dvosmislenu predstavu u formi JEB (Jugoszláv Egyesült Baloldal), pa je lako zamisliti da je mađarska nacionalna zajednica u Vojvodini, kojoj je predmetna stranka bila ne samo neprihvatljiva nego i posve antipatična, stvarala neslane šale i igre reči na račun supruge bivšeg diktatora, Slobodana Miloševića i njegovog „šlepa". PUPS (Partija udruženih penzionera Srbije) u nemačkom jeziku znači vetrove, ali ne meteorološke prirode, nego u smislu eliminacije intestinalnih gasova, što takođe proizvodi negativne asocijacije.

6. Funkcionalnost, motivisanost i imperativna interpretabilnost abrevijacija (manje nakaradno: njihova svrhovitost, opravdanost i obavezno objašnjenje)

6.1. Pozitivne i negativne osobine skraćenica

U ubrzanoj komunikaciji današnjice[31] često se uočavaju neželjene pojave skraćenja saopštavanja koja čak idu i na uštrb razumljivosti. Prisutnost skraćenica na svim nivoima je nepobitna. U pravnom opštenju – pošto se radi o unutarstrukovnom jezičkom saobraćaju – to je sasvim razumljivo i uz potrebna znanja i predznanja učesnika služiće potpunijem ispoljavanju pozitivnih osobina ovog lingvističkog fenomena.

6.1.1. Pozitivne osobine

U dobre strane metoda skraćivanja prvenstveno spada racionalizacija obima teksta, njegovo rasterećenje, naročito ako se imaju u vidu prekomerna ponavljanja unutar određenog pravnog teksta. Ako u aktu, propisu, napisu, članku moramo 15 puta da upotrebimo naslov Zakona o opštem upravnom postupku (ZUP) jasno je kao dan da ćemo kompletnim ispisivanjem punog naziva samo nepotrebno opteretiti tekst. Zbog toga je svrsishodno i opravdano da primenimo metod „akronimizacije". Prvi put se prezentuje potpuna verzija – po mogućnosti

[31] Ako u urgentnoj poruci na engleskom jeziku čitamo: *4U*, to znači „for you", ili *CU*, značenjski sadržaj je „see you". U prvom slučaju „za tebe", a u drugom primeru smisao je „vidimo se". U medijskom titlovanju sam se sreo sa ništa manje katastrofalnim skraćenjima, npr. *mgmt* (management), ili *mtg* (meeting), itd.

sa naznačenjem svih detalja izvora, npr.: Službeni glasnik (autentično glasilo ili izdavač, strana itd.). Posle te prve faze se daje odgovarajuća skraćenica sa objašnjenjem:

a) u samom tekstu,
b) na margini,
c) u fusnoti.

Sasvim je prirodno da se u sledećih 14 navrata piše samo ZUP. Isto to se odnosi na manje dugačke naslove: Zakon o nasleđivanju (ZON). Naravno, ima i skribomana. Izvestan broj pravnih pisaca, autora originalnih dela, kao i prevodilaca vođenih pobudama grafomanije ili jednostavno iz stilskih razloga čine svoj tekst razgranatim. Takođe, i nesigurnost u doslednosti, adekvatnosti, prihvaćenosti izabrane verzije može autore dovesti do stanja u kojem izbegavaju i bezosećajno tamane skraćivanje. Kako je izloženo: stali smo na stanovište da bi željeno stanje bilo samo izuzetno korišćenje skraćenica. Naravno, u domenu opštepoznatih kratica KZ, ZKP, ZPP, takva opasnost od nedoslednosti nam ne preti, pa je jasno da načelo racionalnosti, sažetosti treba da uživa prednost nad ostalim aspektima.

Nadovezujući se na pomenutu nesigurnost u potpunu tačnost ili pak u praktičnost korišćenih skratica, iznećemo i njihovu oštru kritiku.

6.1.2. Negativne osobine

U loše strane ubrajamo nerazumljivost, nedoslednost, i, kao što smo ranije videli te ih umereno kudili, dvosmislenost i izazivanje nesporazuma.

a) Nerazumljivost

U ovom napisu do sada upotrebljeni i prikazani primeri pretežno pretpostavljaju postojanje strukovne komunikacione zajednice. Čak i unutar nje može se lako desiti da manje rasprostranjene skraćenice budu nerazumljive. Bez namere da ih sve do kraja pojasnim, proizvoljno ću pomenuti neke kao što su RIV, PIV, SIV, PIO, DORH[32], itd., u rogobatnom naletu tih lingvističkih fenomena – nadam se ne treba posebno naučno dokazivati – lako će se potkrasti stalne ili improvizovane skraćenice sa ogromnom ili manje velikom količinom elementa neshvatljivosti. Za jačanje ove tvrdnje ću biti smeo da uzmem i sledeću ravan stručnojezičke upotrebe: da li običan „podanik", pravnički neuk čovek svakodnevnice, treba da zna, mora da raspolaže takvim spoznajama, da shvati pravnu struku u dubini, da napamet otkriva značenje svih tih sretnih i manje

[32] DORH: Državno odvjetništvo Republike Hrvatske

praktičnih skraćenica. Moramo kazati da je dekodiranje, dešifrovanje, često ne samo mukotrpna procedura i sliči rešavanju najkomplikovanije zagonetke, nego je ona štaviše nemoguća čak i uz pomagalo najsavremenijih tehnika internetskih pretraživača. Tok percepcije, shvatanja teksta, ne sme da bude prenaporan, zamoran, a odgonetka enigmi ne bi smela da oduzima previše vremena.

Prema tome, može se zaključiti da inicijali i akronimi bez tumačenja lako mogu postati kontraproduktivni, a neželjena nuspojava će im biti nejasnost i nerazumljivost, kao i nepotrebno gubljenje dragocenog vremena umesto rasterećenja i racionalizacije saopštenja. Kao što sam kod pozitivnih osobina već pomenuo, ovaj put naglašeno ponavljam da je legenda, tj. objašnjenje pojmova preduslov i obavezan element, *conditio sine qua non* upotrebe skraćenica.

b) Nedoslednost

U nizu pojavnih oblika raznolikosti i neujednačenosti u upotrebi skraćenica možemo razlikovati sledeće podgrupe:

– *morfološka* nedoslednost (kao što smo videli, koristi se ustaljeni oblik ZUP umesto potpunije forme ZOUP, a nasuprot tome ZON, zašto onda oblik nije ZN?) ;
– *ortografska* nedoslednost (za društvo sa ograničenom odgovornošću se mogu naći forme D. o. o., d. o. o., doo, DOO, kao i D. O. O., itd., nabrajanje primera može da ide u nedogled) ;
– *izgovorna* nedoslednost (IMF, IEMEF, AJEMEF, itd.) ;
– *interferentna*, tj. nedoslednost kao posledica prevodilačke interferencije, tj. nastanka smetnji, neželjenih, ali nepremostivih „faznih razlika" semantičkih polja u međuuticaju izvornog i ciljnog jezika, u suženju, proširenju, ili jednostavno nejednakosti u upotrebi inicijalizama i akronima (IMF, ili MMF, neodlučni smo koja je opšteprihvaćena ili koju prevodilac treba da predloži).

7. Zaključak

Svaki red gornjih izlaganja čini jednosmislenim da je primarni nivo primene skraćenica nastao u stručnojezičkoj komunikaciji. Glavni cilj je ostvarenje načela jezičke ekonomičnosti. Naime, značajne uštede se mogu postići u pogledu prostora, vremena, pa čak i u uštedi novca, jer slanje pismenih poruka nije besplatno. Opšte je mesto konstatacija da čoveku današnje epohe digitalizovane informatike stoji na raspolaganju veoma ograničen prostor i vreme (koje je novac), a svi ti faktori nisu beskonačni. Pojedine stručne knjige, leksikoni, tako-

đe ograničavaju obim natuknica. Ove okolnosti skraćenice nedvosmisleno čine nezaobilaznim i posebno važnim elementom jezika. Njihova stalna prisutnost u stručnim i opštejezičkim doticajima je evidentna.

S druge strane, u velikim zbornicima i zbirkama skraćenica se na više strana ređaju mnogoznačne abrevijacije istovetnog oblika. Njihov broj može da bude od dva-tri tuceta, pa do više stotina odrednica. Ova činjenica svakako otežava sprovođenje u život varijante principa ekonomičnosti, koja ne vređa oživotvorenje sveopšte razumljivosti. Jer, ako će se primenioci pridržavati podsticaja autora ovog napisa, njihova pismena saopštenja će svakako postati opširnija i razgranatija zbog priziva objašnjavajućih napomena. Autor naglašava da dosledno želi da se pridržava proklamovanja bezuslovnog značaja interpretacije, jer beskrupulozno sabijanje ne sme ići na uštrb jasnoće i jednosmislenosti. Radi mimoilaženja nepoželjne nepreglednosti, haosa i nesigurnosti u saopštenju, sprovođenjem preskriptivnog (propisujućeg) i deskriptivnog (opisnog) načina postizanja jednoobraznosti mogu se i imaju se ukinuti semantičke i pravopisne nedorečenosti i nedoslednosti.

Da utvrdimo: skraćenice su kao proizvodi jurnjave galopirajućeg sveta današnjice potrebne i kao takve neistrebljive. Njihovo plevljenje i odstranjenje iz jezičke svakodnevnice bio bi beznadežan poduhvat. Međutim, njihova upotreba je uvek mač sa dve oštrice, pa moramo uložiti sav svoj trud i napor da primena skratica po mogućnosti bude maksimalno jedinstvena, a njihovo tumačenje i objašnjenje je obavezno. Pa ako stvorimo takvo stanje, na unutarslojnoj, -skupinskoj i -strukovnoj ravni opštenja problemi unifikovanog razumevanja neće, ili će samo u maloj meri zagorčati naš jezički život.

Endre Letsch, PhD

ABBREVIATIONS IN THE LEGAL LANGUAGE

Summary

The thesis is aimed at the presentation and detailed analysis of abbreviations in the legal language and broader: in the language of administration, telecommunication and other fields of professional systems of communication. This is an ongoing problem, which has been unjustifiably neglected in most scientific, vocational and textbook elaborations, finding its place within the systematization usually only at the end of contents. The abbreviations are now placed into the

centre of scrutiny, their severalfold classification and accompanying phenomena are presented, which are indeed common at all levels of transmitting information. The author gives a critical analysis and apart from the various categorizations he displays a relatively wide range of their positive and negative features. As a crucial conclusion the writer lays down that the interpretation of abbreviations is obligatory, which is sadly not always the case in practice.

Keywords: *acronyms, initialisms, abbreviations, interpretation, polysemy.*

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USTAVNE I ANTIDISKRIMINACIONE GARANCIJE ZAŠTITE OD RODNO ZASNOVANOG NASILJA U REPUBLICI SRBIJI

Sažetak – *U radu se polazi od stanovišta da je rodno zasnovano nasilje oblik diskriminacije zasnovane na rodu, odnosno konkretnije, diskriminacije žena. U tom smislu, suzbijanje rodno zasnovanog nasilja ne može da se zasniva samo na njegovoj zabrani i sankcionisanju, već prevashodno na antidiskriminacionoj politici i eliminisanju stereotipa, običaja i drugih društvenih obrazaca ponašanja koji su zasnovani na ideji podređenosti ili nadređenosti polova. Stoga bazična antidiskriminaciona legislativa mora obuhvatiti i problematiku rodno zasnovanog nasilja na osnovu ustavnih garancija obezbeđenja i zaštite osnovnih ljudskih prava i sloboda na principu jednakosti i nediskriminacije.*

Ključne reči*: Ustav, antidiskriminaciono zakonodavstvo, rod, rodno zasnovano nasilje*

1. Uvodne napomene

Definicije diskriminacije i osnova diskriminacije su od izuzetnog značaja za žene i njihove mogućnosti da uživaju sva ljudska prava i fundamentalne slobode u jednakoj meri kao muškarci. Priznavanje diskriminacije samo na osnovu *pola* nepovoljno utiče na razvijanje odgovarajuće i efikasne nacionalne politike u cilju suzbijanja diskriminacije žena i sticanja *suštinske* rodne ravnopravosti. Postizanje ovog cilja zahteva jasno razumevanje i priznavanje razlikovanja *pola* (kao bioloških svojstava pojedinca) i *roda* (kao društveno konstruisanih očekivanja u pogledu tradicionalnih uloga žena i muškaraca u društvu). Ako se

nasilje kao što su silovanje, prostitucija, trgovina ljudskim bićima i prebijanje od strane supruga u 95 procenata slučajeva dešava ženama, onda je sigurno reč o nasilju koje je zasnovano na komponenti roda[1].

U tom smislu, ustavne i antidiskriminacione klauzule imaju veliki značaj u formulisanju i primeni zakonodavstva čiji je cilj suzbijanje rodno zasnovanog nasilja, s obzirom da je ono međunarodnopravnim standardima određeno kao *„oblik diskriminacije koji ozbiljno umanjuje mogućnosti žena da uživaju prava i slobode na jednakoj osnovi sa muškarcima"*. Ova definicija data je u Opštoj preporuci br. 19 Komiteta UN za eliminaciju svih oblika diskriminacije žena[2] (čl. 1). Ovakvom interpretacijom Komitet je eksplicitno protumačio da je rodno zasnovano nasilje vid diskriminacije žena, te da se stoga na njega odnose odredbe Konvencije o eliminaciji svih oblika diskriminacije žena[3], iako ga sama Konvencija izričito ne pominje.

Opšta preporuka br. 19 daje i definiciju rodno zasnovanog nasilja. Prema toj definiciji, ono je *„nasilje koje je usmereno protiv žene zato što je žena ili nesrazmerno pogađa žene"* (čl. 6). Ova Preporuka je značajna za formulisanje nacionalnog zakonodavstva u oblasti suzbijanja rodno zasnovanog nasilja, jer je prva zvanična interpretacija međunarodnog ugovora o ljudskim pravima koja zabranjuje rodno zasnovano nasilje i zahteva od država ugovornica Konvencije da preduzmu sve neophodne mere radi suzbijanja ovog vida nasilja[4], uključujući krivične, građanskopravne i preventivne mere. S obzirom da je rodno zasnovano nasilje akt diskriminacije na osnovu roda, mere za osiguranje rodne ravnopravnosti predstavljaju važnu polaznu tačku za obezbeđivanje pravne osnove za borbu protiv ovog vida nasilja[5].

Stoga je neophodno da zakonodavac polazi od stanovišta da je diskriminacija u srži rodno zasnovanog nasilja, te da povećava izloženost žena nasilju. Pravna zaštita od diskriminacije zahteva usvajanje i primenu efikasnih antidiskrimina-

[1] Jarić, V. Radović, N., *Rečnik rodne ravnopravnosti*, Art Print, Novi Sad i Beograd, 2010, s. 147–148; Mršević, Z., *Ženska prava u međunarodnom pravu,* Jugoslovenski komitet pravnika za ljudska prava, Beograd, 1998, s. 26–41.

[2] Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against women (Eleventh session, 1992), U. N. Doc. A/47/38 at 1 (1993)

[3] U. N. Doc. A/34/46

[4] Pojavni oblici ovog nasilja su raznovrsni i obuhvataju, kako to navodi Pekinška platforma za akciju (st. 113–115), fizičko, polno i psihološko nasilje do kog dolazi u porodici (kao što su zlostavljanje i bračno silovanje) i u široj zajednici (kao što su silovanje, trgovina ženama i prisilna prostitucija), zatim prisilna sterilizacija, prisilni pobačaj, prenatalni odabir pola, i razni akti nasilja nad ženama u situacijama oružanog sukoba, kao što su sistematsko silovanje, seksualno ropstvo i prisilna trudnoća. Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 September 1995, A/CONF. 177/20 (1995) and A/CONF. 177/20/Add. 1 (1995)

[5] OEBS. (2009). *Za bezbednost kod kuće: Suzbijanje nasilja nad ženama u regionu OEBS. Zbornik dobrih praksi.* (D. Seftaui, Ur.), OEBS Misija u Srbiji, Beogad, str. 86.

cionih zakona, uključujući poseban zakon o rodnoj ravnopravnosti[6], kao i ukidanje svih oblika diskriminatorskih praksi i normi. Ovo podrazumeva ukidanje i diskriminatorskih zakona i odredbi koji se odnose na pravo na nasleđivanje, zapošljavanje, imovinu, državljanstvo, razvod, deobu bračne imovine i seksualna i reproduktivna prava. Način na koji se pravni identitet i ljudska prava žena povezuju u zakonima koji se odnose na položaj dece, porodice i zajednice mogu da predstavljaju vid diskriminacije[7] i stoga je značajno eliminisati sve diskriminatorske odredbe. Žene sa nesigurnim pravnim statusom, kao što su migrantkinje, izbeglice i prognana lica, kao i one bez državljanstva, naročito su podložne diskriminaciji, te je stoga neophodno da im zakoni pruže odgovarajuću zaštitu[8]. Legislativa u ovoj oblasti treba da obuhvati i razrađivanje prava, obaveza i odgovornosti organa javne vlasti u suzbijanju rodno zasnovanog nasilja, uključujući sistem obrazovanja i medije, građanskopravnu zaštitu i uvođenje posebnih mera mera i programa namenjenih zaštiti i zbrinjavanju žrtava nasilja, kao i prema počiniocima radi sprečavanja daljeg nasilja.

2. Ustavne garancije zaštite od rodno zasnovane diskriminacije

Sve je više država koje u svoje ustave ugrađuju naèelo rodne ravnopravnosti i zabranu diskriminacije na osnovu pola, a pojedine (Demokratska Republika Kongo, Kina, Kolumbija, Tajland, Centralnoafrièka Republika) sadrže èak i eksplicitne zabrane rodno zasnovanog nasilja[9]. Ustav Južnoafrièke Republike (1996) je jedan od retkih ustava koji među osnovama zabrane diskriminacije navodi i zabranu na osnovu roda, a ne samo pola: *„Država ne sme nikoga da diskriminiše na posredan ili neposredan način po jednom ili više osnova, uključujući rasu, rod, pol, trudnoću, bračno stanje, etničko ili socijalno poreklo, boju*

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[6] Datoteka dobrih praksi u oblasti suzbijanja rodno zasnovanog nasilja Generalnog sekretara UN navodi primer Nepala, čiji je Zakon o rodnoj ravnopravnosti (2006) doprineo ukidanju ili dopunjavanju krivične i građanske legislative u ovoj oblasti, uključujući silovanje i seksualno uznemiravanje. UN Secretary General's Database on Violence Agaist Women web site, pristupljeno 4. avgusta 2010. godine, *http://webapps01.un.org/vawdatabase/searchDetail.action?measureId=6883*

[7] United Nations. „Good practices in combating and eliminating violence against women." Report of the expert group meeting, 17 to 20 May 2005, Vienna, Austria. 2005. p. 15.

[8] *Ibidem.*

[9] Leest, Van der K. (ed.), *Engendering Constitutions: Gender Equality Provisions in Selected ConstitutionsL A comparative study accompanied with case studies in: Bosnia and Herzegovina, Kosovo, Montenegro, Serbia,* UNIFEM, pp. 5–21. Dostupno na: <*http://www. unifem. sk/uploads/doc/Constitutional%20publication%20Nov%2020071. pdf*>.

kože, seksualnu orijentaciju, doba, invalidnost, veroispovest, uverenja, kulturu, jezik i poreklo." (čl. 9, st. 3).

Ustav Demokratske Republike Kongo (2006) obavezuje na vođenje politike suzbijanja seksualnog nasilja (čl. 15). Ustav Kine (1982) zabranjuje nasilje nad ženama: „*Zabranjeno je kršenje slobode zaključivanja braka. Zabranjeno je zlostavljanje starih ljudi, žena i dece."* (čl. 49.[10]. Centralnoafrička Republika u svom Ustavu (2004) takođe ima odredbu o zaštiti žena i dece. Prema članu 6 stav 3, zaštita žene i dece od nasilja, nesigurnosti i eksploatacije obaveza je države i drugih zajednica[11].

Kraljevina Tajland se osvræe na problematiku nasilja nad ženama i u porodici u nekoliko ustavnih odredbi (2007.[12]. Član 40 Ustava garantuje pravo svakog deteta, mlade osobe, žene, starije osobe ili lica sa invaliditetom na odgovarajuću sudsku zaštitu i tretman u sluèaju seksualnog nasilja. Deca, mladi, žene i članovi porodice imaju ustavno pravo da budu zaštićeni od strane države od nasilja i nepravičnog tretmana, kao i pravo na zdravstveni tretman i rehabilitaciju. Ustav obavezuje državu da deluje u skladu sa zakonom i pravdom u obezbeđenju podrške privatnim organizacijama koje pružaju pravnu pomoć, naroèito žtvama nasilja u porodici. Ustav Kolumbije (1991) takođe zahteva sankcionisanje nasilja u porodici: *„Svaki vid nasilja u porodici se smatra destruktivnim za njenu harmoničnost i jedinstvo i biće sankcionisan prema zakonu."* (čl. 42, st. 4).

Novi Ustav Republike Srbije (*Službeni glasnik RS*, br. 98/06) predstavlja dobru ustavnopravnu osnovu za unapređenje zakonodavstva u cilju suzbijanja rodno zasnovanog nasilja. Iako se u tekstu nigde izričito ne pominje zabrana rodno zasnovanog nasilja, ona se podrazumeva opštom garancijom uživanja i primene ljudskih prava i zabranom diskriminacije. Ustavom se jemče, i kao takva neposredno primenjuju, ljudska prava garantovana ratifikovanim međunarodnim ugovorima, opšteprihvaćenim pravilima međunarodnog prava i zakonima, pri čemu zakon ni u kom slučaju ne sme da utiče na suštinu zajemčenog prava (čl. 18, st. 1). Ova ustavna garancija podrazumeva da se jemče i neposredno primenjuju sva osnovna ljudska prava i slobode čije se uživanje ugrožava ili ukida aktima rodno zasnovanog nasilja[13].

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[10] UN Secretary General's Database on Violence Against Women web site: *http://webapps01.un.org/vawdatabase/searchDetail.action?measureId=24309*

[11] UN Secretary General's Database on Violence Against Women web site: *http://webapps01.un.org/vawdatabase/searchDetail.action?measureId=17810*

[12] UN Secretary General's Database on Violence Against Women web site: *http://webapps01.un.org/vawdatabase/searchDetail.action?measureId=18231*

[13] Prema Opštoj preporuci br. 19 Komiteta UN za eliminaciju diskriminacije žena, rodno zasnovano nasilje ugrožava uživanje sledećih prava: (a) pravo na život; (b) pravo da se ne bude žrtva mučenja ili okrutnog, nehumanog ili ponižavajućeg postupanja ili kažnjavanja; (c) pravo na jednaku zaštitu prema odredbama humanitarnog prava za vreme trajanja međunarodnog ili unutrašnjeg

Ustav proklamuje načelo jednakosti pred Ustavom i zakonom i zabranjuje neposrednu i posrednu diskriminaciju na bilo kojoj osnovi, uključivši na osnovu pola (čl. 21, st. 3). Nadalje, garantuje pravo na jednaku zakonsku (čl. 21, st. 2) i sudsku zaštitu (čl. 36), pravnu zaštitu svih osnovnih ljudskih prava svim građanima i građankama bez diskriminacije, uključujući i obraćanje međunarodnim institucijama u cilju zaštite zajemčenih prava (čl. 22, st. 2). Ustav garantuje i pravo na pravnu pomoć (čl. 67) i pravo na rehabilitaciju i naknadu materijalne ili nematerijalne štete prouzrokovane nezakonitim ili nepravilnim radom državnih ili drugih organa (čl. 35),

Član 26 stav 3 Ustava, koji zabranjuje prinudni rad, izričito naglašava da se seksualno ili ekonomsko iskorišćavanje lica koje je *u nepovoljnom položaju* smatra prinudnim radom. Ova odredba je značajna za ženska prava, s obzirom na činjenicu da su žene, a naročito siromašne, posebno ranjive u pogledu ekonomske eksploatacije i diskriminacije na radu.

Član 19 Ustava ukazuje da je svrha ustavnih jemstava „očuvanje ljudskog dostojanstva i ostvarenje pune slobode i *jednakosti* svakog pojedinca". Ustav ustanovljava politiku jednakih mogućnosti kao obavezu države u članu 15: *„Država jemči ravnopravnost žena i muškaraca i razvija politiku jednakih mogućnosti."* Ova odredba je u skladu sa Konvencijom UN o elimininaciji svih oblika diskriminacije žena, koja u članu 2a obavezuje države ugovornice da načelo ravnopravnosti muškaraca i žena podignu na nivo ustavne garancije, kao i da obezbede njenu primenu putem zakona i na druge odgovarajuće načine.

Prema članu 21 stav 4, nadalje, Ustav predviđa da Republika Srbija može uvesti posebne mere *„radi postizanja pune ravnopravnosti lica ili grupe lica koja su suštinski u nejednakom položaju sa ostalim građanima"* (čl. 21, st. 4). Ova ustavna odredba otvara prostor za razvijanje politike rodne ravnopravnosti i odgovarajuće legislative, kao i za uvođenje mera u cilju eliminacije diskriminacije žena.

3. Zakon o zabrani diskriminacije

Zakon o zabrani diskriminacije (*Službeni glasnik RS,* br. 22/09) uređuje opštu zabranu diskriminacije, oblike i slučajeve diskriminacije i postupke zaštite. Zakon daje definiciju diskriminacije *(„svako neopravdano pravljenje razlike ili nejednako postupanje, odnosno propuštanje (isključivanje, ograničavanje ili davanje prvenstva), u odnosu na lica ili grupe kao i na članove njihovih porodica,*

oružanog sukoba; (d) pravo na slobodu i bezbednost ličnosti; (e) pravo na jednaku zaštitu pred zakonom; (f) pravo na ravnopravnost u porodici; (g) pravo na najviši dostupan standard fizičkog i mentalnog zdravlja i (h) pravo na pravedne i prihvatljive uslove rada (opšti komentar 7).

ili njima bliska lica, na otvoren ili prikriven način"), a među osnovama diskriminacije navodi, između ostalih, pol, rodni identitet, seksualnu orijentaciju, bračni i porodični status (čl. 2, st. 1). Pol, rodni identitet i seksualno opredeljenje uvršteni su među osnove diskriminacije koja se kvalifikuje kao težak oblik ukoliko se radi o izazivanju i podsticanju neravnopravnosti, mržnje i netrpeljivosti (čl. 13, t. 1). Kao težak oblik diskriminacije Zakon posebno navodi jedan vid rodno zasnovanog nasilja, trgovinu ljudima (čl. 13, t. 4), kao i višestruku (t. 5), ponovljenu i produženu diskriminaciju (t. 6), što su oblici diskriminacije koji pogađaju žrtve rodno zasnovanog nasilja.

Zakon u članu 20 definiše diskriminaciju na osnovu pola kao postupanje *„protivno načelu ravnopravnosti polova, odnosno načelu poštovanja jednakih prava i sloboda žena i muškaraca u političkom, ekonomskom, kulturnom i drugom aspektu javnog, profesionalnog, privatnog i porodičnog života"* (st. 1), i zabranjuje, između ostalog, *„fizičko i drugo nasilje, eksploataciju, izražavanje mržnje, omalovažavanje, ucenjivanje i uznemiravanje s obzirom na pol, kao i javno zagovaranje, podržavanje i postupanje u skladu sa predrasudama, običajima i drugim društvenim obrascima ponašanja koji su zasnovani na ideji podređenosti ili nadređenosti polova, odnosno stereotipnih uloga polova"* (st. 2).

Zaštitu od diskriminacije prema ovom Zakonu uživaju ne samo državljani Srbije, već i sva lica koja borave na teritoriji Srbije ili se nalaze pod njenom jurisdikcijom, bez ozbira na to da li se radi o strancu ili licu bez državljanstva (čl. 2, st. 1, t. 2). Prema Zakonu, govor mržnje, uznemiravanje i ponižavajuće postupanje su oblici diskriminacije (čl. 5). Pod uznemiravanjem i ponižavajućim postupanjem se podrazumeva „povreda dostojanstva lica ili grupe lica na osnovu njihovog ličnog svojstva" (čl. 12).

Zakon u članu 14 predviđa primenu posebnih mera uvedenih radi postizanja pune ravnopravnosti, zaštite i napretka lica, odnosno grupe lica koja se nalaze u neravnopravnom položaju.

4. Zakon o ravnopravnosti polova

*Z*akon o ravnopravnosti polova (*Službeni glasnik RS,* br. 104/09), usvojen decembra 2009. godine, uređuje stvaranje jednakih mogućnosti ostvarivanja prava i obaveza, preduzimanje posebnih mera za sprečavanje i otklanjanje diskriminacije zasnovane na polu i rodu i postupak pravne zaštite lica izloženih diskriminaciji. U članu 10 Zakon daje definicije pola, roda, ravnopravnosti polova i nasilja zasnovanog na polu, koje su u skladu sa međunarodnopravnim standardima. Ipak, Zakon ne govori o rodnoj ravnopravnosti, već o ravnopravnosti polova, kako je to uobličeno i u samom nazivu Zakona.

Ravnopravnost polova, po čl. 2, st. 1 ovog Zakona, podrazumeva *„ravnopravno učešće žena i muškaraca u svim oblastima javnog i privatnog sektora, u skladu sa opšteprihvaćenim pravilima međunarodnog prava, potvrđenim međunarodnim ugovorima, Ustavom Republike Srbije i zakonima, i svi su dužni da je poštuju"*. Definicija diskriminacije po osnovu pola, data u ovom Zakonu (čl. 4), opširnija je od definicije u Zakonu o zabrani diskriminacije (čl. 20). Prema Zakonu o ravnopravnosti polova, diskriminacija po osnovu pola je „*svako neopravdano pravljenje razlike ili nejednako postupanje, odnosno propuštanje (isključivanje, ograničavanje ili davanje prvenstva) koje ima za cilj ili posledicu da licu ili grupi oteža, ugrozi, onemogući ili negira priznanje, uživanje ili ostvarivanje ljudskih prava i sloboda u političkoj, ekonomskoj, društvenoj, kulturnoj, građanskoj, porodičnoj i drugoj oblasti"*. Diskriminacijom se smatra i ako se prema licu neopravdano postupa lošije nego što se postupa prema drugome, isključivo ili uglavnom što je tražilo ili namerava da traži pravnu zaštitu od diskriminacije ili je ponudilo ili namerava da ponudi dokaze o diskriminatorskom postupanju.

Zakon pravi razliku između pola i roda, navodeći da se pol odnosi na biološke karakteristike lica (čl. 10, st. 1, t. 1), dok rod označava „*društveno uspostavljene uloge, položaje i statuse žena i muškaraca u javnom i privatnom životu, a iz kojih usled društvenih, kulturnih i istorijskih razlika proističe diskriminacija zasnovana na biološkoj pripadnosti određenom polu"* (čl. 10, st. 1, t. 2). I pored ovog jasno definisanog razgraničenja, Zakon govori o nasilju zasnovanom na *polu,* a ne o *rodno* zasnovanom nasilju, kako to zahtevaju međunarodnopravni standardi. Data definicija opisuje ovaj vid nasilja kao „*ponašanje kojim se ugrožava telesni integritet, duševno zdravlje ili spokojstvo, ili nanosi materijalna šteta licu, kao i ozbiljna pretnja takvim ponašanjem, koje sprečava ili ograničava neko lice da uživa prava i slobode na principu ravnopravnosti polova"* (čl. 10, st. 1, t. 5). Prema ovoj definiciji, nasilje zasnovano na polu uključuje fizičko, psihičko i ekonomsko nasilje, ugrožavanje telesnog integriteta i pretnju nasiljem.

Zakon eksplicitno navodi oblike nasilja zasnovanog na polu: uznemiravanje (čl. 10, t. 6; čl. 18), seksualno uznemiravanje (čl. 10, t. 7; čl. 18), seksualno ucenjivanje (čl. 10, t. 8; čl. 18.[14]. Ostali oblici rodno zasnovanog nasilja, kao što su seksualno nasilje, prisilna prostitucija, prisilni brak, rani brak, trgovina ljudskim bićima, seksualno ropstvo i seksualna eksploatacija, nisu pomenuti.

Sa stanovišta usklađenosti sa međunarodnim standardima, manjkavost je što nasilje u porodici nije jasno definisano kao rodno zasnovano nasilje. Odnosna

[14] Primera radi, Zakon o rodnoj ravnopravnosti Crne Gore (*Službeni glasnik RCG*, br 46/07) kao oblike nasilja po osnovu pola posebno navodi porodično nasilje, incest, silovanje i trgovinu ljudima (čl. 7, t. 7).

odredba (čl. 29) je rodno neutralna, jer formulacija *„svi članovi porodice imaju jednako pravo na zaštitu od nasilja u porodici"* previđa da kod ovog vida nasilja žene čine ogromnu većinu žrtava, a muškarci većinu počinilaca, te da se zapravo radi o muškom nasilju nad ženama[15]. Neuvažavanje ove činjenice može da oteža formulisanje efikasne legislative u cilju suzbijanja nasilja u porodici i zaštite žrtava. Ovo se odnosi i na definisanje politike i mera prevencije nasilja u porodici, koje

Odredba posvećena nasilju u porodici (čl. 29) unapred isključuje da se posebni programi i mere namenjeni žrtvama i počiniocima ocene kao diskriminacija. Konkretno, diskriminacijom se neće smatrati mere i programi namenjeni žrtvama nasilja u porodici kojima se obezbeđuje socijalna, pravna i druga pomoć i naknada u cilju zaštite od nasilja u porodici i otklanjanja i ublažavanja posledica nasilja; zatim programi i mere namenjeni zbrinjavanju žrtava nasilja, kao i izvršiocima nasilja u porodici, u cilju sprečavanja daljeg nasilja.

Zakon obavezuje organe javne vlasti da planiraju, organizuju, sprovode i finansiraju mere namenjene podizanju svesti javnosti o potrebi sprečavanja nasilja u porodici. Nedostatak ovog člana o nasilju u porodici je što garantuje jednako pravo na zaštitu od ovog vida nasilja jedino članovima porodice, dok međunarodni standardi zahtevaju da zaštita obuhvati znatno širi krug lica, uključujući lica koja su ili su bila u intimnom odnosu, uključujući bračne, vanbračne i istopolne odnose, lica koja žive u istom domaćinstvu, koja su u odnosu hraniteljstva i usvojeništva i slično, jer se nasilje može desiti i nakon završetka formalnih ili neformalnih partnerskih odnosa[16]. Ovakav širi krug zaštićenih lica navode i Krivični zakonik (*Sl. glasnik RS*, 72/09) i Porodični zakon (*Sl. glasnik RS*, br. 18/05.[17].

Zakon zahteva uvođenje vaspitanja o ravnopravnosti polova kao sastavnog dela obrazovanja i obaveze oslobađanja od stereotipa i predrasuda zasnovanih na polu, što svakako ide u prilog prevenciji nastajanja rodno zasnovanog nasilja.

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[15] Ovu činjenicu potvrđuje i statistika o broju osuđenih punoletnih lica prema krivičnom delu i polu. Tako je u 2006. godini za krivično delo nasilja u porodici bilo osuđeno 1.020 muškaraca i 39 žena. Izvor: Republički zavod za statistiku Srbije, *Žene i muškarci u Srbiji,* Republički zavod za statistiku Srbije, Beograd, 2008, s. 47.

[16] V.: Nikolić-Ristanović, V., Dokmanović, M. (2005). *Međunarodni standardi o nasilju u porodici i njihova primena na Zapadnom Balkanu,* Prometej, Beograd, s. 74–76, 160–163.

[17] Porodični zakon daje širu definiciju kruga zaštićenih lica od Krivičnog zakonika. Dok Krivični zakonik (čl. 112, t. 28) štiti jedino članove porodice (iako u veoma široko datom opsegu), Porodični zakon (čl. 197, st. 3) u nju uključuje i lica u tazbinskoj vezi, kao i lica koja su ili su bila u emotivnoj ili seksualnoj vezi.

5. Zaključak

Imajući u vidu da je rodno zasnovano nasilje manifestacija tradicionalnih društvenih nejednakosti između žena i muškaraca, ostvarivanje principa rodne ravnopravnosti pretpostavlja preispitivanje celokupnog zakonodavstva i uklanjanje diskriminatorskih odredbi iz svih zakona. Ovo je, naime, preduslov za zaštitu i ostvarivanje ljudskih prava svih građana i građanki na principu ravnopravnosti. Otuda je razvijanje efikasne antidiskriminacione legislative ključno i za suzbijanje rodno zasnovanog nasilja.

I pored određenih manjkavosti, Ustav, Zakon o zabrani diskriminacije i Zakon o ravnopravnosti polova predstavljaju dobar pravni okvir za ostvarivanje tog cilja. Ustav zabranjuje diskriminaciju po svakom osnovu, garantuje politiku jednakih mogućnosti i predviđa posebne mere za suzbijanje diskriminacije. Oba navedena zakona zabranjuju nasilje zasnovano na rodu i predviđaju mere i instrumente za ukidanje diskriminatorskih normi i praksi.

Najveća zamerka ovim ključnim izvorima antidiskriminacione politike odnosi se na nekonsistentnost u pogledu priznavanja razlike između 'roda' i 'pola'. Uprkos tome što polazi od definicija 'pola' i 'roda' prema međunarodnim standardima, Zakon o ravnopravnosti polova govori o nasilju zasnovanom na 'polu', iako dalja razrada ovog pojma jasno ukazuje da se radi nasilju čiji su uzroci u društveno uspostavljanim ulogama i statusu muškaraca i žena, običajima i obrascima zasnovanim na ideji podređenosti ili nadređenosti polova, kako to jasno formuliše i Zakon o zabrani diskriminacije. Stiče se utisak da se zakonodavac još uvek ustručava da se jasno i nedvosmisleno suprotstavi stereotipima i predrasudama kojima obiluje javni i privatni život. Iako to možda ne izgleda važno na prvi pogled, terminologija koja se koristi u Ustavu i zakonima je od velikog značaja, s obzirom na to da će se politika jednakih mogućnosti i sudska antidiskriminaciona praksa razvijati naslanjajući se upravo na te odredbe. Otuda bi bilo dobro da Zakon o ravnopravnosti polova sadrži i jasne definicije svih oblika rodno zasnovanog nasilja.

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CONSTITUTIONAL AND ANTIDISCRIMINATION GUARANTEES OF THE PROTECTION FROM GENDER BASED VIOLENCE IN THE REPUBLIC OF SERBIA

Summary

Accordingly to the international standards, gender based violence is a form of discrimination agaist women. Therefore, national legislation, including constitutional clauses, should prohibit gender based discrimination, guarantee women right to freedom from violence and protect victims. The Constitution of the Republic of Serbia prohibits discrimination on basis of sex and introduces policy of equal opportunities as an obligation of the State. The newly adopted Law against Discrimination and the Law on Equality between Sexes have recognised gender and gender identity as grounds of discrimination, and provided norms related to combating gender based violence. However, there is still inconsistency with respect to gender related terminology. Although it provides for definition of gender and gender based violence as set by the international standards, the antidiscrimination legislation still avoids using the term `gender`, and prefers using the term `sex` when speaking about gender. This approach may negatively influence development of appropriate norms, policies and measures, particularly in the field of prevention. Besides, eliminating this gap and introducing definition of all types of gender based violence in the antidiscrimination legislation should contribute improving court practices and raising gender sensitiveness of judiciary and state officials.

Key words: *Constitution, antidiscrimination legislation, gender, gender based violence*

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FENOMEN CIVILNOG DRUŠTVA: ANALITIČKA RETROSPEKTIVA

Sažetak *– Bez obzira na pro ili contra teoretsku poziciju, civilno društvo manifestuje fenomen koji je pozicioniran u različitim diskurzivno-kognitivnim postavkama sa širokom interpretativnom matricom. Analiza evolucije pojma civilnog društva će obuhvatiti: (1) ideju da civilno društvo nije jednako sa političkom organizaciom društva; (2) važnost dobrovoljnog udruživanja; (3) difrenciranje civilnog društva od države, ekonomskih relacija i privatne sfere. Rad se zaključuje razmatranjem socijalnog kapitala i javnog diskursa kao najvažnijim eksternim posledicama funkcionisanja civilnog društva.*

Ključne reči: *civilno društvo, država, politička teorija, demokratija, javna sfera, socijalni kapital.*

1. Uvod

U sveukupnoj političkoj misli evidentni su tako generički pozicionirani problemski delovi koji kao konstitutivne fenomenološke komponente ne gube ni na diskurzivno-kognitivnoj ni na institucionalno-sistemskoj važnosti. Jednu od tih supstancijalnih programskih konstanti predstavlja i civilno društvo, analizirano kroz dinamiku i obim konceptualnih promena semantičkih, funkcionalnih i sadržinskih dimenzija njegove pojmovne evolucije: od klasičnog identifikacionog koda koji civilno društvo izjednačava sa njegovom političkom organizacijom- državom, pa do razvijene moderne paradigme utemeljene na potpunom razdvajanju i antinomiji civilnog društva i države. Dihotomija civilnog društva i države, one ontološki dominantne nad-države koja je vekovima uživala status

metafizičke prvosti, klasifikuje se u ona civilizacijska dostignuća koja iz zone načela spekulativno-ezoterične dijalektike socijalnog progresa prelaze u transparentno polje naučno egzoteričnih istina sa autentičnom bitnošću jednog sveprisutnog, nezaobilaznog i transedirajućeg javnog kompleksa koji je, bez obzira na dugu istoriju teoretske artikulacije i pragmatične objektivizacije, uvek iznova zahvaćen propitivanjem kvaliteta odnosa između: (1) shvatanja i realizacije demokratske jednakosti i slobode; (2) nestabilnih i promenljivih društvenih uslova; i (3) pojmovno domišljene i istorijski realizovane disolucije tradicionalnog izjednačavanja civilnog društva sa političkom zajednicom.

2. Radikalna alternativa ili harmonična egzistencija?

Svako evolutivno postavljeno propitivanje savremenog shvatanja civilnog društva, bez obzira na afirmacijske ili alteracijske stavove autora, mora konstatovati da je to jedan od onih relevantnih i amorfnih pojmova koji flotiraju u različitim diskursima sa jako širokim spektrom interpretativno-političkih konotacija.[1] Suštinski posmatrano, zamisao civilnog društva predstavlja amalgam raznovrsnih koncepcija sa diferenciranom istorijsko-diskurzivnom pozicijom (i/ili pozadinom). U suprotnosti sa antičkim shvatanjem, gde je fuzionisano sa centralizovanim državnim sredstvima za uređenje društva – polisom, moderno civilno društvo objedinjuje dve izuzetno važne ideje. Prvo, to je koncept diferenciranja sredstava za realizaciju društvenog sistema, ideja da socijalni poredak može biti ostvaren nepolitičkim sredstvima. Ova zamisao svoje korene ima u srednjevekovnoj hrišćanskoj političkoj misli, u njenom dihotomnom tretiranju utemeljenja vlasti na političkom suverenitetu i Bogu. Takvo polazište je izmestilo moralnu valencu društvene organizacije sa političkog suvereniteta na religiju i impliciralo da različiti domeni društva treba da imaju i različita sistemska načela.

Postoji, dakle, pet bitnih atributa srednjevekovnog društva koji u sticaju omogućavaju nastanak modernog civilnog društva: (1) društvo se više ne određuje putem njegove političke organizacije, ova promena predstavlja jednu od pretpostavki civilnog društva i može se smatrati temeljom zapadnog liberalizma, srednjovekovna prirodno-pravna teorija prestaje biti direktno utemeljena na identitetu sa političkom organizacijom, politički autoritet funkcioniše samo kao jedan od množine političkih organa; (2) difrencijacija društva i njegove političke organizacije razvijala se preko institucionalizovanja sakralne ideje koja je Crkvu konceptualno tretirala kao nezavisno društvo, hrišćani postoje u ovozemaljskom

[1] Post, R. i Rosenblum, N.: „Introduction." u Rosenblum, N. i Post, R. (ur.) : *Civil Society and Government*, Princeton University Press, Princeton, 2002, s. 23.

i onozemaljskom društvu i nijedno od tih društva nije subalterno onom drugom – hrišćanska ideja crkve, njeno shvatanje kao zbirnog pojma verujućih, a ne kao funkcionalne ustanove klera, dobila je atribute socijalne autonomnosti; (3) dostignut je nivo koji manifestuje relevantan pomak u shvatanju individualnih prava, uprkos rigidnim i opskurnim socijalnim uslovima, ustanovljena je neke vrsta ugovora koji obavezuje i vlast i građane, otvorio se prostor za produkovanje relevantnog inicijalnog seta legalnih ličnih prava; (4) počeli su da se razvijaju relativno samostalni i samodovoljni srednjevekovni gradovi; (5) autokratski vladari u upravljanju svojim monarhijama morali su da računaju sa naizmeničnom, nesigurnom, nezagarantovanom i nepredvidljivom podrškom vlastele – spajajući političku strukturu sa celokupnošću društva, ovako je pozicionirana dijarhija produkovala sasvim sekularizovani dualizam.[2]

Diskurzivna klica diferencijacije, na liniji politički suverenitet – društveni poredak realizovan nepolitičkim sredstvima, bila je potpuno prenebregnuta u teoretskim opusima Hobsa i Bodena, koji su smatrali da je suverena politička moć glavna integrativna dimenzija društva, a tek je Lok ponovo registruje, te konstituiše njen moderno-distinktivni modalitet preko kombinovanja sa drugom ključnom idejom, povezanom sa civilnim društvom – voluntarističkom asocijativnošću. Ipak, treba napomenuti da se koncepcija zasebno pozicionirane asocijativne svrhe najranije može evidentirati u diskurzivnoj postavci Tomasa Hobsa, koji državu razmatra pre kao organizacionu strukturu zasnovanu na asocijativnim principima, nego kao korporativno, organsko telo. Naime, za Hobsa, ljudi su, više nego što to se to generalno želi priznati, jednaki po pitanju svojih fizičkih i umnih kapaciteta, a univerzalna i apriorna ljudska težnja ka samoodržanju svoje korene ima u najvažnijoj jednakosti među ljudima: moći da jedan čovek drugome oduzme život. Samoodržanje, kao najjače ljudsko osećanje, proizilazi, dakle, iz straha od nasilne smrti, a jednaki individualni kapaciteti uslovljavaju jednaka nadanja i kompetitivni karakter međuljudskih odnosa proizašao na istovetnosti objekata preferencija. Sledstveno, svi zakoni prirode, te društvene i političke obligacije, subordinirane su prirodnom pravu individuuma na samoodržanje: država je *par excellance* produkt straha i njime uslovljene i ustrojene političke razboritosti na nivou obezbeđenja i garantovanja sigurnosti.

U takvoj konceptualnoj konjunkciji ne postoje nikakve indikacije da bi asocijativnost mogla da rezultuje autentičnom vrstom društvenog sistema koji je distingviran od represivnog poretka nametnutog od strane države. Hobsijanski modalitet liberalizma, shvatanje po kome društvo predstavlja devijantnu agregaciju partikularno-egoističnih pojedinaca odvojenih od korporativističke zajednice, predstavlja osnovu za problematičnu matricu propitivanja modernih asocijacija

[2] Tejlor, Č.: *Prizivanje građanskog društva.* Beogradski krug, Beograd, 2000, s. 19–21.

koja se može konstatovati kod Ferdinanda Tonija, posebno u njegovom razlikovanju zajednice i asocijativno utemeljenog civilnog društva.[3] Preko određenja asocijativnih relacija kao neadekvatnih i anomaličnih, Toni sugeriše da fluidnoj, asocijativno zasnovanoj organizaciji društva nedostaju integrativni socijalni kapaciteti neophodni za individualnu i društvenu reprodukciju.

Lok, dakle, prvi razmatra društvo kao posledicu kontraktualistički utemeljene kohezivnosti jednakih, legitimnost društvene organizacije se zasniva na autonomnoj i neprisilnoj obligatornosti individuuma: inicijalni društveni ugovor ne uključuje državu – već samo sporazum, dok drugi ustanovljuje državu kao poverenika društva zarad realizacije onih preferencija koje ne mogu biti dosegnute preko voluntarističkih asocijacija. Sa Lokom religiozni aspekt opet zadobija supstancijalnu važnost za voluntarističke asocijacije, etička snaga religiozne protestantske posvećenosti manifestuje nužnu osnovu za konstituisanje socijalnog poretka, civilno društvo ima zasebno etičko značenje prostora unutar koga se problemi rešavaju preko dogovora među jednakima.[4] Vlast je, dakle, podeljena na sfere: ona upravlja samo onim stvarima koje su neophodne za primarnu egzitenciju društva, *ergo*, gro relevantnih socijalno-upravljačkih procesa se ostvaruje preko načela voluntarističke asocijativnosti. Iako se za Loka ne može reći da je bio demokrata *par excellence*, ipak se u njegovoj konceptualnoj postavci može evidentirati intenzivna povezanost između samoupravljanja, civilnog društva i demokratije.

Teoretsku poziciju po kojoj je civilno društvo distancirana moralna zona međusobnih ljudskih relacija, područje koje mora biti zaštićeno od intervencionizma države, razvio je i intenzifikovao u svome delu Adam Ferguson. Njegova percepcija civilnog društva je eliminisala teološku komponentu i zamenila je apostrofiranjem socijalne i benevolentne prirode čoveka, koji samo treba da sledi i aplicira svoje imanentne unutrašnje kvalitete da bi uspešno produkovao moralnu sferu socijalne interaktivnosti. Shvatanje demokratije, koje implicira ovako pozicionirana koncepcija, najdirektnije je povezano sa definisanjem samoupravljanja preko voluntarističkih principa, ono je toliko jaka da se, i dan danas unutar opšte političke kulture mnogih demokratskih zemalja, strah od represivnih potencijala države ne određuje samo preko pretnje individualnim slobodama, već i preko ugrožavanja voluntarističkih modaliteta društvenog organizovanja.

Da bi definisao konstitucionalna sredstava za limitiranje centralizovane moći monarhije i harmonizovao njen odnos sa pravima i položajem staleža, Monteskje je, uz svoju epohalnu tripartitnu podelu vlasti, razvio i danas uticajan koncept

[3] V. Tonnies, F.: *Community and Association.* Routledge and Kegan Paul, London, 1955.
[4] Seligman, A.: *The idea of Civil Society,* Free Press, New York, 1992, s. 23–25.

po kome postojanje društvene moći koja posreduje između države i pojedinca može da generiše sasvim diferenciran i autentičan poredak. Takav konceptualni algoritam je presudno uticao na Tokvilovo eksperimentisanje sa shvatanjem da u procesu demokratizacije asocijacije mogu poslužiti kao funkcionalni ekvivalent staležima u apsolutističkim državama, makar do onoga momenta kada počnu da nameću i/ili održavaju državnu tiraniju. Međutim, ova konceptualizacija asocijacija kao znanja o „metodama kombinovanja" je rezultovala sa tri nova aspekta doprinosa civilnog društva dobrom demokratskom upravljanju: (1) Tokvil je prvi propitao mogućnost da, uz uvažavanje državnog autoriteta, asocijacije obavljaju reprezentativne funkcije, takva teoretska sugestija ne može da se evidentira ni kod Loka, a ni kod Monteskjea; (2) Tokvil je prvi konstatovao da asocijacije utiču na razvoj individualnih kapaciteta koji podržavaju demokratiju- nasuprot tome, zahvaljujući kalvinističkim shvatanjima, Lok nije uspeo da se fokusira na asocijativne veze koje socijalizuju građanina i formulisao je društvo kao posledicu ugovora samodovoljnih i već formiranih individua, Tokvil jeste naglašavao moć i ulogu religije u Americi, ali je, isto tako, ukazao na to kako asocijacije mogu da utiču na formiranje građanskih vrlina: (a) one kultivišu naviku kolektivnog angažovanja, produkuju aktivno, samodovoljno, te uvek budno i oprezno građanstvo, (b) one mogu anulirati prirodno individualno prenebregavanje šire društvene zajednice i podstaći individue da doprinos javnim stvarima tretiraju kao vlastiti interes, (c) one formiraju etos lakih i jednostavnih egalitarnih odnosa među građanima, uključujući i generalizovanje etičkog senzibiliteta, koji u Evropi toga vremena nije mogao da napusti horizont zajednice, staleža ili klase; (3) Tokvil je prvi uvideo da asocijacije mogu da predstavljaju alternativni modalitet uprave, tako je po prvi put plasirano shvatanje po kome civilno društvo može da involvira u upravljanje preko logike supsidijarnosti, da priroda i opseg određenog socijalnog problema može biti definisana prema sredstvima i obimu kolektivnog angažmana. Adam Smit je zaslužan za prvu sistemsku analizu tržišta i ideju da, ukoliko državi nedostaje moć da obezbedi socijalno potrebne integrativne uslove i komponente, tržište može na sasvim zadovoljavajući način i potpuno kompletno organizovati društvo. Važno je napomenuti da je on poznavao distinkciju između društva, područja u okviru koga može da se inicira, razvija i akumulira najplemenitija etička percepcija i osećajnost, i tržišta, područja zaduženog za intenzifikaciju interesa kao daleko čvršće baze socijalne organizacije, naravno, sa daleko manjom moralnom senzibiliziranošću. S obzirom na to da je tržište kompaktna, persistentna i stabilna celina, a da individualna benevolencija i drugi fragilni, nepostojani i dinamični moralni faktori komponuju labilne postamente socijalne organizacije, Smit nikada nije ozbiljno razmatrao mogućnost da asocijacije mogu manifestovati treći izdiferencirani modalitet socijalne organizacije. Ipak, britansko društvo će, napokon,

na kraju XVIII i početkom XIX veka, produkovati građanina koji će svoju slobodu crpsti iz više različito situiranih sloboda.

Iz te perspektive, u klasično-liberalnoj Britaniji građani će sebe smatrati slobodnim, jer niko nije raspolagao neograničenim, neprikosnovenim totalitetom moći – ni političke vođe, ni političke frakcije, ni crkva, ni korporacije, ni profesionalna udruženja, moć se difuzno širila kroz ono što je Oukšot nazivao građanskim asocijacijama.[5] Poštovanje zakona nije podrazumevalo da će svaki pojedinac podržavati celokupnu pravnu regulativu, zakon, po sebi, predstavlja spontano menjanje poretka i u sebi akumulira ne samo poštovanje onoga što jeste, već i onoga što manifestuje viziju i anticipaciju nekog budućeg sistemskog ustrojstva. U građanskim asocijacijama upravljanje je predstavljalo instrument ljudi ispunjenih verom u institucionalni poredak koji im omogućava da traže lično odabrane i deklarisane ideale.[6] XX vek je doneo odstupanje od takvog tipa asocijacija, neliberalne nacionalne države su rekonstituisale svoje građane u proizvodne asocijacije, koje su se bazirale na imperativnom zahtevu za realizacijom zajedničkih interesa i ciljeva. Postojala je samo jedna suverena svrha, a poligon programskog delovanja političkih lidera se mogao definisati kao skup radnji na ostvarivanju toga cilja, i to kroz upravljanje i dirigovanje individuama u skladu sa proklamovanim ciljevima i odrednicama (iz toga aspekta, komunizam i nacional-socijalizam se mogu označiti kao ekstremne forme proizvodnih asocijacija).[7]

Napokon, Hegel je prvi moderni mislilac koji je artikulisao sasvim autentično, konceptualno kompletirano i teoretski dovršeno shvatanje civilnog društva. Za Hegela, civilno društvo predstavlja dimenziju etičkog života, sferu koja se nalazi između prirodne zajednice porodice i univerzalnog moralnog života države. Na prvi pogled, izgleda da se Hegelov koncept civilnog društva, sa akcentom na dezintegracione društvene procese koji se javljaju kao posledica spontanosti, nepredvidljivosti i nestabilnosti tržišne ekonomije, bitno oslanja na postavke škotskih prosvetitelja. Civilno društvo se pozicionira kao ekskluzivna sfera partikularnog, oblast koju karakteriše i određuje univerzalni egoizam te individualna ekspresija vlastitih interesa. Pored svega, za Hegela civilno društvo ipak ima kako integrativne, tako i obrazovne kvalitete koji sprečavaju njegovu atomizaciju i potpunu individualizaciju. Potpuna konceptualizacija civilnog društva uključuje institucije iz oblasti javnog interesa, one ustanove koje regulišu i podržavaju ekonomske aktivnosti. Civilno društvo, takođe, obuhvata: (1) glavne društvene klase (*Stände*) ; (2) profesionalne asocijacije; (3) crkvu; (4) obrazovna društva; i (5) gradska veća. Institucije građanske vlasti štite blago-

[5] V. Oakeshott, M.: *Rationalism in Politics and Other Essays*, Liberty, Indianapolis, 1991.

[6] Green, D. G.: *Reinventing Civil Society*, IEA Health and Welfare Unit, London, 1993, s. 9

[7] Ibid., 8.

stanje i prava svakog člana civilnog društva, dok korporacije obezbeđuju osećaj pripadnosti, solidarnosti i priznavanja individua u kompetitivnom, razmrvljenom i narcisoidnom ekonomskom okruženju.

Civilno društvo, dakle, svoje pune potencijale može da realizuje samo ukoliko je integrisano u višu etičku egzistenciju države. Ako se civilno društvo ne kontroliše i ne ograničava, država može da podlegne uticaju slobodne igre pojedinačnih interesa i subjektivnog mišljenja građana. Imajući to na umu, Hegel predlaže limitiranje dometa javnog mišljenja i vertikalne socijalne participacije, a najznačajnu ulogu dodeljuje izvršnim državnim organima: (1) vladi; (2) ministrima; i (3) državnoj birokratiji. Ipak, njegov koncept civilnog društva uspešno formuliše sferu intermedijativnih asocijacija, popunjavajući tako prostor između partikularnosti privatnih interesa i apstraktne univerzalnosti države. Institucije civilnog društva obrazuju građane za progresivnije i opštije nivoe interesa. Njegova ideja civilnog društva je prešla dug put da bi premostila jaz između buržuja i građanina, procepa otvorenog žestokom Rusoovom kritikom škotsko-prosvetiteljske vizije tržišnog društva homogenizovane kategorijama privatnog interesa i podele i/ili specijalizacije rada.

Marks je sledio Hegela u izjednačavanju civilnog društva sa ekonomskim korpusom, nemačka sintagma za civilno društvo zapravo znači buržoasko društvo i konceptualno je povezana sa nastankom tržišta.[8] Za razliku od Hegela, on je registrovao relevantni organizacioni potencijal u slobodnim i demokratskim asocijacijama proizvođača: ljudi su mogli da projektuju društvenu budućnost preko rasprava i dogovaranja o vlastitim ciljevima, te preko njihovog planiranja i korigovanja. Takva konstelacija ukazuje na to da Marks prvi koristi tripartitnu distinkciju između državnih, tržišnih i asocijativnih relacija zarad definisanja sredstava socijalne organizacije, ali, nasuprot aktuelnoj upotrebi, civilno društvo je, ipak, operacionalizovano samo da bi identifikovalo set tržišnih odnosa unutar buržoaskog društva. Njegovo potenciranje čvrstih relacija između asocijativne socijalne organizacije i demokratske vlasti moglo se već ranije evidentirati kod Rusoa, mislioca čije je konceptualno težište manifestovano konstrukcijom društva u okviru koga bi ta diferencijacija, elaborirana u tradciji Loka i Monteskjea, morala biti prevaziđena preko: (1) veličine države koja bi morala da bude usaglašena sa potrebom da se sve legislativne odluke donose na zasedanjima skupštine sastavljene od celokupnog građanstva; (2) zabranom parcijalnih asocijacija kao najdirektnije pretnje generalnoj volji građana; i (3) pozicijom države koja bi morala da bude sveobuhvatana asocijacija, tako da zakoni koji rezultuju iz građanske debate ne mogu biti podeljeni preko socijalnih frakcija.

[8] V. Bell, D.: „American exceptionalism' revisited: the role of civil society." *The Public Interest*, 94, 1989, s. 38–56.

Ovako postavljen model manifestuje apsorpciju države u civilno društvo i političkog života u moralni život: unitarnu varijantu demokratije utemeljenu na viziji neizdiferenciranog društva. Marksov koncept je otišao jedan korak dalje: građanski kapaciteti za donošenje odluka treba da budu vraćeni sa alijenativnih lokacija unutar države koja odumire, jer su sve njene funkcije preuzete od strane slobodne i demokratski konstruisane asocijativne strukture proizvođača.

Bipolarni model, utemeljen na bifurkaciji civilno društvo – država, rezultuje mnogim problematičnim tematima: (1) udaljavanje od nedržavnih zona za koje su karakteristične relacije sile rezultuje time da se sve nedržavne forme asocijativnosti definišu kao voluntarističke, bez obzira na to što asocijacije uvek funkcionišu u polju konstituisanom na odnosima moći koji potiču iz različitih vrsta i nivoa kontrole nad resorsima; (2) mariginalizovanje analize konsekvenci političke snage uslovljava limitiranu koncepciju onoga što se tretira kao političko; (3) postojanje konceptualnog galimatijasa između asocijacija, države i tržišta rezultuje time da diferenciranje autonomnih domena postaje gotovo nemoguće; i (4) čvrsto postavljena dihotomija civilno društvo – država, po sebi, zatvara mogućnost da asocijacije služe kao alternativni modalitet upravljanja i vlasti, modalitet koji je supstancijalna premisa asocijativnog demokratskog projekta. Za Talkota Parsonsa, nastajanje civilnog društva je povezano sa diferencijacijom između tri kategorije operativne organizacije modernih društva: (1) novcem koji funkcioniše kroz tržište; (2) administrativnim pravilima koja su podržavana preko prisilne moći države; i (3) voluntarističkim asocijativnim odnosima delotvornim preko normativnog i diskurzivnog uticaja.

Kant je prvi tumačio civilno društvo preko ideje javne sfere kao prostora gde indivduumi, shvaćeni kao privatne ličnosti, kroz različito struktuirane interakcije kreiraju javnu upotrebu zbirno formulisanih interesa, zahteva i razloga. On je tvrdio kako se obaveza prosvećenih moharhija ne svodi samo na zaštitu od javnog kritikovanja ovog krucijalnog socijalnog prostora, već podrazumeva i njegovo permanentno i intenzivno osnaživanje. Antonio Gramši je razvio različit, ali u nekim tačkama sasvim komparabilan i tipski jednako orijentisan koncept: naime, za njega, pojam civilno društvo označava institucije (škola, univerzitet, crkva itd.) koje obezbeđuju prostor za zadobijanje normativne legitimnosti, ili hegemonije, države i kapitalističke klase. Sledstveno, revolucionarna strategija će pre svega zavisiti od sposobnosti organizovanja anti-hegemonističke kulture, izgrađene na kritici „zdravog razuma" unutar asocijativne zone. Takva konjunkcija predstavlja inicijalni modalitet ideje o tome kako javnost može da bude disperzivni, široko inkluzivni fenomen i o tome kako normativno regulisanje politike može biti na dobitku od javno artikulisanog kriticizma. Javna sfera, dakle, manifestuje područje za realizaciju demokratskog političkog prosuđivanja, što zauzvrat obezbeđuje političke smernice za državu i, sve više, za tržišne

aktere. Da bi javnost imala nužne demokratske kvalitete, treba da je dvostruko nezavisna: (1) ona mora biti autonomna u smislu izolovanosti od državne arbitrarnosti, finansijskog pokroviteljstva i uticaja državno vođenih medija; i (2) ona mora biti autonomna u kantovskom smislu, po kome se javno mnenje formuliše preko javne deliberacije, a ne preko pukog reflektovanja akumuliranih individualnih preferencija.

Jirgen Habermas oštro razdvaja upotrebu koncepta civilnog društva kao alternative institucionalnom sklopu države od usmerenosti civilnog društva na svet života unutar moderno zadanog socijalnog ambijenta i uporedo sa moderno konstruisanim državnim institucijama. Ova oštro proklamovana diskrepancija supsumira i konceptualno diferenciranje tradicionalnih (nelegitimnih) od post-tradicionalnih (legitimnih) civilnih društava. Tradicionalno poimanje civilnog društva korespondira sa idejom „istorijske vertikale", dugotrajnog vremenskog perioda koji kreira zajednicu sa interpersonalnim vezama, javnim institucijama i nacionalnom kulturom potpuno rezistentnim na pritisak snažnih političkih autoriteta. Duboka istorijska utemeljenost modaliteta zajednice, identiteta i asocijacija teško da se može narušiti delovanjem prolaznih i kratkotrajnih, kako ekonomskih, tako i političkih sila. Za razliku od tradicionalnih shvatanja, post-tradicionalno određenje civilnog društva apostrofira asocijativno koncipiranu socijalnu situaciju individuuma i selekciju uslova u okviru kojih se ta asocijativnost može realizovati. Ovi principi pomeraju stariju matricu kritičke refleksivnosti, one koja markira usmerenost na fiksirane uloge, automatsko izvršavanje dužnosti i nekritičko uvažavanje socijalnih arbitara, na post-konvencionalni kritički stav u procesu iznalaženja i konstituisanja socijalnog identiteta. Individue koje čine civilno društvo, zahvaljujući vlastitoj evaluaciji moralnog autoriteta, vrlo brzo napuštaju sociocentrizam tradicionalnog poretka.

Habermas takvu konjunkciju, onu koja je uvek u opasnosti od sistemske agresije i kolonizacije, artikuliše binarnim vokabularom sveta života, i to preko razlikovanja: (1) društvene integracije situirane na nivou akcije i komunikacije; i (2) sistemske integracije situirane na nivou funkcionalnosti. Konceptualnom fuzijom fenomenologije i funkcionalne sociologije, Habermas namerava da reformuliše i uravnoteži eklatantnu suprotnost između intimne zajednice direktnih međusobnih odnosa i kompleksnog sveta racionalne društvene organizacije. Svet života je utemeljen na čistoj intersubjektivnosti, izolovanoj od uticaja države i ekonomije, regulisan sekundarnim poretkom normi koje materijalizuju heterogenost i pluralizam modernih civilnih društava, te regulišu socijalne razlike bez nametanja bilo kakve supstancijalne doktrine društvenog morala. Suštinska karakteristika ovakve konceptualizacije civilnog društva je celovito odbacivanje rigidnosti i suprematije bilo koje formulacije opšteg dobra koja bi determinisala i nametnula konstantnu komunikativnu obligaciju. To znači da se: (1) svako

svođenje i ujednačavanje treba kritički propitati i menjati; (2) sve veze neprestano diskutovati; (3) u sve asocijacije, zato što su limitirane i nisu date jednom za svagda, ulaziti i izlaziti; a (4) sve sličnosti ili razlike ne tretirati kao petrifikovane meta-kategorije, već kao imaginarna i promenljiva svojstva.

Habermas je, dakle, prvi teoretičar koji je pokušao da osmisli normativnu političku teoriju javne sfere razvijajući etičku komponentu diskurzivno-voljne formacije za koju je verovao da može da utemelji racionalno-kritički dijalog, čiji je cilj stvaranje demokratskih barijera za odbranu od konstantnih nasrtaja sistemskih imperativa. Ovako postavljen problem vodio je ka funkcionalnoj separaciji države od društva i institucionalizovanju političke javne sfere kao nezavisne u odnosu na ekonomski i politički uticaj, racionalni diskurs nije subordiniran nijednom organizacionom prostoru, već je otvoren za različite prakse javne debate. Etički diskurs predstavlja skup pravila koja asistiraju u produkciji racionalnog konsenzusa po pitanju normi i koja iniciraju teoriju komunikativne akcije, sporazum je racionalan kada je u saglasju sa principima koji predstavljaju nužnu pretpostavku u svim komunikacijama i kada, u slučajevima kada je eksplicitan, omogućava diskurzivnu evaluaciju normi. Povratak civilnog društva u političku teoriju i političku filozofiju, realizovan za vreme škotskog Prosvetiteljstva, bio je zapravo zasnovan na njegovoj sposobnosti medijacije specifičnih vrsta tenzija između: (1) individualnog i društvenog; (2) javne etike i privatnih interesa; te (3) partikularnih pasija i predmeta od javnog značaja.[9] Imajući to na umu, civilno društvo, po Habermasu, opredmećuje spoj više ili manje spontano konstituisanih asocijacija, organizacija i grupa, koje, senzibilizovane za rezonanciju društvenih problema u sferi privatnog života, izdvajaju i transponuju produkovane reakcije u javnu sferu: jezgro civilnog društva predstavlja mreža asocijacija koja institucionalizuje diskurse za reševanje problema po pitanju opštih interesa unutar referentnog okvira organizovane javne sfere.[10]

Koen i Arato smatraju da se etički diskurs transponuje u teoriju političkih institucija sa centrom u praksi civilnog društva.[11] Po njima, etički diskurs *in genere* ima sasvim jasne političke implikacije: imperativ angažovanja u otvorenom dijalogu, preko stvari od zajedničkog interesa, uslovljava demokratsku legitimnost i konstituiše set osnovnih demokratskih prava. Verifikcija sporazuma o zajedničkim moralnim normama temelji se na slobodnom dogovoru između svih onih koji su zainteresovani za odluku, svih onih koje valjan razlog mobiliše da definišu vlastitu poziciju i to na način da distinktivna politička etika ne

[9] Seligman, A.: „Civil Society as Idea and Ideal. „ u Chambers, S. i Kymlicka, W. (ur.), *Alternative Conceptions of Civil Society*, Princeton University Press, Princeton, 2002, s. 13–33.

[10] Habermas, J.: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* Polity Press, Cambridge, 1996, s. 367.

[11] Cohen, J. i Arato A.: *Civil society and Political Theory*. MIT Press, Cambridge, 1992, s. XVII

znači pristajanje na neku konkretnu vrstu demokratskog poretka. Javno pravo, koje je institucionalno odvojeno od individualnih moralnih vrednosti, legitimno je zahvaljujući ekstra-legalnom javnom moralitetu. Etički diskurs rekonstruiše proceduralne uslove za demokratsko zadovoljenje legalnih propisa, pravo i moralitet su redefinisani kao odvojeni, ali uzajamno podržavajući uslovi: ono što se računa kao individualno-privatno, samim tim i kao nešto što je van javne diskusije, i ono što može biti inkorporirano u javni prostor su od krucijalne važnosti za potencijalnu demokratsku debatu.

Etički diskurs diktira minimalne uslove za organizovanje političkih institucija, i to u formi procedura demokratske validacije i seta osnovnih demokratskih prava, koja se ne doživljavaju kao vlasnička prava na imovinu, već kao građanska prava koja omogućavaju demokratsku legitimnost. Ova prava omogućavaju simetriju između različitih zahteva i predmeta iz kojih proističu, ona pomažu zasnivanju javnog prostora koji dodatno generiše demokratsku legitimnost. Koncept civilnog društva, najadekvatniji ovakvoj konjunkciji, razdvaja građansku sferu demokratskog dijaloga od funkcionalne sfere ekonomije i države. Javni prostor civilnog društva se kontinuirano ispunjava novim udruženjima, asocijacijama, organizacijama i pokretima, mnogobrojnim i sasvim diferenciranim zahtevima, koji zaštićeni pravom i otvoreni za diskusiju, manifestuju potencijalnu osnovu za javnu politiku. Javna sfera, upoređujući i nivelišući najrazličitije oblike dijaloga i debata, može organizovati mišljenje u formi koja će vršiti uticaj na politički sistem.

Šekter sasvim odbacuje Koenovu i Aratovu funkcionalističku argumentaciju usled evidentne mogućnosti civilnog društva da harmonično opstaje pored drugih institucija (npr. ekonomska i državna aparatura), a da ne bude njihova radikalna alternativa.[12] U tom smislu, država nije nužno antagonizovana u odnosu prema civilnom društvu, niti je odsustvo države dovoljno da se razvije dobro civilno društvo.[13] Civilno društvo, po Šekteru, predstavlja osnovu za preporod javne sfere, koja može radikalno transformisati društvo uvođenjem drugačijeg institucionalnog poretka u političko nadmetanje. Oslanjajući se na diskurs Hane Arent, on suprotstavlja otvoreno-zatvoreni i nehijerarhijski karakter javne sfere civilnog društva suverenitetu i hijerarhijskom poretku države. Samo takvo civilno društvo može da adekvatno pozicionira određene političke akcije, u smislu razotkrivanja sistemskih granica koje definišu domen političkog. Rezultat tog procesa nikada ne može biti apsolutno predviđen i kontrolisan: u zavisnosti od kvaliteta ponašanja mnogobrojnih aktera koji reprezentuju diverzifikovane soci-

[12] Schecter, D.: *Sovereign States or Political Communities? Civil Society and Contemporary Politics.* Manchester University Press, Manchester, 2000, s. 81.

[13] Levy, J. D.: *Tocqueville's Revenge: State, Society, and Economy in Contemporary France.* Harvard University Press, Cambridge, 1999, s. 295–301.

jalne opcije, u svakom momentu može doći do nepredvidljivih zaokreta i obrta. Dok se država i parlamentarizam funkcionalno redukuju do nivoa gde se političko samoprepoznaje i samopotvrđuje, civilno društvo reprezentuje javnu sferu zaduženu za promovisanje, verifikovanje i afirmisanje naizgled potpuno divergentnih i nekompatibilnih individualnih sistema postojanja u modernom svetu.

U svakom slučaju, javna sfera treba da bude strategijski povećavana zarad stabilizacije civilnog društva, koncentrisanog na etablirane interese i politiku socijalnog priznavanja. U odnosu na postavku koju zastupaju Koen i Arato, Šekterovo naglašavanje pluraliteta distanciranih socijalnih perspektiva opredmećuje značajno uvećanje senzibiliteta za nepredvidivu i dinamičnu prirodu politike u okviru fluktoacije ideja javne sfere. Njegova usredsređenost na definisanje civilnog društva više kroz pojmove političkih relacija, nego kroz ekskluzivnu moralnu deliberaciju, je, ako ne naprednija, ono sigurno primerenija aktuelnoj društvenoj konstelaciji. Takvo shvatanje javne sfere izbacuje u prvi plan ideju političkog prostora stvorenog civilnim društvom i osposobljenog za konstituisanje ljudskog delovanja oslobođenog od antagonizama i upotrebe sile.[14] Iako Šekter izbegava „fetišizaciju" konsenzusa svojstvenu Habermasovom shvatanju komunikativne racionalnosti, njegov pogled na civilno društvo odražava uobičajenu tendenciju, posebno karakterističnu za levo orijentisanu političku misao, koja kao glavni cilj i najvišu svrhu civilnog društva ističe sprečavanje animoziteta i konflikata.

U poslednjih sto godina, liberalno razdvajanje javnog i privatnog bilo je dopunjeno i razlikovanjem intimnog od javnog, gde javno obuhvata kako državu, tako i civilno društvo. Dok klasična liberalna postavka apostrofira društvo kao temeljnu zonu lične slobode, neke konceptualizacije ukazuju na važnost socijalno-kulturoloških matrica ponašanja pojedinca: individualitet se ne posmatra samo kroz političku prinudu, već i kroz sveprisutni pritisak društvenih očekivanja. Za takva romantično-republikanska shvatanja, privatno znači odvojenost od dominantne sistemske egzistencije i usmerenost na samorazvoj i samoekspresiju. Nasuprot tome , za klasičnu liberalnu misao privatno korespondira sa društvom koje *a priori* manifestuje domen slobodnih racionalnih aktivnosti, koji je zaštićen i potenciran politikom državnog nemešanja i povećavanjem građanskih sloboda. Čisti romantizam i liberalizam ne razlikuju se samo po shvatanju privatnog života, već i po motivaciji za stvaranje privilegovane privatne sfere.[15] Romantična postavka uključuje društveni život u područje javnog zbog veza sa civilnim društvom: nepolitički subjekti se podvrgavaju proceni i mogućoj cenzuri drugih.

[14] Schecter, D.: *op. cit*. 50–51.

[15] Rosenblum, N.: *Another Liberalisam: Romanticism and the Reconstruction of Liberal Thought,* Harvard University Press, Cambridge, 1987, s. 59.

Individuumima je potrebno njihovo autentično egzistencijalno-ontološko vreme, vreme udaljeno od javnog života koje će im omogućiti promišljanje: (1) vlastitih ideja i stavova; (2) formi regeneracije moći; i (3) održavanja i razvoja intimnih relacija. Moderna privatnost je prvobitno otkrivena kao suprotnost ne političkoj, već socijalnoj sferi. Romantičarsko akcentiranje privatnosti donekle koincidira sa liberalnim strahom: (1) od prisilnog nametanja dominacije jedne distancirane grupe nad sopstvenim članstvom (u profesionalnim asocijacijama, sindikatima, obrazovnim institucijama itd.) ; i (2) od generalnije presije zarad društvene uniformnosti, protiv koje pluralizam asocijacija i tržište ideja ne pružaju pojedincima adekvatnu zaštitu. *Summa summarum*, moderne liberalističke koncepcije nisu usmerene samo na bezbednost privatne sfere od imperativa društvenog života, već i na otvaranje prostora unutar privatne sfere, prostora gde individuumi stvarno i potpuno mogu realizovati svoju privatnost. Privatni život, dakle, podrazumeva participaciju u institucijama civilnog društva i otklon prema poretku društvenog života.

Sve u svemu, aktuelne teoretske deskripcije i definicije civilnog društva upućuju na poprilično široku diskurzivnu paletu koja obuhvata različite konceptualne sadržaje: (1) porodice, zajednice, socijalne formacije zasnovane na prijateljstvu, solidarističke veze zaposlenih, voluntarizam, spontane grupe i pokrete;[16] (2) samogenerišući i samoupravljački svet privatnih grupa i institucija;[17] (3) sferu društvene interaktivnosti lociranu između ekonomije i države, komponovanu od zona intimnosti, asocijacija, socijalnih pokreta i formi javne komunikacije;[18] (4) sve društvene grupe koje mogu biti shvaćene kao voluntarističke i neprisilne, što isključuje nevoluntarističke relacije karakteristične za porodicu i državu (čak i kad njena legitimnost počiva na saglasnosti građana) ;[19] (5) skup formalno i neformalno organizovanih društvenih aktivnosti koje su politički relevantne, ali nisu utemeljene na porodici i srodstvu, ekonomskoj proizvodnji i razmeni, te na državi;[20] (6) oblast u okviru koje su asocijativne voluntarističke relacije prevalentne i koja je pozicionirana kao različita od domena organizovanih preko tržišta i države, te operativna i funkcionalna, van područja gde su biološke veze i intimnost predominantni;[21] (7) ambiciozni projekat restruktuiranja društva, po-

[16] Wolfe, A.: *Whose Keeper?* University of California Press, Berkeley, 1989, s. 20.

[17] Selznick, P.: *The Communitarian Persuasion.* Woodrow Wilson Center Press, Washington, 2002, s. 44.

[18] Cohen, J. i Arato A.: *op cit.* IX

[19] Walzer, M.: „Equality and Civil Society. „ u Chambers, S. i Kymlicka W. (ur.) : *Alternative Conceptions of Civil Society.* Princeton University Press, Princeton, 2002, s. 35.

[20] Rueschemeyer, D.: „The Self-organisation of Society and Democratic Rule. „ u Rueschemeyer, D., Rueschemeyer, M. i Wittrock, B. (ur.) : *Participation and Democracy in East and West.* M. E. Sharpe, Armonk, 1998, s. 18.

[21] Warren, M. E. *Democracy and Association,* Princeton University Press, Princeton, 2001, s. 57.

litike i kulture na način koji dozvoljava jednake šanse, demokratsku participaciju, individualnu slobodu i društveno samoorganizovanje, a pod uslovima mira, ograničene vlasti, društvenog blagostanja i fundamentalne civilizovanosti;[22] (8) sferu solidarnosti u okviru koje se postepeno definiše i donekle osnažuje određeni vid univerzalizujuće zajednice, šablonizovane preko seta posebnih institucija i prepoznatljive po istorijski definisanim interaktivnim praksama (poput: civilnosti, jednakosti, kritičnosti ili respektovanja) ;[23] ono što ostane od društva kada se od njega oduzme država.[24]

3. Zaključak

Ono što postaje sasvim izvesno iz ovakve konstelacije, a i iz istorijske perspektive promišljanja fenomena civilnog društva, jeste da zajednički imenitelj svih pristupa predstavlja činjenica da civilno društvo nije deo državne strukture. Međutim, demarkaciona linija povučena prema tržištu i privatnoj sferi značajno je manje jasna i precizna. Ne sumnjajući u to da postoji čitav set valjanih istorijskih i političkih razloga zarad profilisanja i pozicioniranja civilnog društva kao svega onoga što je opozitno opresivnosti države, ili gotovo svega onoga što je suprotno načelima komercijalizacije, u visoko diferenciranim društvima zapadne demokratije javlja se potreba za kompleksnijim konceptualnim okvirom civilnog društva kao idealom društvenog poretka i institucionalne sfere društva u celini. Imajući to na umu, kao glavne karakteristike civilnog društva mogu da se odrede sledeći elementi: (1) voluntarizam kao noseći princip; (2) asocijacije kao prevalentni akteri; (3) volja da se dela u smeru zajedničkog cilja i da se, saglasno tome, preuzme određena odgovornost kao glavni preduslov za involviranje u civilno društvo; (4) debata kao idealni oblik donošenja odluka (argumenti postaju medijum razmene) ; (5) mešavina privatnih, solidarističkih i javnih koristi kao dobara koja generiše; te (6) socijalni kapital i javni diskurs kao eksterno najvažniji pozitivni efekti internih aktivnosti civilnog društva. Socijalni kapital i javni diskurs, osnovni, ali često nehotični, spoljni benefiti, manifestuju dve različite tradicije u promišljanju civilnog društva: (1) one koja se tiče voluntarističke kooperativnosti, društvene samoregulacije i civilizovanosti; i (2) one koja se tiče političke demokratije, javne sfere, te pritiska i kontrole usmerenih

[22] CiSoNet (European Civil Society Network) *Towards a European Civil Society (proposal description for the EU).* WZB (Social Science Research Center Berlin), Berlin, 2002, s. 3.

[23] Alexander, J. C.: „Introduction. „ u Alexander, J. C. (ur.) : *Real Civil Societies.* Sage, London, 1998, s. 7.

[24] Gellner, E.: *Conditions of Liberty: Civil Society and Its Rivals.* Allen Lane/Penguin Press, New York, 1994, s. 212.

ka državi. Pojam socijalnog kapitala se koristi u smislu kolektivnih karakteristika društvene organizacije, kakve su norme, poverenje ili socijalne mreže, koje mogu da unaprede društvenu efikasnost preko olakšavanja koordiniranih aktivnosti.[25] Javni diskurs se, opet, odnosi na oblikovanje javnog mišljenja, kolektivnih vrednosti i ciljeva, te na borbu protiv države i javne politike koja je povezana sa ovim procesima. Ovakva konjunkcija, stavljanje javnog diskursa u istu ravan sa socijalnim kapitalom, sugeriše preusmeravanje pažnje na političku stranu civilnog društva. *In summa*, umesto da bude ne-državno, ne-tržišno i neporodično, civilno društvo može da se odredi kao društveni domen unutar koga su prevalentne voluntarističke asocijacije i asocijativne relacije.

Djordje Stojanovic, PhD

PHENOMENON OF CIVIL SOCIETY: ANALYICAL RETROSPECTIVE

Summary

Regardless of the theoretical pro or contra position, civil society manifests a phenomenon that is positioned in a variety of discursive-cognitive setting with a wide interpretation matrix. Analysis of the evolution of the concept of civil society will include: (1) the idea that civil society is not equal to the political organization of society; (2) the importance of voluntary association; (3) differentiation of civil society from state, economic relations and private sphere. The paper concludes by considering social capital and public discourse as the most important external consequences of the civil society functioning.

Key words: *civil society, state, political theory, democracy, public sphere, social capital.*

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[25] Putnam, R. D., Leonardi R. i Nonetti R. Y.: *Making Democracy Work: Civic Tradition in Modern Italy.* Princeton University Press, Princeton, 1993, s. 167.

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PRAVO, PRIVREDA I PLURALIZAM INTERESA

Sažetak – *Pojam interesa se, kao sociološka kategorija, veoma lako može odrediti i identifikovati i u okviru privrede jedne zemlje, jer upravo privredni razvoj i rast ljudske zajednice utiču na povećanje broja različitih interesa. Svakako, veliki broj različitih interesa utiče na to da se oni često sukobljavaju međusobno, a od ishoda tih sukoba ponekad zavisi i samo funkcionisanje kako privrede, tako i čitavog društvenog i pravno-političkog života jedne zemlje. Ipak, ostaje nepoznato na koji način razrešiti sve sukobe oprečnih interesa, a da se pritom sačuvaju osnovne vrednosti jednog društva i postavljene zakonitosti koje u privrednom životu postoje. Nesporna je jedino činjenica da tržište, kao centar svih zbivanja u privredi i kao mesto susreta ponude i tražnje, igra veoma značajnu ulogu u pomenutim sukobima, da može samo regulisati zbivanja na njemu, ali da mu u tome često treba i pomoć. Tu vrstu pomoći je jedino sposobna da dâ država, koja to nekad čini sa uspehom, a nekad taj uspeh izostane, s obzirom da je i država sama nesavršena i da ne može da pruži odgovore na sva pitanja i rešenja za sve probleme. Naravno, tržišni učesnici koji poseduju neophodne resurse i krupan kapital, lakše zadovoljavaju svoje potrebe i interese. Biti tržišno moćan ili kako se to naziva žargonski – biti tajkun, znači na prvom mestu zadovoljiti svoj osnovni interes–sticanje profita, pa tek onda brinuti o eventualnim posledicama svojih poslovnih odluka po druge učesnike na tržištu, koji uostalom predstavljaju marginalne učesnike u odnosu na krupan kapital i zavisni su od njega.*

Ključne reči: *Privreda, interesi, sukob interesa, tržište, dominantni privredni subjekti.*

1. Uvodne napomene

Ukoliko se kretanje kapitala i novca zamisli i predstavi u jednom krugu, onda bi početak akumuliranja i kretanja kapitala svakako bila privreda, njen privatni, ali i javni sektor. Dalja putanja bi bila upravljena ka zaposlenima u privredi, zatim, državnom intervencijom bi se vršila preraspodela dohotka na određene kategorije ljudi, pa se to kretanje kapitala i novca ponovo vraća u privredu putem kupovine roba i usluga od strane potrošača i od strane države[1]. Dakle, predstavljajući kretanje kapitala i novca kao ciklični krug koji počinje i završava se u privredi, onda je sasvim sigurno da privreda, sa svim svojim elementima, jeste centralna i bazična osnova postojanja čitavog modernog društva. Iz nje nastaje novac i u nju se vraća, pa kriza privrednog sistema veoma brzo dovodi do krize u svim sferama društvenog života, a zbog današnje povezanosti gotovo svih privreda sveta, kriza u jednoj privredi, u zavisnosti od njenog udela u ukupnoj svetskoj privredi, može imati domino efekat i na sve druge privrede u svetu, kao i na njihovo društveno-političko uređenje. Od jačine privrede jedne zemlje zavisi i njen položaj u globalnom svetskom poretku, odnosno zavisi i veličina njene političke i vojne moći, mogućnost za tehničko-tehnološki napredak, pronalaske alternativnih sirovina i sl. Znači da, ako se na ovaj način prikaže značaj privrede i njen uticaj i upletenost u sve sfere savremenog života ljudi, vrlo brzo postaje jasno da u takvoj situaciji, ne samo globalno posmatrano, već i posmatrano na nivou jedne nacionalne privrede kao što je naša, dolazi do veoma čestih konfrontacija različitih interesa, čiji pluralizam dovodi do toga da funkcionisanje privrede ponekad potpuno zavisi od pravljenja kompromisa i mirenja više oprečnih interesa. Kao polazni, obično se posmatraju suprotstavljeni pojedinačni interesi nasuprot opštim, što ujedno predstavlja i najširu kategoriju koja prožima sveukupne ljudske delatnosti. Dalje slede oprečni interesi koji postoje između proizvođača, distributera, odnosno prodavaca i potrošača, zatim različiti interesi privrednika i njihovih zaposlenih, a ponekad se i sami interesi države i funkcionisanja njenog ogromnog birokratskog aparata, potpuno razlikuju od interesa njenih građana, ili bar nekih od njih.

Naime, i u privredi, kao i u svakodnevnom životu, prvenstveno se suprotstavljaju pojedinačni i zajednički, odnosno opšti interesi. Ukoliko se čovek posmatra kao jedna jedinstvena i neponovljiva individua, sa svojim biološkim osobenostima, moglo bi se zaključiti da su interesi svakog čoveka ponaosob međusobno različiti. To je samo delimično tačno, jer pored bioloških osobenosti, čovek poseduje i karakteristiku društvenog bića. Dakle, interesi nastaju u interakciji

[1] Škorić, Sanja: *Zloupotreba dominntnog položaja na tržištu*, magistarska teza, Novi Sad, 2009, s. 175.

čoveka, njegove prirode i društva, što znači da grupa ljudi koja živi u sličnom društvenom okruženju, može imati i slične interese. Konkretno, u privredi, za pomirenje pojedinačnih i opštih interesa neophodno je uvažiti pristup koji postoji kod odnosa dela i celine. Naime, mora se jasno izraziti onaj opšti interes koji ne može biti krnjen, kao i pojedinačni interes koji ne može biti ugrožen[2]. Posmatrajući u ekonomskom smislu, pojedinačni interes se vrlo često, ako ne i uvek, ispoljava u vidu lične koristi koja se suprostavlja solidarnosti kao civilizacijskoj pretpostavki savremenog društva. Rešenje ovako postavljenog sukoba se može pronaći u izboru onih osnovnih parametara koji će omogućiti optimalan odnos u izražavanju ličnog interesa (koristi) kroz stvaranje uslova za različite oblike društvene solidarnosti. Kao primer za ovo bi se mogao uzeti odnos lične i opšte potrošnje, gde je potrebno izabrati takav skup osnovnih parametara koji će omogućiti stalan rast lične potrošnje, ali u isto vreme i zainteresovanost svakog pojedinaca da se društvene potrebe ostvare u duhu solidarnosti i na jednom višem nivou[3].

Kako je čovek centralni akter u svim sukobima interesa koji se u privredi mogu pojaviti, može se predstaviti još jedan nivo i izvor tih sukoba. S obzirom da je čovek taj koji sve stvara i onaj zbog koga se sve stvara, u njemu se razvija dvojna uloga – čovek kao proizvođač i čovek kao potrošač. Polazeći od ovoga, čovek predstavlja mesto gde se sučeljavaju suprotno delujući faktori. Kao proizvođač, pojedinac želi da njegovi proizvodi na tržištu budu što je moguće skuplji (da imaju veću cenu), a kao potrošač, čovek želi da nađe odgovarajuću robu ili uslugu sa nižom cenom, odnosno da zadovolji što je moguće više sopstvenih potreba[4].

Prethodno rečenim se tek otvorio veliki i nepregledni, moglo bi se reći ring, u kome se vodi neprestana borba između velikog broja suprotstavljenih interesa u privredi. Rešenje tih konflikata, koji mogu biti i veoma opasni i ponekad se mogu proširiti i na druge oblasti ljudskog života, predstavljajući pretnju za sam opstanak dotadašnjeg društvenog i političkog uređenja, može jedino pružiti država. Kako i sam državni aparat razdiru slični konflikti sa dodatkom sukoba međunacionalnog i multikulturalnog nivoa, postizanje rešenja je često mnogo teže nego što bi se to u prvi mah činilo. Sam državni vrh, koji takođe čine ljudi, odlikuje sukob interesa pozicije i opozicije, politička previranja kojima se zamagljuje stvarna slika u društvu, zatim sukobi pojedinačnih i opštih interesa, gde se pojedinačni manifestuju u vidu lične koristi, koja je glavni krivac opšteg društvenog nezadovoljstva itd. Dakle, pomirenje različitih interesa, koje jedino

[2] Đorđević, Miroslav: Osnovi privrednog sistema i sistemski pristup privrednom razvoju, Kragujevac, 2004, s. 136.

[3] *Ibidem.*

[4] *Ibid.,* s. 138

može postići država svojom aktivnom ulogom u društvu, često je nemoguće jer država nije dorasla ovakvom zadatku, budući da i je i sama uvučena u te konflikte. Ipak, intenzitet sukoba interesa nije uvek isti i upravo na njega država može uspešno da utiče, tako što se putem sprovođenja odgovarajućih mera, bar na kratko, stišavaju konfliktom interesa podignute strasti i održava neka vrsta ravnoteže u zadovoljavanju različitih interesa.

U svetlu privrede i sukoba interesa koji u njoj postoje, moglo bi se sa sigurnošću zaključiti da upravo kapital i novac predstavljaju glavni izvor tih sukoba.

2. Tržište

Tržište, onakvo kakvim ga mi poznajemo, nije postojalo oduvek. Ono je nastalo na stepenu razvoja društvene zajednice na kojem su ljudi stvorili višak proizvoda, odnosno deo proizvedenih sredstava koji je ostao nakon što je njegov proizvođač zadovoljio svoje potrebe. U početnim fazama razvoja, to je bila trampa, kao najprimitivniji oblik razmene viška proizvoda, kao rudimentalni oblik tržišta. Tek sa pojavom trgovaca i društvenom podelom rada počinje funkcionisati tržište. Ono je u početku vezano samo za njegov geografski element, kao mesto gde se iznosila roba namenjena razmeni, ili na srpskom trg, od koga izraz tržište i vodi poreklo. Tek u kasnijem periodu razvoja, tržište dobija i svoje druge elemente.

Centralno mesto razmene svih dobara i kretanja svih vrsta roba i usluga jeste tržište. Na njemu se susreću privredni subjekti sa drugim privrednim subjektima (poslovnim saradnicima, neposrednim konkurentima, potencijalnim investitorima i sl.), privredni subjekti i njihovi zaposleni (ukoliko je u pitanju tržište rada) i privredni subjekti i potrošači, odnosno korisnici njihovih usluga. Svi ti susreti rezultiraju promenom ponašanja privrednih subjekata u vidu promena nekih poslovnih odluka, promena načina poslovanja, promena načina pravnog organizovanja itd. Tržišna dešavanja su upravo determinisana dinamikom interakcije učesnika na tržištu. Međusobne odnose različitih kategorija tržišnih učesnika, sa različitim poslovnim i ličnim afinitetima, možemo posmatrati i kroz prizmu sukoba njihovih interesa, jer upravo interes nastaje prilikom interakcije različitih subjekata, odnosno učešća različitih subjekata na tržištu. Privredni razvoj predstavlja jedan od osnovnih ciljeva državne intervencije u privredi. Međutim, privredni razvoj utiče i na povećavanje broja interesa u društvu, a ekonomski resursi u privredi utiču na zadovoljenje interesa onih koji ekonomske resurse poseduju, a samim tim takvi interesi dobijaju i legitimitet od strane vladajuće klase u društvu. Iz ovoga proizilazi da je privreda, kao oblast društvenog života u kojoj se akumulira novac i ekonomska snaga, stecište sukoba interesa koje se

reflektuje na život svih ljudi. Upravo na primeru konflikta interesa u privredi može se dobiti slika tih konflikata i u svakodnevnom životu ljudi.[5]

Dakle, moderna privreda je uslovljena postojanjem tržišta i svojine. Međutim, tržište sa svojim ustaljenim zakonitostima često zahteva pomoć pri svom funkcionisanju, jer nije uvek samo u stanju da, svojim sistemom kazni i nagrada, eliminiše nesposobne i nagradi najuspešnije učesnike na tržištu. Kad god postoji određeni odnos između dva ili više lica, potrebno je da se ta aktivnost koordinira i uredi. Konkretno, za tržište, to znači da postoje čvrsto definisana pravila ponašanja kojih se drže svi učesnici u razmeni. Na toj osnovi, svaki učesnik razmene može da predviđa reakcije ostalih tržišnih subjekata na promenu njegove poslovne odluke i može, takođe, da oceni moguće dejstvo sankcija u slučaju da su prekršena ustaljena pravila tržišne razmene[6]. Na tržištu se vrši razmena posredstvom novca i na njemu dolazi do obrazovanja cena proizvoda.

Međutim, i pored postojanja ustaljenih pravila ponašanja, subjekti na tržištu su potpuno slobodni u svom privrednom odlučivanju, odnosno svaki prodavac je slobodan u odlučivanju o svojoj ponudi i svaki kupac potpuno slobodno i nezavisno od drugih odlučuje koliko robe će da kupi. To se naziva decentralizovano odlučivanje, koje karakteriše tržište[7].

Kada se govori o tržištu, treba imati u vidu još dve činjenice:

a) tržište deluje *ex post* i

b) ono daje samo kratkoročne informacije.

Delujući *ex post*, tržište kasni kao alokator najznačajnijih dugoročnih investicionih odluka, te tako kasni u njihovoj proveri, osporavajući ili potvrđujući njihovu opravdanost. O tekućim i prošlim privrednim aktivnostima postoje informacije koje pruža tržište, ali su one nedovoljne za donošenje dugoročnih ekonomskih odluka[8].

3. Dominantni privredni subjekti i njihov odnos sa drugim učesnicima tržišta

Od svih privrednih subjekata koji učestvuju na tržištu i u privredi uopšte, najznačajnije je delovanje onih koji raspolažu pravno relevantnom tržišnom moći, odnosno onih koji se nalaze u dominantnom ili monopolskom položaju[9]. Dominantni položaj, kao sposobnost privrednog subjekta da samostalno i nezavisno

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[5] Škorić, Sanja: *Tržišna dominacija i njena zloupotreba*, Beograd, 2010, s. 61.

[6] Labus, Miroljub: *Osnovi ekonomije*, Beograd, 2007, s. 66.

[7] *Ibid.,* s. 67.

[8] Đorđević, Miroslav: *op. cit*. 39–40.

[9] V.: Marković-Bajalović, Dijana: *Tržišna moć preduzeća i antimonopolsko pravo*, Beograd, 2000.

deluje na tržišne zakonitosti, ne uzimajući pritom u obzir volju, interese i položaj drugih učesnika na tržištu, nosi u sebi permanentnu opasnost zloupotrebe tog položaja i time ugrožavanja konkurencije na tržištu kroz eliminaciju konkurenata ili pak kroz njihovo potčinjavanje svojoj volji. Dominantni privredni subjekti su realnost današnje privrede, kao što više ne predstavlja tajnu ni to šta su takvi subjekti u stanju da učine da bi svoj stečeni položaj još više ojačali i učvrstili. Ukoliko se dominantni privredni subjekti uzmu kao fokus rasprave o pluralizmu i konfrontaciji interesa, odmah će njihova velika privredna i tržišna moć ukazati na značaj koji oni imaju u sveukupnoj borbi različitih interesa. Ovome bismo možda mogli dodati i činjenicu da i u privredama koje se ne smatraju previše razvijenim, kao što je naša, ima veoma veliki broj tržišno moćnih privrednih subjekata. Prema statističkim podacima za 2004. god. 300 najvećih privrednih subjekata u Srbiji imalo je veći prihod od 10 miliona evra[10] , što je i impozantan broj njih, ali i njihov godišnji prihod, imajući u vidu geografsku veličinu Srbije, njen privredni i ekonomski potencijal, ukupan udeo u svetskoj privredi i svakako, društveno-političke prilike koje postoje u Srbiji.

Dominantni privredni subjekti, kao uostalom i svi drugi privredni subjekti, imaju suprotstavljene interese sa svojim potrošačima, zaposlenima, konkurentima, pa i poslovnim saradnicima i državom. Međutim, posedovanje dominantnog položaja pruža mogućnost privrednom subjektu da se lakše izbori za svoje interese, da svojim kapitalom, uticajima i moći bukvalno kupi tuđe interese i pomiri ih sa svojima. To je upravo i deo njegove stateške borbe na tržištu, u kojoj koristi svoju tržišnu dominaciju da bi pridobio uticajne političke ljude, uništio konkurenciju, obezvredio radnu snagu i ostavio potrošače bez mogućnosti slobodnog izbora. Tada bi trebalo na scenu da stupi država sa svojim monopolom sile i zaštiti interese slabijih, koji nemaju sredstva i mogućnosti da ih sami zaštite.

3.1. Odnos unutar dominantnih privrednih subjekata

Privredni subjekt se može posmatrati na dva načina. Prvo, kao harmonična celina koja ima jedan zajednički cilj, a to je da zauzme što bolji položaj na tržištu između mnoštva drugih privrednih subjekata uključenih u konkurentsku utakmicu. Drugo, kao poprište sukoba velikog broja suprotstavljenih interesa. Naime, i unutar samog dominantnog privrednog subjekta takođe postoji konfrontacija interesa – njegove upravljačke strukture i vlasnika naspram interesa zaposlenih, zatim interesa samog privrednog subjekta (kao vrste opšteg intere-

[10] *Ekonomski magazin*: Posebno izdanje: „300 najvećih", Beograd, 2005.

sa) naspram interesa njegovog personalnog supstrata[11] (ljudi koji se nalaze na različitim nivoima u podeli rada u privrednom subjektu) i slično.

Iako se privredni subjekt često posmatra kao imovinska zajednica više ljudi, obično njegovih osnivača i vlasnika, on ipak ima određeni pravni subjektivitet, te sam po sebi ima određene interese koji su odvojeni od pojedinačnih interesa njegovih interesnih segmenata[12]. Kada se jednom osnuje, privredni subjekt počinje voditi „zaseban život" od svojih osnivača i vlasnika, te privredno zakonodavstvo sadrži odredbe koje nalažu personalnom supstratu privrednog subjekta da radi u interesu privrednog društva, kao primarnom. Regulacija se pokazala potrebnom, jer se vrlo često dešavalo ponašanje vlasnika i upravljačke strukture koja su bila totalno suprotna smislu postojanja privrednih društava (zloupotreba privrednog društva radi zadovoljavanja pojedinačnih interesa). Tu postoji i interes privrednog subjekta u sociološkom smislu, kao interes za njegovu sudbinu: interes za održanjem i povećanjem zaposlenosti, interes zdrave životne sredine, interes konkurentnosti i prestiža i sl. Sa druge strane, i u okviru samog personalnog supstrata privrednog subjekta postoje sukobi interesa koji su upravo rezultat postojanja opštih i pojedinačnih interesa. Osim kada se radi o jednočlanom privrednom subjektu, vlasnička struktura može biti uzrok sukoba interesa. Naime, nije svejedno da li se radi o vlasniku kome je primarni cilj dobro poslovanje koje je posledica tehnoloških inovacija i ulaganja u nove, naprednije tehnologije, sa kratkoročnim smanjenjem dobiti, ali dugoročnom stabilnošću, ili se radi o vlasniku – špekulantu kome je velika dobit primarni cilj, jer je okrenut kratkom roku poslovanja.

Poslednji, ali ne i najmanje važan, jeste odnos privrednog subjekta i njegovih zaposlenih. Pretpostavka je da se osnovni kapital privrednog subjekta može uvećati samo radom zaposlenih. Iako se ranije smatralo da su interesi zaposlenih potpuno irelevantni, dokazano je da oni itekako mogu imati uticaj na poslovanje privrednog subjekta. Zaposleni, kao najbrojnija, ali i ekonomski najslabija kategorija subjekata unutar privrednog subjekta, najteže uspevaju da se izbore za zadovoljavanje svojih interesa. Baš zbog toga, radno zakonodavstvo, ali i privredno u okviru prava zaposlenih i njihovog participiranja u upravljanju privrednim subjektom, sadrži norme kojima se ti interesi nastoje zaštititi uz pomoć države.

[11] V: Divljak, Drago: *Kompanije – zaštita i sukobi interesa*, Novi Sad, 2003.
[12] Vasiljević, Mirko: *Poslovno pravo*, Beograd, 2004, s. 443.

3.2. Odnos dominantnih privrednih subjekata prema neposrednim konkurentima

Utvrđivanje pojma i prirode odnosa tržišno dominantnih privrednih subjekata zahteva da se oni posmatraju kao idilični učesnici na tržištu, koji imaju samo jedan zajednički interes. Potrebno je zanemariti sve one konflikte različitih interesa koji razdiru i samog privrednog subjekta.

U odnosu prema svojim konkurentima, tržišno dominantni privredni subjekti se mogu različito ponašati. To prvenstveno zavisi od jačine njihovih konkurenata. Ukoliko su i oni tržišno moćni, privredni subjekt će pokušati uspostaviti dijalog, koji može voditi dogovoru o recipročnom ponašanju, koji može biti pretočen u pismeni sporazum ili može biti usmeno dogovoren. Može se, takođe, postići dogovor o podeli određenog tržišta, po principu „ti ne smetaj meni, pa neću ni ja tebi". Sve to se, naravno, negativno odražava na privredni razvoj, pristup nove konkurencije na takvo tržište i na slobodan izbor potrošača.

Ukoliko su konkurenti privrednog subjekta slabiji, sa neznatnom tržišnom snagom, onda se odigrava sasvim drugačiji scenario na takvom tržištu. Tržišno dominantni subjekti, oslobođeni pritiska jake konkurencije, utiču samostalno na tržišna dešavanja upravljajući ih u svoju korist. Ambijent koji se tada stvori, može biti takav da konkurentima bude veoma teško da ostanu u tržišnoj utakmici. U takvim situacijama često dolazi i do preuzimanja malih konkurenata, koji jedini izlaz mogu naći u spajanju ili pripajanju tržišno dominantnom subjektu, prema uslovima koje, naravno, diktira onaj tržišno moćniji. U ovakvim situacijama ključnu ulogu može odigrati i jačina potencijalne konkurencije. To će opet zavisiti od države i njene volje da se tržište vrati konkurentnim osnovama, jer je upravo ona ta koja može potenijalnu konkurenciju pustiti na tržište otklanjanjem pravnih i administativnih barijera. Međutim, nekada je i sama država paralizovana od strane moćnih privrednih subjekata. Opšte je poznato da veliki broj, upravo najvećih i najjačih, političkih partija finansiraju tržišno dominantni privredni subjekti. Onda je potpuno nerealno očekivati da će se takva politička elita usuditi da objavi „rat" moćnicima od kojih ekonomski zavisi[13].

Međutim, tržišno dominantni privredni subjekti se ne ponašaju u svim interakcijama sa svojim konkurentima na način koji je suprotan pravilima konkurencije. Postoje i tzv. dozvoljeni načini konkurentske borbe, pomoću kojih tržišno dominantni privredni subjekti mogu zadovoljiti svoje interese. Dozvoljeni načini ostvarivanja i zadovoljavanja interesa bi pre svega bili: povećanje efektivnosti i efikasnosti proizvodnje ili pružanja usluga putem ulaganja u naučno-istraživački rad, zatim uvođenje novih, inovativnih metoda u proizvodnji

[13] Škorić, Sanja: *Tržišna dominacija i njena zloupotreba*, Beograd, 2010, s. 63.

i upravljanju, ulaganja u tehničko-tehnološka istraživanja i sl. Sve ovo je, sa aspekta opšteg privrednog i društvenog razvoja, poželjan način borbe za ostvarivanje svojih interesa, bez obzira da li ih sprovodi dominantni privredni subjekt ili ne. Međutim, praksa je pokazala da upravo tržišno dominantni subjekti jedino i mogu koristiti ovakva unapređivanja svoje delatnosti, jer poseduju dovoljno ekonomskih dobara i odgovarajuću tržišnu moć, te mogu izdvajati za to potrebna sredstva. Stoga je potreban izvesan protok vremena da bi se ulaganja radi optimizacije proizvodnje zaista i isplatila. Slabiji privredni subjekti se ređe upuštaju u taj vid rizika, mada postoje i takvi slučajevi.

Pored ove, striktne podele načina na koji dominantni privredni subjekti ostvaruju svoje interese, postoje i izvesne međupodele, odnosno načini koji, u zavisnosti od situacije, mogu biti ili dozvoljeni ili nedozvoljeni. Tu bi, primera radi, moglo biti lobiranje dominantnih privrednih subjekata za svoje interese preko nadležnih državnih organa, odnosno preko određenih političkih grupa ili pojedinaca u vlasti, zatim sa prethodnim mogu biti i često jesu povezane i koruptivne metode rada dominantnih privrednih subjekata, gde oni uglavnom nude mito određenim licima u državnim organima da bi izbegli posledice koje ih mogu pogoditi ukoliko bi zloupotrebili svoj dominantni položaj i sl. Veliki problem, koji je neminovan pratilac svih zemalja u tranziciji – korupcija, gotovo svakodnevno otkriva nedoslednost u primeni zakonskih propisa, te se kao glavni pokretač svih ljudskih akcija javlja ekonomska korist pojedinaca i njihovo neprestano bogaćenje. A ko bi bolje tu korist zadovoljio do onog ko u svojim rukama drži tržišnu moć i koji ima takav položaj na tržištu da nema straha od konkurencije ili države, pa i od potrošača koji svojom neznatnom snagom ne uspevaju da se izbore za svoje interese. Dakle, dominantni privredni subjekti, bar za sada, u svakoj konfrontaciji interesa odnose pobedu i nameću svoj interes kao pobednika, a ustupci koje su ponekad primorani da učine nisu takvog intenziteta da bi se njima poljuljao stečen, ali u većini slučajeva i dobro čuvan dominantni položaj na tržištu.

Ipak, tržište i njegove zakonitosti nisu lako predvidive i moglo bi se dogoditi da danas dominantni privredni subjekt već sutra izgubi svoju tržišnu moć i svoje mesto ustupi nekom drugom. Glavni napredak koji je učinjen u situacijama gde postoje konflikti interesa uopšte, pa i u privredi, jeste pre svega to što svaki pojedinac može svoje interese, misli i težnje slobodno da izražava, što, kao veliko dostignuće savremenog društva, otvara mogućnost da se čuju i interesi slabijih, ali i da se zaštite i ponekad zadovolje, u čemu glavnu ulogu mora imati država.

4. Zaključak

Ako bi se moglo reći da politika jedne zemlje, ali i političari jedne zemlje, oslikavaju opšte stanje koje postoji u jednoj državi, Srbija svakako ne bi bila predstavljena u najboljem svetlu. Postoji jedna latinska izreka – *mutare quod non possis, ut natum est, feras,* što znači – ***što ne možeš promeniti, podnosi onakvo kakvo je.*** Upravo u tome leži nesreća jednog društva koje, raščlanjeno na pojedince, nije u stanju bilo šta promeniti, ali organizovano u grupe može izvršiti značajan uticaj na svet oko sebe. Stručnjaci kažu da svet ne možemo promeniti, ali da svakako možemo promeniti naše poimanje sveta. Da su se ovoga pridržavali veliki naučnici i pravni i ekonomski mislioci, ko zna da li bi bili hrabri izneti svoja mišljenja i učiniti da se svet koji su do tada poznavali, promeni. Možda najznačajniju tekovinu savremenog demokratskog društva, osim tehničko-tehnološkog napretka, predstavlja pružanje šanse svima koji to žele, da se njihova priča i njihovi zahtevi čuju. Potpuno ista situacija postoji i u privrednom životu, gde i oni tržišno nemoćni mogu, organizovani, učiniti efikasnijom svoju borbu protiv krupnog kapitala u ostvarivanju svojih interesa. Nije država ta koja je jedina odgovorna za prilike u kojima se nalazi srpska privreda i napredak srpskih dominantnih privrednih subjekata na uštrb sitnog kapitala i potrošača. Svako, kao pojedinac, mora odgovarati za svoju ulogu i položaj koji zauzima u društvu. Dakle, jedini način na koji se mogu zadovoljiti interesi svih uključenih u privredni proces, jeste organizovanje koje pruža prednost u odnosu na pojedinačne akcije i daje smisao borbi i zalaganja za svoje interese i onih koji ne poseduju neophodne resurse da to učine sami.

Sanja Škorić, MA

LAW, ECONOMY AND PLURALISM OF INTERESTS

Summary

Concept of interest, as a sociological category, can be determinate and identify in the case of the economy some country, because just the economic development and growth of the human community has an impact on the increasing number of different interests. Of course, large scale of different interests has a strong affect on their often confrontations. From the final outcome of those confrontations sometimes depends whole economy and social, political and legal system of the

country. However, it remains unknown in what manner we can solve conflicts of opposite interests and in the same time how to save basic values of the society and the established legitimacy which exists in the economic system.

Unquestionable is only the fact that market, as a center of the all events in the economy and as a please where is the near collision of demand and supply, plays an important part in the mentioned conflicts. The market can by itself regulate events which happen on it, but it often needs help. That kind of help is only capable to give state, which sometimes does that successfully, and sometimes without success, because the state is also imperfect and can't always give rights answers and solve all problems.

Of course, market participants which have necessary capital goods and large profit can easiest satisfied their needs and interests. To has the market's power, or in the common language – to be the boss, means satisfying its basic interests – getting and increasing the profit. Than maybe companies above think about consequences of their business decisions and their impact on others market's participants which depend of large and powerful companies.

Key words: *Economy, interest, conflict of interests, market, dominant companies.*

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FINANSIJSKI INSTRUMENTI ZAKONA O ZAŠTITI ŽIVOTNE SREDINE

Sažetak – *U radu autor daje prikaz sistema finansijskih instrumenata finansiranja zaštite životne sredine, prema skoro usvojenim izmenama i dopunama Zakona o zaštiti životne sredine, uz ukazivanje na njihov pojedinačni značaj i opšte principe funkcionisanja sistema prikupljanja sredstava u cilju zaštite i unapređenja stanja okoline u kojoj živimo. Pored toga, skrenuta je i pažnja na značaj ekonomskih podsticajnih mera, potrebu unapređenja aktuelne pravne regulative koja se odnosi na sistem finansiranja zaštite životne sredine u skladu sa evropskim standardima i tehnološkim napretkom. Autor u zaključnim razmatranjima daje jasan stav o važnosti stvaranja koherentnog i sveobuhvatnog sistema finansiranja životne sredine i kombinaciji finansijskih sa drugim raspoloživim istrumentima zaštite životne sredine u cilju obezbeđivanja kvalitetne brige o našem prirodnom okruženju.*

Ključne reči: *istrumenti finansiranja zaštite životne sredine, Zakon o zaštiti životne sredine*

1. Uvod

Dobra politika zaštite životne sredine predstavlja složenu i kompleksnu delatnost koja između ostalog iziskuje i ogromna finansijska sredstva. Samim tim, od velikog značaja je i način pravnog uređivanja izvora njihovog prikupljanja, kao i vidova korišćenja takvih sredstava. Cilj autora je da u ovom radu da prikaz klasifikacije finansijskih istrumenata zaštite životne sredine prema usvojenim izmenama i dopunama Zakona o zaštiti životne sredine[1] (u daljem tekstu:

[1] Zakon o zaštiti životne sredine, *Službeni glasnik Repuplike Srbije*, br. 135/2004, 36/2009 i 36/2009–dr. zakon

ZZŽS), ukaže na njihovu važnost, funkciju, ali i da skrene pažnju na potrebu unapređenja i permanentne razrade pravne regulative koja se na njih odnosi, u skladu sa evropskim standardima i tehnološkim napretkom na ovom polju.

Finansijski istrumenti zaštite životne sredine predstavljaju jedan od mogućih pristupa ekološkoj politici, kao odgovor na rizike zagađivanja.[2] Njihova osnovna uloga i cilj je da osiguraju efikasnu i održivu upotrebu ekoloških resursa, odnosno, da stvore uslove za prilagođavanje strukture i dinamike privrednih i drugih delatnosti stanju i procesima u životnoj sredini, tako da se zadovoljavanjem potreba sadašnjih ne ugrožava pravo budućih generacija na zdravo prirodno okruženje.[3] Ostvarivanje ovakvog koncepta, kao i uspešna upotreba finansijskih istrumenata, svakako zahtevaju značajne promene u ponašanju svih subjekata i nosilaca odgovornosti za zaštitu životne sredine, odnosno usklađivanje razvojne i ekonomske politike.[4]

Sredstva za finaniranje zaštite životne sredine kod nas obezbeđuju Republika Srbija, autonomne pokrajine, odnosno jedinice lokalne samouprave, u okviru svojih nadležnosti, ali se ona mogu prikupiti i putem donacija, kredita, sredstava međunarodne pomoći i stranih ulaganja namenjenih zaštiti životne sredine, kao i putem programa i fondova Evropske unije, Ujedinjenih nacija i drugih međunarodnih organizacija.[5] Bez obzira na način njihovog prikupljanja, finansijska sredstva (kao i finansijski istrumenti), imaju značajnu funkciju u procesu sprečavanja zagađivanja životne sredine, ali i obezbeđivanju izvora prihoda za njenu adekvatnu zaštitu.[6]

2. Vrste finansijskih istrumenata kojima se obezbeđuje finansiranje zaštite životne sredine u Srbiji

Postoji više načina prikupljanja sredstava, odnosno više vrsta finansijskih istrumenata namenjenih zaštiti životne sredine. Pa tako ZZŽS u poglavlju VI

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[2] Blažević-Zec, B.: *Ekonomski istrumenti zaštite životne sredine*, Nacionalni konvent o Evropskoj uniji, preuzeto sa sajta: *www.eukonvent.org/downloads2/090407-BiljanaBlazevicZec.pps,* 16. oktobra 2009.

[3] Mladenović, D.: Ekonomski istrumenti u oblasti zaštite životne sredine, *Pravni život*, 9/2006, s. 581.

[4] Mladenović D., ibid., 582.

[5] U. S. Environmental Protection Agency, *Guidebook of Financial Tools Paying for Environmental Systems*, s. 19–51. preuzeto sa sajta *www. epa. gov/efinpage/publications/GFT2008. pdf* 8. oktobra 2009. godine

[6] Alibašić, H.: Finansiranje zaštite životne okoline u BIH, *Životna Sredina ka Evropi*, South Environment and Weather Agency, preuzeto sa sajta: *http://sewa.sewa-weather.com/~ambassadors/new_site/srp/images/stories/Papers/02–04.pdfs.* 5. oktobra 2009. godine

utvrđuje vrste naknada, odnosno izvore kojima se obezbeđuje finansiranje i ostvarivanje ciljeva zaštite životne sredine. To su: *naknada za korišćenje prirodnih vrednosti*, *naknada za zagađivanje životne sredine*, *naknade za zaštitu i unapređenje životne sredine*, i *osnivanje Fonda za zaštitu životne sredine*.

Naknada za korišćenje prirodnih vrednosti predstavlja realizaciju načela „korisnik plaća"[7], a treba da obezbedi da svako ko koristi prirodne vrednosti plati realnu cenu za njihovo korišćenje i rekultivaciju prostora.[8] U skladu sa ovim principom, ZZŽS članom 84 nalaže korisniku prirodne vrednosti da plati naknadu za njeno korišćenje, kao i da snosi troškove sanacije i rekultivacije degradiranog prostora, u skladu sa posebnim propisima. Pa se tako na osnovu Uredbe o stavljanju pod kontrolu korišćenja i prometa divlje flore i faune[9] predviđa plaćanje naknade za sakupljanje zaštićenih vrsta u komercijalne svrhe, u iznosu od 10% u odnosu na formirane cene zaštićenih vrsta na godišnjem nivou.

Na osnovu novodonetog Zakona o zaštiti i održivom korišćenju ribljeg fonda[10] utvrđeno je da je naknada za korišćenje ribarskog područja prihod budžeta Republike Srbije i da se koristi preko Fonda za zaštitu životne sredine, a naknada za korišćenje ribarskog područja na teritoriji autonomne pokrajine prihod budžeta autonomne pokrajine, i da se upotrebljava preko pokrajinskog budžetskog fonda za zaštitu životne sredine.[11] Visina ove naknade iznosi 15% od novčanog iznosa troškova za izdavanje dozvole za privredni ribolov i 10% od novčanog iznosa troškova za izdavanje dozvole za rekreativni ribolov, i koristi se namenski za zaštitu, unapređenje i održivo korišćenje ribljeg fonda.[12]

Zakon o rudarstvu[13] takođe obavezuje na plaćanje naknade na sve komponente mineralnih sirovina koje se koriste ili prodaju u određenim propisanim količinama, izuzev na uzorke mineralnih sirovina koji su namenjeni za tehničko-tehnološka ispitivanja.

Uredba o visini naknada za korišćenje voda, naknade za zaštitu voda i naknade za izvađeni materijal iz vodotoka za 2008. godinu, doneta na osnovu Zakona o vodama[14] predviđa plaćanje naknade za korišćenje površinskih, podzemnih i

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[7] Vig, Z.: „Prevencija" i „zagađivač plaća" kao principi ekološkog prava. *Pravo i politika*, 5/2010, 81–91.

[8] Mladenović, D.: *op. cit*. 582.

[9] Uredbe o stavljanju pod kontrolu korišćenja i prometa divlje flore i faune, *Službeni glasnik Republike Srbije*, br. 31/2005 i 45/2005.

[10] Zakon o zaštiti i održivom korišćenju ribljeg fonda, *Službeni glasnik Republike Srbije*, br. 36/2009.

[11] Čl. 6, s. 2. Zakona o zaštiti i održivom korišćenju ribljeg fonda

[12] Ibid., s. 3 i 5

[13] Zakon o rudarstvu, *Službeni glasnik Republike Srbije,* br. 34/2006

[14] Zakon o vodama, *Službeni glasniik Republike Srbije,* br. 46/91, 53/93, 67/93, 48/94, 54/96 i 101/2005–dr. Zakon

mineralnih voda, za zaštitu voda i za izvađeni pesak, šljunak i drugi materijal iz voda.

Prema *Zakonu o šumama*[15] plaćaju se naknade za posečeno drvo, korišćenje šuma i šumskog zemljišta, kada se one daju u zakup, kao i za iskrčenu šumu. Ova sredstva koriste se isključivo za finansiranje poslova zaštite i unapređenja šuma.[16]

Sredstva ostvarena od *naknada za korišćenje prirodnih vrednosti* prihod su budžeta Republike, autonomne pokrajine i lokalne samouprave.[17] Ona se, pored pomenutih namena, predviđenih posebnom regulativom, koriste i za finansiranje različitih projekata čiji je isključiv cilj unapređenje opšteg stanja u životnoj sredini.[18]

Naknada za zagađivanje životne sredine, kao finansijski istrument, treba da obezbedi da zagađivač plaća naknadu za zagađivanje životne sredine kada svojim aktivnostima prouzrokuje, ili postoji mogućnost da će prouzrokovati opterećenje životne sredine, odnosno snosi ukupne troškove mera za sprečavanje i smanjenje zagađivanja koji uključuju i troškove rizika po životnu sredinu i troškove uklanjanja štete nanete životnoj sredini. Član 85 ZZŽS utvrđuje kriterijume za određivanje visine te naknade. To su: vrsta, količina ili osobine emisija iz pojedinog izvora, vrsta, količina ili osobine emisija proizvedenog ili odloženog otpada i sadržaj po životnu sredinu štetnih materija u sirovini, poluproizvodu odnosno proizvodu.[19] Odredbe ovog člana odnose se na obveznika, odnosno zagađivača koji prouzrokuje zagađivanje životne sredine emisijama, odnosno otpadom, ili proizvodi, koristi, odnosno stavlja u promet sirovine, poluproizvode ili proizvode koji sadrže materije štetne po životnu sredinu. Vlada Republike Srbije (u daljem tekstu: Vlada) bliže utvrđuje vrste zagađivanja, kriterijume za obračun naknade i obveznike, kao i visinu, odnosno način za obračunavanje i plaćanje naknade.[20] Inače, ova vrsta naknade se primenjuje skoro u svim zemljama.[21]

Sredstva prikupljena od zagađivača u visini od 60% predstavljaju prihod budžeta Republike, dok ostatak od 40% pripada jedinici lokalne samouprave.[22]

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[15] Zakon o šumama, *Službeni glasnik Republike Srbije*, br. 46/91, 83/92, 53/93, 54/93, 60/93, 67/93, 48/94, 54/96 i 101/05

[16] Mladenović, D.: *op. cit.* 583.

[17] Čl. 84, s. 2 ZZŽS

[18] Popov, Đ.: Ekonomska analiza prava životne sredine i održiv razvoj, u Nikolić, D. (ur.), *Osnove prava životne sredine*, Pravni fakultet, Novi Sad, s. 307

[19] Čl. 85, s. 2, t. 1–3 ZZŽS

[20] Ibid., s. 4.

[21] Farmer, A.: *Handbook of Environmental Protection and Enforcement*, Earthscan, London, 2007. s. 190.

[22] Čl. 85, s. 5 ZZŽS

Ona se koriste namenski za unapređenje i zaštitu životne sredine.[23] Na osnovu člana 85a ZZŽS Vlada utvrđuje i područja od posebnog interesa u oblasti zaštite životne sredine, na kojima važe nešto drugačija pravila kada je u pitanju visina i način plaćanja *naknade za zagađivanje*.[24]

Zagađivač ima pravo na povraćaj već plaćene *naknade za zagađivanje životne sredine*, odnosno oslobađanje ili smanjenje plaćanja.[25] ukoliko sredstva koristi za sprovođenje mera u cilju prilagođavanja propisanim graničnim vrednostima, ili sprovodi druge mere kojima doprinosi smanjenju zagađivanja životne sredine ispod propisanog nivoa.[26]

Naknada za zaštitu i unapređenje životne sredine predstavlja finansijski instrument koji u okviru svojih prava i dužnosti mogu predvideti jedinice lokalne samouprave u skladu sa svojim potrebama i specifičnostima.[27] Ovu naknadu propisuje skupština jedinice lokalne samouprave, a na osnovu posebnih kriterijuma.[28] Sredstva ostvarena na ovaj način koriste se, preko budžetskog fonda, namenski za zaštitu i unapređenje životne sredine prema usvojenim programima korišćenja sredstava budžetskog fonda, odnosno lokalnim akcionim i sanacionim planovima, u skladu sa strateškim dokumentima.[29]

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[23] Ibid., s. 6.

[24] Vlada utvrđuje kriterijume za utvrđivanje područja od državnog interesa u oblasti zaštite životne sredine, kao i visinu i način plaćanja naknade u njima. Sredstva ostvarena na ovaj način prihod su budžeta Republike Srbije u visini 80%, dok preostalih 20% predstavlja prihod jedinice lokalne samouprave. Ona se takođe koriste namenski za zaštitu i unapređivanje životne sredine.

[25] Merila i uslove za povraćaj, oslobađanje i smanjenje naknade utvrđuje Vlada.

[26] Čl. 86, s. 1 ZZŽS

[27] Ibid., čl. 87, s. 1.

[28] Na osnovu ZZŽS to su: korišćenje stambenih i poslovnih zgrada, stanova i poslovnih prostorija za stanovanje, odnosno obavljanje poslovne delatnosti, kao i korišćenje zemljišta za obavljanje redovne delatnosti, obavljanje određenih aktivnosti koje utiču na životnu sredinu, a koje određuje Vlada i transporta nafte i naftnih derivata, kao i sirovina, proizvoda i poluproizvoda hemijskih i drugih opasnih materija iz industrije ili za industriju na teritoriji jedinice lokalne samouprave sa statusom ugrožene životne sredine na području od značaja za Republiku. Samim tim obveznici plaćanja ovih naknada su: imaoci prava svojine na nepokretnosti, odnosno zakupci ako se nepokretnosti koriste po osnovu prava zakupa, pravna lica i preduzetnici, koji obavljaju određene aktivnosti, vlasnici teretnih vozila, odnosno pravna i fizička lica koja obavljaju transport nafte i naftnih derivata, kao i sirovina, proizvoda i poluproizvoda hemijskih i drugih opasnih materija iz industrije ili za industriju na teritoriji jedinice lokalne samouprave sa statusom ugrožene životne sredine na području od značaja za Republiku Srbiju.

[29] Čl. 87, s. 10 ZZŽS

3. Fond za zaštitu životne sredine

Osnivanje *Fonda za zaštitu životne sredine* (u daljem tekstu: *Fond*) predviđeno je članom 90 ZZŽS. On ima status pravnog lica, sa javnim ovlašćenjima, u cilju obezbeđivanja finansijskih sredstava za podsticanje i unapređenje životne sredine u našoj zemlji. *Fond* je počeo sa radom 25. maja 2005. godine, sedište mu je u Beogradu, a osnovni ciljevi finansiranje priprema, sprovođenja i razvoja programa, projekata i drugih aktivnosti u oblasti očuvanja, održivog korišćenja, zaštite i unapređenja životne sredine, kao i aktivnosti u oblasti energetske efikasnosti i korišćenja obnovljivih izvora energije u Republici Srbiji.[30]

Prihodi *Fonda* obezbeđuju se namenski iz budžeta Republike, ostvarenih po osnovu naknada koje plaća pravno lice, odnosno preduzetnik za promet određenih vrsta divlje flore i faune.[31] potom prihoda koja lica plaćaju za registraciju u sistem EMAS[32], odnosno *naknade za zagađivanje životne sredine*, uključujući tu i one za zagađivanja učinjena na područjima od posebnog interesa.[33] sredstava ostvarenih po osnovu promene vlasništva preduzeća u postupku privatizacije, priloga, donacija, poklona, pomoći, iz programa i projekata sprovedenih na osnovu međunarodne saradnje u oblasti zaštite životne sredine i sl.[34] Sredstva prikupljena na ovaj način koriste se u različite svrhe, i to pre svega za: zaštitu, očuvanje i poboljšanje kvaliteta vazduha, vode, zemljišta i šuma, kao i ublažavanje klimatskih promena i zaštitu ozonskog omotača, zaštitu i očuvanje biodiverziteta i geodiverziteta, podsticanje održivog korišćenja zaštićenih prirodnih dobara, ruralnog područja, stimulisanje sprovođenja čistije proizvodnje, upotrebu tehnologija koje smanjuju opterećenje i zagađivanje životne sredine, korišćenje čistijeg transporta, unapređenje sistema informisanja o stanju životne sredine i sl.[35] U ove svrhe pravo na korišćenje sredstava *Fonda* imaju pravna i fizička lica i to putem zajmova, izdavanja garancija i drugih oblika jemstava, subvencija, pomoći i donacija na osnovu javnog konkursa koji on objavljuje.[36] Opštim aktom *Fonda* utvrđuju se uslovi koje korisnici sredstva moraju ispuniti

[30] Ibid., čl. 90, s. 3 i čl. 91.

[31] Ibid, . čl. 27, s. 5.

[32] EMAS (Eco-Management and Audit Scheme) ili sistem upravljanja zaštitom životne sredine i provere, predstavlja program EU kojim se omogućava dobrovoljno ucešce organizacija u ovom sistemu. Regulisan je *Uredbom EC No 761/2001* Evropskog parlamenta. Vidi isto: čl. 45, s. 7 ZZŽS.

[33] Čl. 85 i 85a ZZŽS

[34] Ibid., čl. 92, s. 1, t. 1–6.

[35] Ibid., 93, s. 2, t. 1–15.

[36] Ibid., čl. 94, s. 1.

za dodeljivanje njegovih sredstava, kriterijumi i merila za ocenjivanje predloga projekata, odnosno zahteva za dodeljivanje sredstava i sl.[37]

Svoje poslove *Fond* obavlja primenom principa objektivnosti i javnosti prilikom donošenja odluka, sledeći priznate dobre primere iz međunarodne prakse.[38.] *Fond* ima upravni[39] i nadzorni odbor[40], čije članove imenuje i razrešava Vlada i direktora, koga na predlog Ministra nadležnog za poslove zaštite životne sredine (u daljem tekstu: Ministar), takođe postavlja i razrešava Vlada. Sva pomenuta lica se imenuju na period od četiri godine.[41] Rad *Fonda* obavlja se u skladu sa njegovim unutrašnjim aktima, i to pre svega Statutom, kojim se uređuje unutrašnja organizacija i način poslovanja, nadležnost pojedinih organa, način rada, odgovornost zaposlenih i sl.[42] Statut donosi upravni odbor uz prethodnu saglasnost Vlade.[43]

4. Regionalni i lokalni fondovi

Na osnovu člana 100 ZZŽS autonomna pokrajina i jedinice lokalne samouprave su u obavezi da formiraju budžetske fondove, u koje će se prilivati sredstva ostvarena iz *naknada za zagađivanje*, uključujući tu i one za zagađivanja učinjena na područjima od posebnog interesa, kao i *naknada za unapređenje životne sredine*, kao i onih naknada plaćenih za zagađivanja vršenih na njihovoj teritoriji.

Sredstva budžetskog fonda koriste se na osnovu utvrđenog programa korišćenja sredstava koji donosi nadležni organ autonomne pokrajine, odnosno jedinice lokalne samouprave, na koju je potrebno prethodno pribaviti saglasnost Ministra.[44] Sredstva budžetskog fonda koriste se namenski, za finansiranje akcionih i sanacionih planova u skladu sa Nacionalnim programom, kao i za finansiranje programa i planova autonomne pokrajine i jedinice lokalne samouprave.[45] Izveštaj o njihovom korišćenju autonomna pokrajina, odnosno jedinice lokalne

[37] Ibid., čl. 94, s. 3

[38] Ibid., čl. 93, s. 1 ZZŽS

[39] Upravni odbor *Fonda za zaštitu životne sredine* ima sedam članova i čine ga: tri predstavnika Vlade i po jedan predstavnik Narodne banke Srbije, autonomne pokrajine, jedinice lokalne samouprave i samog *Fonda*.

[40] Nadzorni odbor *Fonda za zaštitu životne sredine* se satoji iz pet članova i čine ga: dva predstavnika Vlade, po jedan predstavnik organa autonomne pokrajine, jedinice lokalne samouprave i samog *Fonda.*

[41] Čl. 96, s. 1, 2, 4 i 6 ZZŽS

[42] Ibid., čl. 97, s. 1 i 3.

[43] Ibid., . s. 2.

[44] Ibid., čl. 100, s. 4 i 5.

[45] Ibid., s. 3.

samouprave dostavljaju jednom godišnje Ministru, i to najkasnije do 31. marta tekuće godine, za prethodnu.[46]

U velikom broju država srednje i istočne Evrope fondovi za zaštitu životne sredine igraju veliki značaj u finansiranju investicija koji imaju za cilj zaštitu životne sredine.[47] Recimo, u Poljskoj, slično našem sistemu, postoji Nacionalni fond za zaštitu životne sredine, kao i posebni regionalni fondovi. Oni su prvenstveno finansirani iz budžeta i igraju značajnu ulogu kod finansiranja inspekcijskih organa.[48]

5. Ekonomske podsticajne mere

Pored finansijskih istrumenata zaštite životne sredine, ZZŽS predviđa i pojedine *ekonomske podsticajne mere*. Pa tako postoji mogućnost za *dobijanje poreskih, carinskih i drugih olakšica*, kao i *oslobađanja od obaveze plaćanja* za pravna i fizička lica koja primenjuju tehnologije, proizvode i stavljaju u promet proizvode čiji je uticaj na čovekovu okolinu povoljniji od drugih sličnih, odnosno koji koriste obnovljive izvore energije (sunce, vetar, biogas), kao i za lica koja upotrebljavaju opremu i uređaje koji neposredno služe zaštiti životne sredine.[49]

Uslovi i načini za sprovođenje ovih *ekonomskih podsticajnih mera* utvrđuju se posebnim propisom. ZZŽS predviđa mogućnost dobijanja *subvencija, depozita i njegovog refundiranja* za potrošače koji organizovano vraćaju korišćene i neupotrebljive uređaje ili njihove delove, proizvode ili njihovu ambalažu, i za proizvođače koji obezbede njihovu reciklažu ili uklanjanje, odnosno smanjuju negativni uticaj svojih aktivnosti na životnu sredinu na drugi organizovan način.[50] Bliži uslovi i načini za sprovođenje ovakvih mera takođe se utvrđuju posebnom regulativom.[51]

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[46] Ibid., s. 6.

[47] Francis, P.: Financing environmental protection in economies in transition: the role of environmental funds, *Environment and Planning*, *27*, s. 300.

[48] U vezi modernizacije prava koja se odnosi na finansiranje zaštite životne sredine u Poljskoj vidi: Hughes, G., Bucknal, J.: *Poland: Complying with EU environmental legislation*, World Bank Publications, 2000.

[49] Čl. 101, s. 1 ZZŽS

[50] Ibid., s. 2.

[51] Ibidem.

6. Zaključak

Kao i u drugim zemljama koje su u procesu tranzicije, i u Srbiji se politika u oblasti finansijskih istrumenata zaštite životne sredine još uvek nalazi u procesu izgradnje i unapređenja.[52] Ona svakako, mora biti usklađena sa dostignućima i aktuelnim trendovima u ekonomskoj i ekološkoj teoriji i praksi u svetu.

Sa obzirom da su u sadašnji sistem zaštite životne sredine naše zemlje uvedena savremena načela i prihvaćeni brojni evropski standardi, njemu moraju biti prilagođeni i principi samog finansiranja. Takođe, postojeće finansiranje je potrebno permanentno razrađivati i unapređivati.[53] Tako je, najpre, neophodno ojačati institucionalne i administrativne kapacitete *Fonda*, što istovremeno znači usvajanje posebnog Zakona koji bi detaljno definisao njegove ciljeve i funkcije, kao i osnove po kojima on stiče prihode. Unapređenje sistema finansiranja zaštite životne sredine znači i potrebu uvođenja novih finansijskih istrumenata i njihovo integrisanje u postojeću zakonsku regulativu i sam postupak primene postojećih mera, što bi trebalo da obaveže veći broj zagađivača na plaćanje naknada, poveća efikasnost upravljanja prikupljenim sredstvima, a takođe i da ojača kapacitete za finansiranje projekata. Pored toga, potrebno je razraditi i unaprediti i sistem *podsticajnih mera*, jer bi se na taj način pružila podrška onima koji su prilagodili svoje tehnologije potrebama zaštite životne sredine, a istovremeno stimulisala i ostala pravna i fizičkim lica učine slično i na taj način daju svoj doprinos rešavanju brojnih ekoloških problema.

Takođe, Vlada bi trebalo da uspostavi koherentan i sveobuhvatan sistem izveštavanja javnosti o aktuelnom stanju životne sredine, funcionisanju čitavog modela finansiranja njene zaštite i sprovedenim ulaganjima u ovoj oblasti, uz neophodnu popularizaciju uspešnih modela ponašanja i odnosa društva prema okolini u kojoj žive.

Veći deo javnih službi u oblasti zaštite životne sredine i s njima povezana ekološka infrastruktura organizovani su na nivou lokalnih vlasti, stoga je preporuka da se ojača kapacitet opština u pripremi investicionih projekata[54] i da se omogući veći pristup domaćem tržištu kapitala za njihovo finansiranje jer je proces decentralizacije neophodan preduslov za obezbeđivanje finansijskih sredstava i ostvarivanje potreba lokalnih zajednica.

Izvori finansiranja dolaze i iz javnog i iz privatnog sektora, i samo uspešnom kombinacijom finansiranja iz oba izvora investicije u životnu sredinu se

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[52] Mileusnić-Vučić, V. : Konverzija duga i ulaganja za zaštitu životne sredine. *Pravni život*, 9/1997, s. 376.

[53] Mladenović, D.: *op. cit*. 593.

[54] Medved, I.: Obračun troškova u projektima zaštite životne sredine. *Anali Ekonomskog fakulteta u Subotici*, 20/2008, s. 176.

mogu podići na viši nivo. Treći, veoma značajan izvor–sredstva međunarodnih finansijskih institucija i EU, biće iskorišćen samo uz jasno definisane strategije razvoja i određivanje prioriteta u životnoj sredini, te je otuda na državi da u budućnosti obezbedi političku i ekonomsku stabilnost, kreditnu opravdanost projekata i ostvarivanje realnih naknada za korišćenje prirodnih resursa.

Uspeh finansiranja zaštite životne sredine nije moguć bez sistemskog praćenja i procena postojećeg stanja, uz uključivanje svih zainteresovanih lica u ovaj složen proces, kao i kombinovanje finansijskih istrumenata sa drugim raspoloživim istrumentima zaštite životne sredine[55], jer samo ovakav pristup može dovesti do unapređenja stanja okoline u kojoj živimo.

Nesumnjivo je da su poslednjih godina pravna regulativa kao i sistem finansiranja zaštite životne sredine doživeli značajne promene, ipak, postoji još dosta prostora za unapređenje[56], kako bi svi raspoloživi finansijski istrumenti postali siguran, efikasan, savremen i odgovarajuć način prikupljanja sredstava u cilju zaštite i unapređenja stanja životne sredine.

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FINANCIAL INSTRUMENTS OF THE LAW ON THE PROTECTION OF ENVIRONMENT

Summary

The author in this work gives an overview of the system of financial instruments of financing environmental protection according to the recently passed amendments of the Law on the Protection of Environment. The work points out on their importance and on the general principles of functioning of the system of collecting means with the aim of protection and improvement of our environment. Besides, it emphasizes the relevance of incentive measures, need for the improvement of current legal regulation related to the system of financing the protection of environment in line with European standards. In the conclusion, the author gives clear position on the importance of the elaboration of a coherent and comprehensive system of protection of environment, combination of financial and some

[55] Kordelj De Villa, Ž., Papafava, M.: Ekonomski istrumenti u politici zaštite okoliša u Hrvatskojteorijska saznanja i iskustva, *Privredna kretanja i ekonomska politika*, 94/2003., s. 60

[56] Vukićević, M.: Harmonizacija nacionalne ekološke politike (Srbije) i ekološke politike Evropske unije, *Pravo i politika* 1/2010. s. 41

other available instruments of protection of environment, aiming realization of integral and high quality system of care for our natural environment.

Key words: *instruments of financing the protection of environment, Law on the Protection of Environment*

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DR MILOŠ LUKOVIĆ, *BOGIŠIĆEV ZAKONIK – PRIPREMA I JEZIČKO OBLIKOVANJE,* Srpska akademija nauka i umetnosti – Balkanološki institut, Beograd, 2009, 472 strane.

Dr Miloš Luković, naučni saradnik Balkanološkog instituta SANU, upustio se u ozbiljno naučno istraživanje i analizu Opšteg imovinskog zakonika za Knjaževinu Crnu Goru iz 1888. godine. Zakonik se, neretko, označava i kao Bogišićev zakonik, a u skladu sa njim je i naziv monografije – BOGIŠIĆEV ZAKONIK – PRIPREMA I JEZIČKO OBLIKOVANJE. Zakonik je nastao u vreme kada su, kako to ističe autor monografije, rezultati književnojezičke reforme Vuka Karadžića bili opšteprihvaćeni i u crnogorskoj sredini. Čim se Zakonik pojavio, njegov jezički izraz odmah su s pohvalama prihvatili srpski i hrvatski pravnici.

O samom Zakoniku objavljeno je mnoštvo naučnih radova, a mnogo manji broj o životu i radu njegovog tvorca. Suprotno tome, izostala je sistematska naučna analiza same pripreme Zakonika i njegovog jezičkog oblikovanja.

Autor je sebi postavio najteži zadatak: da osvetli nedovoljno poznate probleme pripreme Zakonika i njegovog jezičkog oblikovanja. Ovaj zadatak on je veoma uspešno rešio. Opšti imovinski zakonik za Knjaževinu Crnu Goru iz 1888. godine i njegov jezik iz 19. veka i danas, u vreme balkanizacije ovih prostora i podele svake vrste, ima veliki značaj i zaslužuje sistematsko istraživanje kakvo mu je posvetio autor dr Miloš Luković.

Valtazar Bogišić je, posle proučavanja obimne prikupljene građe, ocenio da nisu sazreli uslovi da se u Crnoj Gori kodifikuje celokupno građansko pravo, nego samo imovinsko, koje bi obuhvatalo stvarno i obligaciono pravo. Posle petnaest godina napornog rada Bogišića na Zakoniku, koji je bio prekidan i drugim poslovima, Opšti imovinski zakonik je proglašen 25. marta 1888. a stupio je na snagu 1. jula iste godine. Iako je to kodifikacija jedne male države, privukao je veliku pažnju stručne i naučne javnosti. Zakonik je još u 19. veku preveden na pet jezika i proneo je slavu Crne Gore po celoj Evropi.

Francuski pravnik, akademik Darest, u Akademiji moralnih i političkih nauka u Parizu održao je predavanje o Opštem imovinskom zakoniku i ocenio da „ovo delo čini čast kako učevnom pravnom savetniku koji ga je stvorio, tako i Knjazu koji je dao inicijativu da se stvori". Nemački pravnik Karlo Dikel je u svojoj obimnoj studiji napisao: „Bogišić je stvorio zakonik koji se, mimo svih obzira na najbolje postojeće zakonike, može smatrati za najoriginalnije kodifikatorsko delo". Ruski pravnik Vladimir Spasovič, prikazujući crnogorski Zakonik sa pohvalom, odobrava Bogišićev rad ističući da je Zakonik ispunjen homerovskim duhom i predlaže da se neka rešenja usvoje i u Rusiji.

U pravnoj nauci na prostorima druge Jugoslavije Zakonik je opravdano ocenjen kao remek-delo našeg zakonodavstva, naš najbolji zakonik, jedna od najzanimljivijih i najboljih tvorevina ove vrste u evropskoj pravnoj civilizaciji 19. veka itd.

Bogišić je prvi u svetu građansko pravo sveo na imovinsko pravo izostavljajući iz njega porodično i nasledno. Posle njega to su uradili Japanci, a danas tako postupaju arapske zemlje.

Dr Miloš Luković je stoga, za predmet svog proučavanja, izabrao značajano pravno delo čiji domašaj prevazilazi prostore Balkana. Opravdano je, u prvom i drugom delu monografije, žižu istraživanja usmerio na istorijat pripreme, tj. sačinjavanja Zakonika. Priprema Zakonika je, naime, trajala dugo, a o ovim pitanjima je najmanje pisano. I drugi veliki evropski građanski zakonici 19. veka (sa izuzetkom Francuskog građanskog zakonika iz 1804. godine) rađeni su dugo.

Tako je Marija Terezija 1753. godine obrazovala komisiju sa ciljem da kodifikuje celokupno pravo u Monarhiji. Austrijski opšti građanski zakonik donesen je, međutim, 1811. godine.

Posle ujedinjenja Nemačke (Drugi rajh) 1871. godine, savezna država je obrazovala komisiju od jedanaest članova radi izrade građanskog zakonika. Rezultat rada Komisije bilo je donošenje Nemačkog građanskog zakonika tek 1896.

Rad na izradi Švajcarskog građanskog zakonika trajao je od 1892. godine sve do njegovog usvajanja na Skupštini federacije 1907. godine.

Takav postupan, dugotrajan i temeljan rad na izradi građanskih zakonika, odlikovao je i Bogišića, a rezultat nije izostao.

Proučavajući pomno propremu Zakonika, naučni saradnik dr Miloš Luković posebnu pažnju je opravdano usmerio na dve kraće i jednu još širu raspravu Valtazara Bogišića. Na francuskom jeziku Bogišić je napisao dve kraće rasprave i to: **1) O obliku nazvanom inokoština u seoskoj porodici Srba i Hrvata i 2) Povodom Crnogorskog građanskog zakonika**. **Nekoliko riječi o načelima i metodu usvojenom pri izradi. Pismo jednom prijatelju.** Istovremeno sa pripremom ovih rasprava, naučni saradnik dr Miloš Luković nalazi da je

Bogišić istovremeno pisao i treću, još širu raspravu, koja je ostala nezavršena, a objavljena je tek 1967. godine pod Bogišićevim imenom i nazivom: **Metod i sistem kodifikacije imovinskog prava u Crnoj Gori.** Autor ocenjuje da sve tri rasprave imaju izvanredan značaj za sticanje uvida u Bogišićeve poglede na načelne i metodološke probleme njegovog kodifikatorskog poduhvata u Crnoj Gori, a pružaju i dodatne podatke o istorijatu te kodifikacije i jezičkom oblikovanju. Dr Miloš Luković ističe da su sve ove rasprave međusobno povezane, ali da su istraživači Bogišićevog stvaralaštva često previđali tu njihovu uzajamnu uslovljenost, te su ih tako tumačili izvan konteksta njihovog nastanka. Stoga su ostali zanemareni neki aspekti Bogišićevog rada na pripremi Zakonika, a pre svega njegova plodna saradnja sa nizom pravnih i jezičkih stručnjaka.

Autor monografije detaljno izučava genezu navedenih radova koji su mu neretko orijentiri, naročito u delu monografije koja se bavi jezičkim oblikovanjem Zakonika.

Obrazovanom pravniku većina reči i izraza iz Zakonika je i danas, posle više od 120 godina, jasna. To proizlazi i iz strukture Zakonika. Opšti imovinski zakonik je materiju grupisao u šest delova: dio prvi – Uvodna pravila i naređenja; dio drugi – O vlaštini (831) i drugim vrstama prava ukorijenjenih u stvari (870) ; dio treći – O kupovini i o drugim glavnijim vrstama ugovora; dio četvrti – O ugovorima (905) uopšte, kao i o drugim poslovima, djelima, prilikama od kojih dugovi (900–902) potječu; dio peti – O čovjeku i o drugim imaonicima (801) kao i o svojevlasti (953) i uopšte raspolaganju u imovinskim poslovima i dio šesti – Objašnjenja, određenja, dopune. Razdio VIII šestog dijela sadrži „Neke zakonjačke (pravničke) izreke i postavke koje, iako ne mogu zakona ni preinačiti ni zamijeniti, mogu mu, ipak, objasniti razum i smisao", kao što su: Zakon je zakon, ma kako opor bio; Zao običaj nikad tvrd, nikad zakonit; Što se grbo rodi vrijeme ne ispravi; '- što je s početka nezakonito, to vremenom samim zakonito ne postaje; Pravdi je nasilje najgori protivnik; Svaka stvar k svome gospodaru teži; Razgovor je razgovor, a ugovor stranama zakon. Što dvojica uglave, ista dvojica i razvrći mogu; Što dva uglave trećega ne veže itd. Ove izreke, koje svoje korenje vuku iz CORPUS IURIS CIVILIS-a, i danas su značajna načela na kojima počiva imovinsko pravo.

Autor opravdano i argumentovano ističe da jezički izraz Opšteg imovinskog zakonika predstavlja dragoceno nasleđe srpskoga standardnog (književnog) jezika. To se posebno odnosi na njegovu terminološku leksiku, koja je jednim delom prodrla u pravni terminološki sistem savremenog srpskog jezika. U Zakoniku se Bogišić starao da „jezik bude prost i narodan" i u tom smislu ističe: „za stil u Zakoniku, uzeo sam za glavno pravilo to: da me narod može dobro razumjeti; i kad bi god suvišna sažetost morala dovesti nejasnost, tu sam se volio izložiti ukoru, da sam mnogorječiv".

Termine koje je primenio u Zakoniku Bogišić je podelio u tri vrste: 1) termine uzete iz narodnog jezika; 2) „pozajmljene" termine i 3) one termine koje je on sam stvorio. Tako je Bogišić sam stvorio termine: punovlastan, držina, držitelj, pridržnik (detentor), samovoljan, štetnik, punoletan, imaonik, docnja ili odvlaka, rušljiv ugovor, razrješni uslov itd.

Dr Miloš Luković utvrđuje da su glavni izvori terminološke leksike Valtazara Bogišića: 1) običajno pravo na srpskom jeziku u ondašnjoj Crnoj Gori i susednim zemljama, 2) stariji rečnici, 3) neki stariji pravni dokumenti srpske i hrvatske provenijencije, 4) rečnici ili druga dela Bogišićevih savremenika, 5) drugi jezici (pozajmljenice), 6) Bogišićeve vlastite kovanice.

Na osnovu komparativne analize pravnih termina Zakonika, pravnih termina iz Srpskog građanskog zakonika iz 1844, Pravno-političke terminologije za austrijske slovenske jezike, drugih pravnih spomenika i savremenog imovinskog zakonodavstva, dr Miloš Luković nalazi da se osnovano može pretpostaviti da je oko tridesetak termina iz Opšteg imovinskog zakonika prodrlo u savremeno srpsko zakonodavstvo, kao što su: Ništavi ugovor, Rušljivost ugovora, Zabluda, Rizik, Docnja, Pretnja, Odložni uslov, Slučaj, Podzakup, Najamnina, Prebijanje, Sjedinjenje, Zadužbina, Dobitak, Štetnik, Nepokretno dobro, Povlasno dobro, Poslužno dobro, Davalac zaloge, Pravo preče kupovine, Tržišna cena itd.

Autor naglašava da je Bogišić jezički izraz Zakonika oblikovao na širokoj novoštokavskoj osnovi koristeći pri tom jezička sredstva i lingvističko nasleđe s celog prostora Srba (od kojih nije odvajao Crnogorce) i Hrvata. Taj jezik je smatrao jednim jezikom, a lično ga je nazivao „srpski", „srpsko – hrvatski", hrvatski ili srpski". U skladu s težnjom da „učini Zakonik razumljiv sucima i narodu", te da „jezik bude prost i narodan", –Bogišić se nije libio da posegne za regionalnim oblicima (naročito iz dubrovačke oblasti i Crne Gore) kad god mu se učinilo da to odgovara potrebama jezičkog oblikovanja konkretne norme Zakonika.

Istraživanje koje je posvećeno pripremi Bogišićevog zakonika jasno opominje sadašnje brzoplete zakonopisce, koji neretko nisu dorasli svom poslu. Umesto detaljne pripreme zakona koji je usklađen sa pravnim sistemom Srbije, vrši se sve više transplantacija anglosaksonskog prava na živi pravni sistem Srbije, koji je proizašao iz rimskog kontinentalnog pravnog sistema Evrope. Takvo strano telo, često i sa stranom termionologijom, pravni sistem Srbije odbacuje. Današnji jezik zakona se sve više udaljava od narodnog, pa i književnog jezika.

Knjiga BOGIŠIĆEV ZAKONIK – PRIPREMA I JEZIČKO OBLIKOVANJE prvi je monografski rad je posvećen ovom problemu. Za pisanje o jezičkom oblikovanju Bogišićevog zakonika pravnicima je nedostajalo produbljeno poznavanje jezika, a lingvistima poznavanje prava. Za takav rad se, zbog toga, angažuju najmanje dva autora iz dva različita polja – filologije i prava. Dr Miloš

Luković, naučni saradnik Balkanološkog instituta SANU je, međutim, diplomirani pravnik, ali i diplomirani filolog. Tako pripremljen, sam je uspešno izneo veliki teret pisanja ove monografije koja je pomerila granice naše spoznaje i predstavlja značajan doprinos pravnoj nauci i filologiji. Autor se na dostojanstven način suočio sa veličanstvenim pravnim izvorom Opštim imovinskim zakonikom i njenim tvorcem Valtazarom Bogišićem.

Govor na promociji knjige dr Miloša Lukovića, *Bogišićev zakonik – priprema i jezičko oblikovanje*, održan 14. novembra 2009. godine u Srpskoj akademiji nauka i umetnosti.

Dr Ilija Babić, redovni profesor
Fakultet za evropske pravno-političke studije Novi Sad

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