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Anders Aune*

DECONSTRUCTING THE EUROPEAN COMMISSION'S DISCOURSE ON SERBIAN'S ACCESSION PROCESS

A Critical Discourse Analysis on the Annual Progress Reports from 2010 to 2021 on Serbia

This article enquires into the evolution of the European Commission's discourse with respect to rule of law, corruption and media development in Serbia during period 2010–2021. The study performs a critical discourse analysis with use of discourse historical approach on the annual progress reports published by the European Commission. The study uncovers that the progress reports shows patterns of both continuity and change. The topics and subtopics related to rule of law, corruption and media represents large patterns of continuity. Some new topics, mostly negative ones, have arisen during the period, but the criteria and form of evaluation seems stable. The intensification strategy in the discourse the last four years seems not to be enough to transform the EU accession process, and it seems that Serbia lacks motivation on their road to accession.

Keywords: *European Union (EU), EU Enlargement, Critical Discourse Analysis, Discourse Historical Approach, Serbia´s accession process to the EU, Serbia.*

1 INTRODUCTION

1.1 Topic and research question

With the eastern enlargement in 2004, the European Union (EU) acquired not just ten new member states but also several new neighbours. With new neighbours, comes new neighbourhood policies.

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> "The EU reiterates its unequivocal support to the European perspective of the Western Balkan countries. The future of the Balkans is within the European Union". (European Commission, 2003, 1)

For the first time a formal EU document included these words in 2003 with The Thessaloniki agenda for the Western Balkans: "Moving towards European Integration". Since the European Union (EU) offered the Western Balkan states the chance to join the EU, the EU has played a critical role in region. Since then, the EU has contributed to resolving ethnic conflicts and bilateral issues (Huszka, 2020, 3). Many years has passed since 2003 and the integration process has continued and connected the region closer to the European Union. However, since then we have only seen two former Yugoslav states join the Union, Slovenia in 2004 and Croatia in 2013.

In the most recent Enlargement Package from 2021, which is providing a detailed assessment of the state of play and the progress made by the Western Balkans (WB), it is stated that the overall integration process has been too ineffective and lack credibility and trust on both sides (European Commission, 2021; Domachowska, 2021; Economides, 2020). As a response to this, the commission has decided to reinvigorate the accession process to bring this project back to life. Nevertheless, EU High Representative for Foreign Affairs and Security Policy/Vice-President of the European Commission, Josep Borrell, said as a comment on the 2021 Enlargement Package:

> "The EU is not complete without the Western Balkans. It's time we come together and unite in building a stronger Europe." (European Commission, 2021)

Despite this re-engagement with enlargement and this kind of visions and claims from EU officials, internally the EU is struggling with enlargement fatigue. There are a great deal of questions regarding enlargement which is being raised in the backroom. One of them being: can the EU afford taking on new member states without jeopardising the political and policy objectives established by the Treaties? One could say that enlargement could be disrupting the process of integration itself, where "widening" the Union could halt and diminish the possibility of "deepening" it (Economides, 2020, 3). In addition, in November 2019, President Macron of France blocked the opening of accession talks with Albania and North Macedonia. The French

veto sent out signals to the candidate countries that there is an internal resistance for enlargement, and this also manifested a decrease in credibility of the enlargement policies to the potential member states (Economides, 2020, 1, 7). So, why does the EU keep pushing for the accession of the Western Balkan states when it is clearly that this process is stagnating and is characterized by enlargement fatigue?

We believe the answer to this question lies in the statement of the commissioner for Neighbourhood and Enlargement, Oliver Varhelyi. As a comment on the 2021 Enlargement package, Varhelyi noted this:

> "Enlargement policy is a geostrategic investment in peace, stability, security and economic growth on our European continent" – Oliver Varhelyi (European Commission, 2021)

The keyword here is the notion that enlargement policy is geostrategic. The EU and the US have predominantly been the main actors in the Balkans, but since the early 1990´s we have seen others become increasingly engaged. The Western Balkans today could be seen as an island when we look at the map, in a sea of surrounding EU neighbours. The Western Balkans has become increasingly important for external actors because this island represents an area where the EU still has not been able to exercise its influence. Some of these actors, for example Russia and Turkey, has a long history of relations with the Balkans countries, bringing them the advantage of having strong ties with certain communities (Bieber, 2020, 105). Moscow uses its close ties to the Orthodox Balkan Slavs with the strategic aim to stop rapprochement between the Western Balkans and the EU and NATO. We also see this in their support of Serbian separatists in Bosnia and Herzegovina and in Kosovo, to create instability (Schwarz, 2021). For the EU, pushing back Russian influence could be considered as a way holding democratic backsliding in check. In this manner, Russian engagement in Serbian and Western Balkans relations is a real and a dramatized challenge to democracy (Bechev, 2021).

In this article, we will conduct a critical discourse analysis on the European Commission's discourse on Serbia´s enlargement process. The analytical focus in this article is directed towards how Serbia is depicted in the annual progress reports issued by the European commission. Additionally, by focusing explicitly on the annual progress reports it will give us a greater understanding of the effectiveness of the progress reports as a monitoring tool.

Serbia, along with 5 other Western Balkans countries, was identified as a potential candidate for EU membership during the Thessaloniki European Council summit in 2003. In 2009, Serbia formally applied for membership and on 21 January 2014, and on the 1st Intergovernmental Conference the official negotiation process started (European Commission). The reason why we have chosen Serbia for the analysis, lies behind the fact that they are seen as the hegemon in the region. Also, it is interesting to see how the integration process have evolved, especially when we look at the situation through a geopolitical lens. In the latter years we have seen several other international actors also trying to gain influence over Serbia and the rest of the Balkans.

The European Union is the largest donor in the Republic of Serbia. Economically, the EU is by far the most important actor regarding investments and as a trading partner and accounting for more than 60% of Serbia´s total trade in 2021 (EU Delegation to Serbia, 2022). Since 2001, the EU has provided, through several various instruments and funds, more than EUR 3 billion in grants to the Republic of Serbia in order to support the reforms. Accession negotiations are currently ongoing, and according to the European Commission in 2018 with the prospect of joining in 2025. However, it was noted that this was "not a target date, not a deadline" (Rankin, 2018).

The increased involvement of third-party external actors in the region challenges the influence and authority of the EU in different ways (Economides, 2020, 7). For example, we have seen with the Covid 19 crisis that China and Russia have increased their stance in the region over the last years, though the distribution of vaccines (Miteva, 2021). At the same time China has connected itself even closer to the Western Balkans and Serbia through the 16+1 initiative, as part of the "Belt and Road" initiative. This has been looked extremely favourably throughout the region because of its promises to build new and improved infrastructure and with investments in specific projects (Tonchev, 2017, 2).

At the domestic level, President of the Republic of Serbia, Alexandar Vucic, has been a vocal supporter of EU integration but with the newly created close ties with China and the strengthened everlasting ties with Russia and Putin, he has been able to balance these relations in order to get the most out of them. Vucic has been accused of "playing" with three different "faces" or "cards" (Economides, 2020, 8). As an example, the Serbian government refuses to condemn and join the

EU sanctions on Russia after the invasion of Ukraine in February 2022. This does not certainly strengthen the EU – Serbia relations. In fact, a group of nine members in the European Parliament has written an open letter to the EU Commission's President Ursula Von der Leyen and the High Representative of the European Union for Foreign Affairs and Security Policy Josep Borrell requesting to freeze the ongoing negotiation process until Serbia distances itself from Russia (Qalliu, 2022). Vucic has noted that this is based on its historical and cultural ties with Russia and that Russia has been supporting Serbia's territorial integrity since 2001, referring to the Russian refusal to recognize Kosovo as an independent country (Ozturk, 2022). Serbia´s path to the European Union will remain blocked unless it can resolve its bilateral and territorial disputes with Kosovo. Kosovo declared independence from Serbia 2008, but Serbia refuses to recognize its former providence as an independent state. (Grzegorczyk, 2021)

In order to be accepted into the European Union, candidate countries have to fulfil numerous criteria. The accession criteria, or Copenhagen criteria (after the European Council in Copenhagen in 1993 which defined them), defines the essential conditions, which are divided into three categories. Firstly, the political criteria, which are defined by stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. Secondly, the EU specifies the economic criteria which means having a functioning market economy and the capacity to cope with competition and market forces. The last criteria revolve around having the administrative and institutional capacity to effectively implement the *acquis* (European Commission).

The acquis is divided into 35 different policy areas, commonly known as chapters. The chapters range from fundamental criteria, which include political criteria and chapters on the rule of law, to chapters including everything from free movement of goods, information society and media, to enterprise and industrial policy.

The candidate countries are being annually evaluated by the Commission. These progress reports are a set of documents summarising and evaluating the current status and progress achieved by the respective countries in the accession process (Universität Duisburg-Essen: Institut für Politikwissenschaft, 2021). Serbia has currently 18 of 35 acquis open, and provisionally closed 2 (European Commision). Given both the historical position and the contemporary political de-

velopment, and the fact that Serbia is seen as a hegemon in the region, it is interesting to look at how the integration process has evolved, especially when we look at the situation through a geopolitical lens. With this backdrop, I will investigate how the EU portrays the accession process in Serbia in their own progress reports and analyze more closely the chapters regarding the rule of law, information society and media and the chapters where corruption is prominent.

This article enquires into the evolution of the European Commission's discourse with respect to media development, corruption and rule of law in Serbia during the period 2010–2021. More concretely, it composes the following research question: how has this discourse evolved during the said period, and to what extent does it feature patterns of continuity and/or change?

The article consists of five chapters. Chapter 2 presents the research design. In subchapter 2.1 I introduce the methodological framework, consisting of discourse analysis and critical discourse analysis. Subchapter 2.2 clarifies the DHA, the data used in the study and the longitudinal approach. Chapter 3 includes my analysis and deconstruction of the discourse around rule of law, corruption and media development. Chapter 4 answers the research question and presents some thoughts about future research studies.

1.1 Literature review

Many scholars have conducted research on EU enlargement towards the WB. Recent literature mainly focuses on the Balkan countries´troubles on their road to EU membership. This gives us an array of conclusions. The main theme encountered when studying the literature is the democratic backsliding in the region (Kmezic, 2019; Bieber, 2020; Economides, 2020). This has of course affected the European Integration process, however the literature also tries to describe this from the viewpoint of the EU. The enlargement process is described by scholars of being victim to enlargement fatigue (Economides, 2020). Domachowska (2021) performed a study where she tried to unveil the status of the European integration process of the WB countries. The study is based on discourse analysis (including critical discourse analysis (CDA) and content analysis). However, she does not use the progress report as data, but data from Freedom House, Transparency International´s Corruption Perceptions Index and various

Commission documents. Her conclusions regarding Serbia´s accession process is characterised by its slow pace due to the country´s struggle with several factors related to building systems of the rule of law and resolving the bilateral problem with Kosovo. She also pinpoints that the EU must also intensify their work with the accession states based on two factors; maintaining a credible status for the accession states and because of the geopolitical situation (Domachowska, 2021). This conclusion also comes forward in an in-depth analysis requested by the European Parliament's Committee on Foreign Affairs; the current approach to enlargement has reached its limits and that the current "autopilot" mode cannot continue (Kmezic, 2015).

Another study using the CDA method is Tatjana Sekulic (2021) The European Union and the Paradox of Enlargement: The Complex Accession of the Western Balkans. Here Sekulic analyse the progress reports (2008–2019), and also expands the empirical evidence with interviews and additional papers (Sekulić, 2021). She suggests that EU enlargement needs mutual transformation from both new arrivals and the EU.

Based on the literature review it becomes evident that there is a lack of linguistic analysis of Commission Documents. So, with this article we want to study the discourse and the linguistics in the progress reports and put it in an historical context, where we can examine the enlargement process. With this article we will contribute to the existing research/academic literature by pairing this topic with Critical Discourse Analysis (CDA) and Discourse Historical Approach (DHA). By analysing the progress reports using this method it will give us not just a longitudinal content analysis of the progress reports, but also an analysis of linguistic means and discursive strategies carried out by the Commission. It is acknowledged that it is generally not sufficient to focus only on the content of public policy. We must also look at ways of arguing and discursive interactions and indicators of politics (Lynggaard, 2019, 58).

2 RESEARCH DESIGN

2.1 Methodological framework

Discourse analysis has become a central approach in European studies (Crespy, 2015; Lynggard, 2019), but it's not yet a part of mainstream research in EU politics (Lynggard, 2019, 160). Lynggard (2019)

defines three common features of discourse analysis (Lynggaard, 2019, 2–3). First, the discourse is the research object of any discourse analysis. Discourse could be defined as "a specific ensemble of ideas, concepts, and categorizations that are produced, reproduced and transformed in a particular set of practices and through which meaning is given to physical and social realities" (Hajer, 1995, 44). Van Dijk (1993) emphasizes that discourse should be perceived as a mental construct, while other definitions also add focus to the role of actors in producing discourse and the context of discourse (Schmidt, 2008). Even if different aspects of discourse could be highlighted, the common denominator for any discourse analysis is focus on the production of collective meaning systems. Second, the focus of discourse analysis is on the products of discourse. These products could be tied to the agents positions, knowledge practices and legitimation of political behavior and policies. So it's not only mapping, but also explanations of causes and consequences of political discourse (Lynggard, 2019, 12). Third, discourse analysis is about the structure and boundaries of discourse. So all in all, as described by Lynggard, a discourse analytical study "are devoted to the study of the development of the discursive structures and boundaries and their effect on actor positions, knowledge, authority and legitimacy in an area of social reality..." (Lynggard, 2009, 3).

So what does it mean that discourse analysis is critical? According to Fairclough (2012, cited in Lynggard, 2019,7) CDA is challenging current state and develop strategies for progression, and evaluates constructs against what is just and legitimate. This problem– driven approach often addresses specific critical empirical questions that challenges the state of affairs. To be critical could also mean gaining distance from the data, clarifying positioning of discourse participants and focus on continuous self-reflection (Reisigl & Wodak, 2017). But there is a lot of variation in the critical part of studies based on choice of research topic and critical aspiration.

CDA emphasizes the mutual constitutive relation between societal practices (context) and discursive practices (text) (Lynggard, 2019, 7). CDA does not have a unitary theoretical framework or methodology, but it could be viewed as a shared perspective including a range of approaches (Amoussou & Allagbe, 2018). The following principles are common for all the approaches of CDA: it addresses social problems, discourse constitutes society and culture, discourse is historical and through CDA the link between text and society is mediated (Huckin,

Andrus, & Clary-Lemon, 2012). Van Dijk's socio-cognitive approach the focus is on the social cognitions that are shared by social collectives (Van Dijk, 1993, 254), and Fairclough's socio-cultural approach focus on ideological effects and power relations between social classes or groups (Fairclough, 2001 cited in Amoussou & Allagbe, 2018). Wodak presents the Discourse-Historical Approach (DHA) as a form of CDA that focuses on the "...historical sources and the background of social and political fields in which discursive "events" are embedded" (Wodak, 2014, 3). DHA has a specific emphasis on identity construction, and the basic fundament of discourses of identity and difference are the discursive construction of 'us' and 'them' (Wodak, 2001, 73 in Aydin-Duzgit, 2014, 358). Ideologies shared by members of specific social groups functions as means of establishing and maintaining unequal power relations through discourse, either by hegemonic identity narratives or by "gate-keeping" (Wodak, 2014).

2.2 Method

This subchapter consists of an explanation of DHA method in practice and discursive strategies. We will further delve into the data and key concepts in a longitudinal study.

2.2.1 DHA in practice

The analytical apparatus of DHA consists of three main steps and is three-dimensional (Aydin-Duzgit, 2014, 358–359; Wodak, 2014). The first step outlines the main content of themes and discourses, and can be described as the "entry-level" analysis (Krzyzanowski, 2015). So, in this step I will do a content analysis examining occurrences of sentences with the words "media", "corruption" and "rule of law". This would give a first impression of how these discourse topics and subtopics evolve over time in the reports. In order to conduct a systematic content analysis, establishing a "codebook" is key. A codebook is a term for the words or phrases which will be looked more closely at/or analysed in the empirical material (Lynggaard, 2019, 57–58). These words have been because they the most prominent indicators in the EU´s discourse of Serbia and stabilization and association policy. In addition, they are also most salient in democratic theory, but more importantly they hold a particularly prominent place in the Copenhagen criteria (European Commission,

1993). As a part of this content analysis I will look at key characteristics and qualities in these sentences. How are the discourse topics and subtopics based on these words described, and how do the characteristics and qualities evolve over time?

In the second and third step, the so-called "in-depth" analysis (Kryzanowski, 2015), the focus is on analysing the discursive strategies and the linguistic means used by the discourse-setter to justify and legitimate the given portrayal in the reports (Wodak, 2014). A discursive strategy is a more or less intentional plan of practices adopted to achieve a particular social, political, psychological or linguistic goal (Reisigl & Wodak, 2017, 94). The third step explores the linguistic means that are used to realize the discursive strategies (Aydin-Duzgit, 2014). Linguistic means are examined as types, and the more specific, context-dependent linguistic realizations are examined as tokens (Reisigl & Wodak, 2017; Wodak, 2014).

Table 1 Discursive strategies, empirical questions and linguistic means (adapted from Reisigl & Wodak, 2017, 95; Wodak, 2014, 8; Aydin-Duzgit, 2014, 359)

Strategy and objectives	**Empirical questions**	**Examples of linguistic means**
Referential/ Nomination: discourse constructions of social actors, objects/ phenomena/events and processes/actions	How are persons, objects, phenomena/ events, processes and actions named and referred to linguistically?	• membership categorization • tropes • substitutions • metaphors • metonymies
Predication: discourse qualification of social actors, objects/ phenomena/events and processes/actions	What characteristics, qualities and features are attributed to social actors, objects, phenomena/events and processes?	• attributes • collocations • predicative nouns/adjectives • various other rhetorical figures
Argumentation: Justification and questioning of claims of truth and normative rightness	What arguments are employed in the discourse in question?	• topoi (formal or more contentrelated) • fallacies

Strategy and objectives	Empirical questions	Examples of linguistic means
Perspectivization, framing or discourse representation: positioning speaker's or writer's point of view and expressing involvement or distance	From what perspective are these nominations, attributions and arguments expressed?	• deictics • direct, indirect or free indirect speech • quotation marks, discourse markers/particles metaphors
Intensification/ mitigation: Modifying (intensifying or mitigating) the illocutionary force and thus the epistemic or deontic status of utterances	Are the respective utterances articulated overtly; are they intensified or mitigated?	• diminutives or augmentatives • (modal) particles, tag questions, subjunctive, • hesitations, vague expressions, etc. • indirect speech acts (e.g., question instead of assertion) • verbs of saying, feeling, thinking

By using the empirical questions shown in Table 1, it is possible to analyse in more detail the discursive strategies and the angle used in expressions, and if there are certain linguistic means that are used to realize the strategies. Also, to look at if and how elements in the discourse are reinforced or mitigated over time. As shown in Table 1, there are arrays of linguistic-analytical means that could be used examining different aspects of discursive representations. The systems of signification (i.e, metaphors, predicates) that are applied in texts are useful in tracing how subject identities are constructed though discourse (Aydin-Duzgit, 2014).

In addition to topics, discursive strategies and linguistic means in a text, DHA also involves the study of intertextual and interdiscursive relationships, extralinguistic social or sociological variables, the history of an organization or institution, and situational frames (Reisigl & Wodak, 2017, 90). These four levels of study show that context is an inherent concept in DHA and contributes to it's principle of triangulation. The historical orientation allows reconstruction of how

recontextualization functions as an important process linking texts and discourses intertextually and interdiscursively over time (Reisigl & Wodak, 2017, 95).

The strengths of DHA includes its interdisciplinary orientation, the principle of triangulation, the historical analysis and the focus on practical application of results (Reisigl & Wodak, 2017). The historical analysis allows the focus on diachronic reconstruction and explanations of discursive change (Reisigl & Wodak, 2017, 120).

2.2.2 Data: Progress Reports

The empirical evidence in this article builds on the annual progress reports on the Republic of Serbia from 2010 up until 2021. During this period the Commission published 11 reports. They did not publish any report in 2017, but both the 2016 and the 2018 report covers the missed period. These reports are a set of documents summarising and evaluating the current status and progress achieved by the respective countries in the accession process (Universität Duisburg-Essen: Institut für Politikwissenschaft, 2021).

For the most part the annual reports are structured in same way. A typical progress report on Serbia consists of five main chapters, with chapter five being the most extensive chapter. This is where they evaluate the process in all of the different political criteria. In terms of length, they have grown substantially from 2010 (59 pages) to 2021 (135 pages).

To conduct this critical discourse analysis, we have used the ATLAS.ti research tool. ATLAS.ti is a tool which lets the user locate, code and annotate findings in data material (ATLAS.ti). Computer-assisted text analysis is usually used when the researcher has a substantial amount of data to handle. These tools are being used for the purpose of mapping out what the discourse is about (see step one in chap. 2.1). It involves identifying themes, word categories and possibly relationships between categories observed in the empirical material (Lynggaard, 2019, 57). What is common for computer-assisted text analysis is that it can be used to supply the content analysis with numerical data and descriptive statistics about the research and present findings in a visual way. So, in essence what computer assisted analysis does is that it assists the researcher in conducting the analysis (Lynggaard, 2019, 58).

When it comes to using documents as data material, Lynggaard (2019) classifies documents as being the most suitable for studying dis-

course over time. The progress reports can be characterised as a type of formal document, with a language very typical in the genre of EU-documents. The strength using EU-documents as data is the fact that they are typically "low-cost" data, in terms of their availability (internet) (Lynggaard, 2019, 51).

2.2.3 Longitudinal Study

This article can be characterised as qualitative longitudinal research based on the nature of CDA and DHA. For this research I use an inductive and explorative approach driven by the empirical data (Tjora, 2017, 259).

Time is a key factor in understanding and explaining political outcomes from the perspective of discourse analysis for at least two reasons: first, it gives us a discursive explanation of political outcomes, and secondly, the study of longer periods of times allows for temporal comparisons (Lynggaard, 2019, 31). Because we are studying a phenomenon over a longer period of time, we can characterise this study as a longitudinal study. Longitudinal studies offer multiple benefits in the field of political science and other scientific fields because they can highlight the development of policies or in this case identify how discourse has changed over time. These studies can uncover process and examine if there is continuity or change in the discourse (Neale, 2016; Lynggaard, 2019).

3 DECONSTRUCTING THE EUROPEAN COMMISSION´S DISCOURSE ON SERBIA

3.1 Rule of Law

Rule of law is an integral part of democracy and with that, also one of the core principles of the European Union. Rule of law can in its most basic form be defined as the mechanism or the process that supports equality of all citizens before the law. This mechanism secures a nonarbitrary form of government and more generally prevents the arbitrary use of power (Choi, 2019). When it comes to the European Union, Rule of law is enshrined in Art. 2 of the Treaty on European Union (European Commission, 1993). The rule of law is a legally binding constitutional principle, which is unanimously recognised as one

of the founding principles inherent in all the constitutional systems of the Member States of the EU and the Council of Europe (European Commission, 2014, 1). The ability to control the power of the political and economic elites is one of the key features of the rule of law. In this regard, strengthening the rule of law is also fundamentally linked to the fight against corruption (Kmezic, 2019, 3).

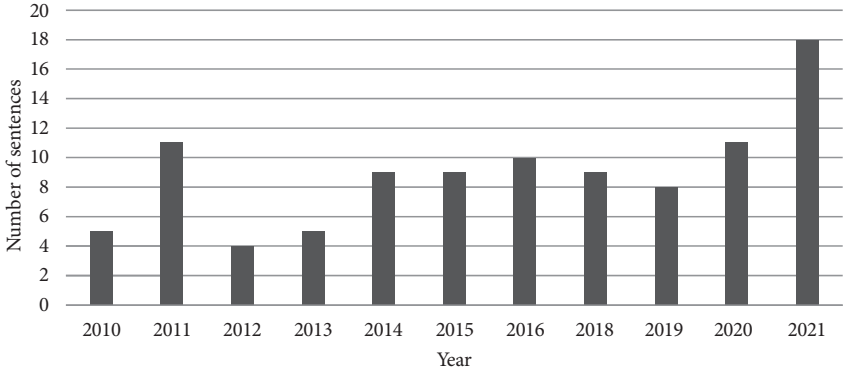

Figure 1. Rule of law: Sentences using the word pr. year

Figure 1 shows how often the word "rule of law" has been used in sentences in the yearly reports. It seems to be a topic of stable attention in the reports, but in the last year we can see a substantial increase in sentences which mentions the word "rule of law". This seems to be due to increased activity on EU related reforms in 2021.

In 2006, Serbia took its first steps into bringing its level of rule of law up to a European standard with its new constitution. In the progress reports the constitution is depicted as a Constitution that is largely in line with European standards and that it lays down the necessary principles for a parliamentary democracy based on the rule of law and the separation of powers (European Commission, 2011, 8, 9). However, implementing the laws in the new Constitution[1] has taken some time. For example, the parliament adopted in 2010 the Law on the national assembly[2]. This law was required by the 2006 Constitution, that established parliamentary budgetary autonomy through a separate budget as opposed to the previous practice of government-

[1] "Official Gazette of Republic of Serbia", no. 98/2006, 115/2021.

[2] "Official Gazette of Republic of Serbia", no. 9/2010.

-decided allocations (European Commission, 2010, 6). In the 2012 report the Commission stated this:

> "Key laws are in place, but the rule of law remains weak" – (European Commmssion, 2012, 27).

The discourse regarding the rule of law is largely characterized by two subtopics: firstly, how the weakness in the rule of law hampers the development in the private sector. This concern by the Commission has been a prominent part of the discourse revolving around the rule of law. In fact, many of the same statements are literally repeated across several years. This means that the progress reports reuse a lot of their statements, and this can be seen in the quotes below:

> "The private sector is underdeveloped and hampered by weaknesses in the rule of law" – (European Commission, 2015, 24; European Commission, 2016, 25)
>
> "The private sector is underdeveloped and hampered by weaknesses in the rule of law and the enforcement of fair competition" – (European Commission, 2018, 4; European Commission, 2020, 54; European Commission, 2021, 58)

Another subtopic that emerges and has been prominent from 2013 and up until 2021 is how the state has a strong footprint in the economy and how this affects the private sector. The commission describes in the 2013 report that the private sector is weak and unprotected as the rule of law is not systematically observed (European Commission, 2013, 19). Additionally, we see that this discourse again that the Commission repeats itself and comes across with the same message again and again.

> "The state retains a strong footprint in the economy and the private sector is underdeveloped and hampered by weaknesses in the rule of law and in the enforcement of fair competition" – (European Commission, 2019, 4; European Commission, 2020, 54; European Commission, 2021, 58)

In the second subtopic the Commissions argument is put on Serbia´s progress. We see in the discourse that the Commission is constantly pushing for Serbia to speed up the process and that the pace of the negotiations is dependent on their progress on the reforms on rule of law.

> "The overall pace of negotiations will continue to depend on Serbia's progress in reforms and in particular on a more intense pace of reforms on rule of law and in the normalisation of its relations with Kosovo" – (European Commission, 2018, 3; European Commission, 2020, 4)

And it seems like Serbia finally put rule of law as its key priority in 2021, and future reports will show if adoption leads to implementation.

> "The government prioritised EU-related reforms in the first half of 2021 and made the rule of law agenda one of its key priorities and fields of action" – (European Commission, 2021, 11)

As the progress reports both evaluate progress and focus on challenges, there is a clear use of predicative strategies in the reports. The progress on rule of law is described through the use of the predicative adjective "weak" and the predicative noun "weakness". These characteristics are repeated each year, and as shown above whole sentences are repeated in several reports. Also the description of private sector as "underdeveloped" assesses predicative qualities, and has been stated the last four years. This shows a high degree of intertextuality between the yearly reports, both in the arguments, qualities and use of sentences. The perspectivization used by the Commission is characterized by formal and indirect language, even when the goal is to evaluate and give feedback to Serbia. In this field of action (genre) it is necessary to follow diplomatic manners, but there is some use of metaphors in the latest years that could be interpreted as rather direct. The description of a state with a strong "footprint" in the economy and enterprises that experiences "shadow economy" emphasizes and assess qualities without using explicit comparisons. The referential strategy uses formal names like Serbia and The Commission, and the report also refer to other Member states. In this way, the discourse-setter wants to be formal and minimize the creation of in-group or out-group descriptions.

An important part of the reports is to set out proposals for the way forward, and we can see that there has been more focus on the pace of the rule of law reforms in last four years (quote on page 10). The adjectives "more intense" are used to describe the needed pace in reforms, and they illustrate the use of an intensification strategy in the period 2018–2021. The arguments used regarding the role of the state and underdevelopment of private sector are present during the whole period, but on the second topic the focus on pace of reforms has emerged in the last four years.

3.2 Corruption

Transparency International defines corruption as the abuse of entrusted power for private gain (Transparency International, 2022). Corruption undermines the rule of law and is a result of misuse of power performed by economic and political elites. The fight against corruption has a central place in the EUs internal and external policies (Office of the High Commissioner for Human Rights, 2020, 1). The relationship between democracy and corruption is a complex one. However, they are closely interweaved. Eliska Drapalova in Transparency International 2019, describes the relationship like this:

> "When democracy deteriorates, we can almost certainly expect an increase in corruption due to the erosion of institutional checks and balances, independence of courts and frequent restriction of the space for civil society actions and political rights of citizens" (Eliska Drapalova, 2019, 1).

Inside the EU the fight against corruption is prominent. In fact, 37% of EU businesses consider corruption to be a problem for them when doing business (Eurobarometer, 2017). As a part of a study carried out by the United Nations Office on Drugs (UNDOC) and Crime in 2011: Serbian citizens rank corruption as the third most important problem facing their country today, after unemployment and poverty/ low standard of living (UNODC, 2011). This shows how prominent corruption has been in Serbia, but what EU and EU-affiliated anti-corruption laws and policies has been implemented and adopted since?

In order to fight corruption EU has adopted several law and policies. The Commission has been given a political mandate to measure efforts in the fight against corruption and to develop a comprehensive EU anti-corruption policy, in close cooperation with the Council of Europe Group of States against Corruption (GRECO) (Directorate-General for Migration and Home Affairs).

One of the most important anti-corruption legislations that has been implemented is aligning Serbia with the GRECO recommendations. Additionally, Serbia established its own Anti-Corruption Agency in 2010 (European Commission, 2010, 11). The Serbian government said that that they were going to implement a national strategy for the fight against corruption, however as we will see in the discourse below, it has been going very slow. This national strategy had the timeframe for 2013–2018 (European Commission, 2014).

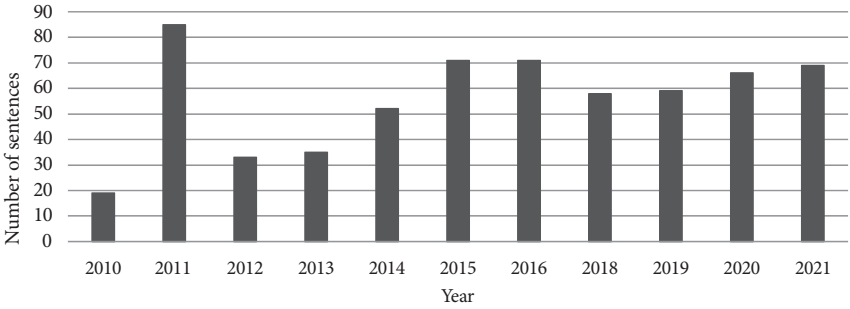

Figure 2. Corruption: Sentences using the word pr. year

Figure 2 shows how often the word "corruption" has been used in sentences in the yearly reports. Sentences containing "corruption" got a substantial increase in 2011, followed by a decrease in the following two years, but has been on a stable level since. The peak in 2011 seems to be partly due to the establishment of the Anti-Corruption Agency.

The discourse is subject to different subtopics. Firstly, a clear part of the discourse is the fact that the progress reports points out how big of a problem the corruption is in the Serbian society. This is a recurring statement annually from 2010 up until 2019. Below is an example of a quote from 2011 and 2018 with the exact phrasing.

> "Corruption remains prevalent in many areas and continues to be a serious problem" – (European Commission, 2011, 38; European Commission, 2018, 4)

Secondly, the discourse revolves around the implementation of the laws and strategies to tackle the prominent impact corruption has on the Serbian society. The common trait revolving around this subtopic is characterized by how little change the Commission has seen. This includes; little follow up and indictments on high-profile corruption cases, experiencing delay in the adaptation on laws on the Anti-Corruption Agency (European Commission, 2012; European Commission, 2016; European Commission, 2018). In terms of linguistic means we see that the progress reports contain a very clear language. Words like "expired" and "no measurable impact" give us a clear indication how the Commission sees the situation.

> "The previous national strategy for the fight against corruption for period 2013–2018 and its accompanying action plan expired" – (European Commission, 2021, 31)

> "There is as yet no measurable impact of anti-corruption reforms" – (European Commission, 2018, p. 19)

The third subtopic can be seen as an extension of the previous one, in terms of that its revolving around the institutions set to tackle corruption. We can see that a that the Anti-Corruption Agency plays a prominent role in this. The Commission can see the progress and increased activity in the agency, and that period of time can be described with a sense of positivity (European Commission, 2012, 12). However, in between 2015 and 2018 a fundamental shift occurs. What comes forward is that new laws intended to strengthen the Agency is pending and that it faces obstacles in playing its role effectively in the form of lack of legal access to databases and records of other state bodies. On top of this, the Commission uncovers that the government does not follow up on and act on the recommendations carried out by the Anti-Corruption Council (European Commission, 2016, 16). Another trait in the description of the institutions is that they are understaffed. This is something that is repeated during 2019 to 2021.

> "The Higher Court in Belgrade dealing with corruption is also understaffed" – (European Commission, 2021, 30)
>
> "The Prosecutor's Office for Organised Crime, which has jurisdiction over high-level corruption cases, is understaffed" – (European Commission, 2020, 28; European Commission, 2021, 30)

The first two subtopics mentioned does not change much over time, and can be portrayed as stable, but the third subtopic emerged in the later years.

When we dive into more details about discursive strategies and linguistic means used on corruption subtopics, the most visible characteristic is the combination of rather vague expressions and the more direct ones shown in the quotations above. In the six latest reports this phrase has been regularly used; "Serbia has some level of preparation in the fight against corruption". This is a rather vague and passive statement and is kind of strange combined with utterances about "serious problems" and "no measurable impact". The use of both mitigating and intensification strategies at the same time creates an unclear message, and also affect the discourse-setter's perspective with both expressing distance and involvement. It seems to be a challenge both to motivate for further work, and also at the same time be direct about current status. There are a great deal of interdiscursivity on this topic, and we can

see that numerous recommendations, plans and evaluations involves other actors like GRECO, Anti-Corruption Agency, Anti– Corruption Council, Agency for Prevention of Corruption and the Ministry of Justice and Public Administration. The involvement of all these actors in the prevention of corruption shows that implementation is complex, and that it is challenging to get the actors to work together.

In the last two years the reports have explicitly emphasized that Serbia had a negative development on the corruption perception index compiled by Transparency International as their rank has changed from 87th in 2018 to 94th in 2020. This negative development is used as a qualitative attribution in the predicative discursive strategy, and could also be said to intensificate the message written in the 2021 report that "Serbia should increase its efforts in addressing these shortcomings and step up the prevention and repression of corruption" (European Commission, 2021, 26).

3.3 Media

The media sector, consisting of film, television broadcasting, music, publishing and related advertisement plays a vital role in our society with providing the public with information and communication. Freedom of speech and the ability to express your thoughts and present your views without any repercussions can be described as the cornerstone of a functional democracy. Freedom of speech is one of EU´s core values and is stated in Art. 11 of the European Convention on Human Rights (European Union Agency for Fundamental Rights). The Union has an interest in addressing media freedom issues in Serbia for both normative and self-interested reasons. In other words, this is an essential topic for the EU because it is so closely related to its core values (Bajic & Zweers, 2020, 1).

The EU acquis on the information society and media aims to create a transparent, predictable and effective regulatory framework for audiovisual media services in line with European standards (European Commission, 2011, 72). In order to achieve this, Serbia has adopted and tried to implement several laws and strategies. In September 2011 the Strategy for the Development of the Media Sector (media strategy) was adopted. A package of three laws implementing the 2011 Serbian media strategy with the goal of further aligning Serbia's legal framework with the EU acquis was adopted in 2014 (European Commission, 2014, 29).

The Serbian government also adopted the Strategy for the Development of Public Information System for the period 2020–2025. This new strategy was drafted by the EU and OSCE, in cooperation with the Norwegian Embassy in Belgrade (The Government of the Republic of Serbia, 2020).

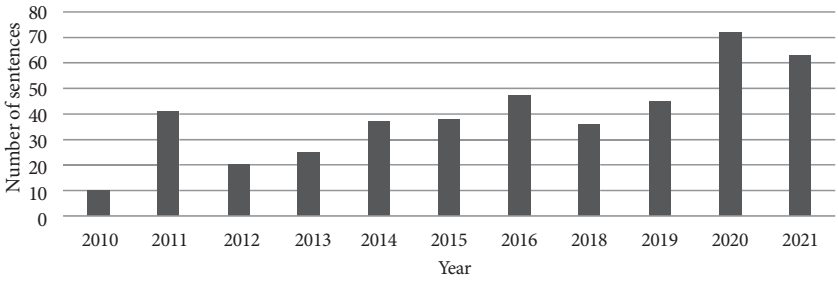

Figure 3. Media: Sentences using the word pr. Year

Figure 3 shows how often the word "media" has been used in sentences in the yearly reports. It seems to be a topic of increased attention in the reports, especially the last two years, where we can see a substantial increase in sentences which mention the word "media". This increase seems to be partly due to focus on the new media strategy and its implementation, and the focus on hate speech as a new topic in the discourse.

The discourse revolving media in Serbia is characterized by different sub-topics. Firstly, the report addresses the lack of transparency in the ownership structures in the media sector as a theme that repeats itself across all the progress reports. Prior to 2012 the media outlets were highly government funded and could be labelled as loyal to the government. This issue has been addressed in both the media strategy from 2011 and in the Strategy for the Development of Public Information System for the period 2020–2025 (European Commission, 2019; The Government of the Republic of Serbia, 2020). The problematic aspects with this are that it gives less media pluralism. This is reflected in reports in the years of election in Serbia. As comments on and the parliamentary elections in 2016 and 2020, the progress report stated:

> "In relation to the election campaign, biased media coverage, undue advantage taken by the incumbent parties and a blurring of the distinction between state and party activities caused distortions in the reporting of the campaign" – (European Commission, 2016, 61)

> "Voter choice was limited by the governing party's overwhelming advantage and the promotion of government policies by most major media outlets" – (European Commission, 2020, 9)

The reports also describe a working climate in the media sector where journalists are being encouraged to self-censorship, which again leads to a media consisting of likeminded opinions. The result of this situation leads to less pluralism in the media sector. The concern regarding self-censorship comes across almost all of the annual progress reports and is being tied together with the political and economic influence over the media by the government (European Commission, 2016, 61). In fact, this exact sentence is repeated in both the 2020 and the 2021 report:

> "Political and economic influence over the media continues to be a source of concern" – (European Commission, 2020, 35; European Commission, 2021, 36)

The 2020 progress report indicates that this is the biggest problem revolving the issue around media pluralism in Serbia.

> "ODIHR (Office for Democratic Institutions and Human Rights) also found that most TV channels with national coverage and newspapers promoted the government policy and that the few media outlets which offered alternative views had limited outreach and provided no effective counterbalance, which compromised the diversity of political views available through traditional media, through which most voters receive information" – (European Commission, 2020, 5)

Secondly, the discourse revolves around the implementation of the laws and strategies mentioned above. For example, a common phrase that appears in the progress reports from 2012 up until 2016 is that the implementation of the 2011 media strategy needs to be stepped up. This indicates that the problems that the new media strategy in 2011 were set out to handle did not fulfil its role. We can see this clearly in the discourse:

> "There was little progress as regards audiovisual policy, particularly in the implementation of the Media Strategy which aims at aligning with the EU acquis in this area" – (European Commssion, 2012, 37)

> "The three new media laws are being implemented, but their impact and effectiveness in terms of achieving the goals of the 2011 Serbian media strategy remain to be seen" – (European Commission, 2015, 55)

The third sub-topic that emerges is something we see being more and more prominent in the later years from 2018 to 2021. The tolerance for hate speech and discriminatory terminology in the media has been an issue the reports have mentioned. The issue with hate speech can be linked to a further polarisation of the public discourse. The 2019 report highlights that it is human rights defenders, together with LGBTI persons and national minorities that face hate speech and discriminatory terminology.

> "Hate speech and discriminatory terminology are often used and tolerated in the media and are rarely tackled by regulatory authorities or prosecutors" – (European Commission, 2019, 27; European Commission, 2020, 36; European Commission, 2021, 36)

The first two subtopics do not change much over time, and can be portrayed as stable, but the third subtopic emerged in the later years. However, it can be interesting to look at some of the linguistic characteristics the subtopics contain. As we can see above, the examples show the arguments presented by the discourse-setter, but also that they are repeated. If we look more closely at a word like "progress", it doesn't mean anything alone, so we need to look at the connotations before it. Surprisingly enough, there is one positive connotation (good) in front of progress in sentences containing "media" across all the progress reports (European Commission, 2015). The rest were characterized by "little, some, limited and no". These came across annually from 2010 up until 2021. And in the 2021 report "limited progress" was repeated twice in the section of media, referring to limited progress in adopting the new media plan to improve freedom of expression in the country (European Commission, 2021). This is a common trait of the newer reports. We see that the discourse repeats itself in terms of sub-topics and themes but also some sentences come across repeatedly over time. There is overall more repetition in the discourse in the last years, 2018–2021.

When we look further into the discursive strategies and linguistic means used on media subtopics, we can see use of rhetorical devices with positive flag words like "freedom", "transparent" and "pluralism" and negative stigma words like "hate speech", "threats" and "attacks".

This is more widely applied the last four years. There is more variation in the language use in the evaluation of media than for rule of law and corruption, and not so repetitive use of same sentences and arguments.

When we look at proposals for the way forward we can see that in 2021 there was an overtly increased focus on the lack of implementation of media strategy and action plans.

> "In addressing the persisting shortcomings, Serbia should implement, without delays, its media strategy and action plan in a transparent and inclusive manner, respecting the letter and spirit of the objectives of that strategy, ..." – (European Commission, 2021, 34)

This clear use of direct speech as in "without delays" shows an intensification strategy and highlights the expectation that Serbia needs to implement both the media strategy and action plan as soon as possible. The media situation in Serbia as portrayed in the progress reports is overall characterized by the Serbian authorities´ unwillingness and/or inability to implement the necessary reforms in order to meet the requirements set out in the accession criteria.

3.4 Summary of analysis

This analysis has focused on the discourse on three central topics in the EU progress reports: rule of law, corruption and media development. These topics are not independent of each other, and the rule of law is also a foundation for discourse topics on both corruption and media.

The overall impression is that the discourse in the progress reports are repetitive and slowly changing for all three topics. The most interesting part of analysing all the 1151 sentences in the 11 reports is to see the high degree of intertextuality between the yearly reports. Both subtopics and main arguments are repeated, and it is even a lot of "copy and paste" of whole sentences from year to year. The high degree of intertextuality makes it difficult to spot changes over time, but the in-depth analysis with focus on discursive strategies and linguistic means uncovers more detailed nuances.

For rule of law, the use of discursive strategies shows mostly predicative elements with use of adjectives and metaphors in a rather formal manner. In the last four years we can notice use of an intensi-

fication strategy in describing the need for a "more intense" pace of reforms on rule of law. For corruption, we can see a clear lack of follow-up of the established institutions and recommendations, but the combination of both mitigating and intensification strategies gives unclear messages in the discourse. Use of objective criteria, like the corruption perception index, is introduced the last two years, and is a new way of intensificating the message about the negative development and the need for increased efforts. For Media much of the same development can be spotted, lack of implementation, more repetitive discourse and focus on the "limited progress".

4 CONCLUSIONS

The topic for this article is the European Commission's discourse on Serbia's EU accession process in the period from 2010 – 2021, with regards to rule of law, corruption and media development. The research question was: how has this discourse evolved during the said period, and to what extent does it feature patterns of continuity and/or change? To answer these two questions we have performed a CDA using DHA to analyse the Commission's annual progress reports. This gave me the possibility to both do a content analysis on topics and subtopics, and a more in-depth analysis into the discursive strategies and linguistic means carried out in the progress reports. As a part of DHA it's important to also look at the broader institutional and social context in which the discourse is constructed. Due to limitations in scope of this thesis, I don't have the possibility to do a comprehensive analysis of the important contextual factors and will briefly include some reflections on this in my final conclusions.

The EC's discourse on rule of law, corruption and media development evolved in the period from 2010 – 2011 the discourse is characterized by a lot of the same topics and subtopics throughout the period. The same challenges seem unresolved, and still only 18 of 35 chapters of the acquis has been opened – and only 2 provisionally closed (European Commission). The continuous challenge of adoption and implementation in Serbia seems to be persistent on all three topics, and that leads to a repetitive evaluation focusing on predicative characteristics about the same problems and intensified feedbacks suggesting Serbia should speed up. For rule of law we see a clear repetition

with the lack of progress and the fact that even tough key laws are in place, the rule of law is still weak. As for Corruption the discourse is repetitive but the discourse addresses a new problem with an Anti-Corruption Agency unable to perform its job effectively. The media situation in Serbia as portrayed in the progress reports is overall characterized by the Serbian authorities´ unwillingness and/or inability to implement the necessary reforms in order to meet the requirements set out in the accession criteria. However, new subtopics emerge with the prominent place hate-speech and discriminatory terminology has in the media.

When it comes to the question of to what extent the discourse feature patterns of continuity and/or change we see that the discourse is in fact characterized by both continuity and change.

As noted by Lynggard (2019, 32) a discourse can at any point in time be described by both continuity and change. When the exact same sentence is used in yearly reports, the context for discourse has additionally changed over time. In addition to analyse the text in the reports, the text needs to be interpreted in relation to the context where it is made and used. Discursive ruptures can occur through dynamics internal to a specific discourse, or could come about when different discourses affect each other or merge into a new discourse (Lynggard, 2019, 33).

The results of our analysis of the progress reports shows patterns of both continuity and change. The topics and subtopics related to rule of law, corruption and media represent large patterns of continuity. Some new topics, mostly negative ones, have arisen during the period, but the criteria and form of evaluation seems stable. Reports are more voluminous in later years with high degree of intertextuality to former reports, and it seems like the strategy is to continue with more of the same evaluative approach. At the same time we can also see a clear pattern of change in the discursive strategies and linguistic means. The lack of progress seems to have provoked an intensification strategy that includes more direct language, use of external benchmarks and predicative adjectives focusing on the need for action. This change can be observed most clearly in the last four years. Still we can see a referential tone that's formal and promotes respect for Serbia as an EU applicant.

Earlier research has used the description «autopilot mode» on the enlargement process towards the Western Balkans (Kmezic, 2015). The annual reports towards Serbia seem to have elements of being in "autopilot mode", the same arguments and sentences is repeated even if the

context has changed substantially over the years. At the domestic level, the current President Alexandar Vucic won the elections in 2012 on the basis of promising an intensification in the integration process towards the EU. However, as this article has uncovered, Serbia has adopted key laws that look good on paper but the actual effect of them remains to be seen. At the same time with new external actors coming into the WB, the newly created close ties with China and the strengthened everlasting ties with Russia and Putin, he has been able to balance these relations in order to get the most out of them. As noted earlier Vucic has been accused of "playing" with three different "faces" or "cards" (Economides, 2020, 8). At the same time, the Democracy Index issued by Freedom House recorded the lowest grade in 2022 since 2006. Additionally, we can see that Freedom House brings up the same problems regarding transparency, media pluralism, ineffective safeguards against corruption and independence of the judiciary is partly compromised by political influence in their country report (Freedom House, 2022).

So what does this development tell us about the power relations and the Commission's position as a gatekeeper? The continuing "autopilot mode", even if we can see a clear intensification strategy the last four years, could reflect that the Commission continue the top-down institutional approach evaluating accession criteria, while Serbia seems to have other alternatives to EU membership and "pretend" to be reformed in order to advance in the accession process (Kmezic, 2015). It seems like the current situation in Serbia needs a new and more transformative approach that could motivate and give new a momentum to their accession process. And if the Commission's old gatekeeper role doesn't work anymore and the discourse doesn't contribute to any progress – the progress reports as an evaluative mechanism needs to be changed.

As for future research it would be very insightful to perform CDA on the rise of authoritarianism in Serbia. This could give us an insightful understanding on how the rise of authoritarianism has influenced the accession process, and also gives us the perspective from the accession state and not only the EU. Other future studies which could have been interesting to see is a comparative study between candidate countries. For example, a CDA/DHA study on Serbia, North Macedonia and Bosnia & Herzegovina would be very interesting. This study could uncover not only how the discourse have evolved in the respective countries but also shown us if or how the EUs discursive strategies differ in-between the WB-states.

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ARTICLE 356 OF THE INDIAN CONSTITUTION: BOON OR A CURSE FOR THE FEDERAL SETUP?

The Constitution of India follows a federal setup. There are clearly elaborated roles, when it comes to the legislative powers of the Central and state governments, which have been stated in the seventh schedule of the Constitution. Article 356 is a device through which, in exceptional and emergency circumstances, the Central government can take over the legislative and executive roles of a state government for a limited time. In India, there exists a multi-party system and there are different parties in states and center. The abuse of Article 356 by the political party at the center is not a shocking event and instances of the same have been observed at various times in India. Because of the ambiguity and subjectivity of the language of the said Article, the misuse becomes possible. This work is a doctrinal research based on case analysis of the Supreme Court of India about the said misuse.

Keywords: *Article 356 of the Indian Constitution, Center states relations, Indian Constitution, President's rule, State emergency.*

1. INTRODUCTION

Article 356[1] states that "If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may Proclaim emergency in a state". When the emergency is proclaimed under the said article, the elected government is dismissed for that time being, the legislature also goes in suspended animation, and all the governance roles are taken up by the Central government

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[1] Article 356, The Constitution of India, 1950, provisions in case of failure of constitutional machinery in the state.

through the President. In practice, the President of India is nominally the head of state, and the real power lies with the central government headed by the Prime Minister (Desta 1993, 16). The administration really is done as per his or her vision.

The words such as 'otherwise' and 'failure of constitutional machinery' have a very broad interpretation and therefore become the means of misapplication. The Article does not define the true meaning of the term failure of constitutional machinery as to what will be such a failure that the jurisdiction of the State can be encroached.[2] Hence, it leaves an area to be interpreted by the Government in the center. Such an unclear use of expression under Article 356, becomes the subject of chief misuse by many political parties and leaves a room for gratification of their own political interests which are cited as the reasons to impose emergency in a State though.

It cannot be ignored that there have been several cases of the unnecessary use of Article 356 since its incorporation. Also, there is the need to implement it with utmost care (Seervai 2008, 286). The research work with the adoption of the doctrinal methodology will embark on to find the real intentions of the makers of the Indian Constitution regarding the usages of Article 356 as discussed in the Constituent Assembly during framing the constitutional provisions and the recent political situations which arose due to misuses. It will also conduct the case analysis of the judgments given by the Supreme Court of India related to the misuse of the mentioned Article.

2. ARTICLE 356 AND IT'S NEED TO ACCOMMODATE THE FEDERAL IDEA

2.1. Purpose of incorporating Article 356

The main aim of the Article 356 was to preserve the status of the state by protecting it from any breakdown of law and order in case of some grave constitutional violation which leads to the ill functioning of the state's mechanism. Due to the liberal interpretation of the Article, which is left to the union government, this fundamental utility of the article is disturbed (Kumar 2012, 12). Some scholars believe that the Article 356 must be scrapped out of the Indian Constitution, but they

[2] This model is used in: Gautham 2019, 28.

fail to realize that deleting the said article will make the states more autonomous which will lead to disturbance in the federal setup suited for the Country. The probable remedy can be the amendment in the text of Article 356 and creation of a specific definition of phrases: 'otherwise' and 'failure of constitutional machinery', so that its scope is fixed.

The phenomenon that was supposed to be used in the oddest cases has become a mechanism to infringe upon the domain of state governments. It has become one of the shadowy sides of Indian politics (Heywood 2007, 167). President's rule must always be the last refuge and prior warnings must be issued. Although, there is a central tilt in the Indian style of federalism still the Central as well as the State governments are kept supreme in their respective area, and none can claim dominance over the other as held in *K. Lakshminarayanan v. Union of India*[3].

Ever since Article 356 has come into existence, it has been a matter of much discussion in India. The roots of this provision go back to the Government of India Act of 1935, Section 93. When the provision was discussed in the Constituent Assembly, many members were against its incorporation in the text of the Indian Constitution. They were of the opinion that, the said Article may result in the union government having undue dominance on the state and it will be able to encroach upon the law-making power of the state mainly due to the term 'otherwise' in the text of the Article. (The model used in Hussain 2012, 109). Shri Bhimrao Ambedkar, who headed the drafting committee of the Constitution of India, on the other hand, stated that "merely because this provision can be misused, it doesn't mean that it is not needed for the wellbeing of the citizens."[4] Although, it is true that it can be subjected to misuse, it is still important for it to be incorporated, and the idea is it must be used in the rarest of the rare cases.

2.2. Text of Article 356 and 365 of the Indian Constitution

"Provisions in case of failure of constitutional machinery in State:

(1) *If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in ac-*

[3] WP No. 28890 of 2017.

[4] Constitutional Assembly Debates 1949, Vol IX, p. 87, Lok Sabha Secretariat, Govt. of India.

cordance with the provisions of this Constitution, the President may by Proclamation:

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State;

(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;

(c) make such incidental and consequential provisions as appear to the president to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority in the State Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts

(2) Any such Proclamation may be revoked or varied by a subsequent Proclamation."

Text of Article 365: "Effect of failure to comply with, or to give effect to, directions given by the Union: Where any State has failed to comply with or to give effect to any directions given in the exercise of the executive power of the under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution."

Article 365 of the Constitution of India operates as a supplementary Article of 356, as it clarifies at least one condition of imposition of emergency in the state. It says that if there is a failure in complying with the directions given by the central government to the state, the President can make an opinion that the situation of the failure of constitutional machinery has arisen. One example can be: If a political party in the state of West Bengal, which is in opposition to the union government is elected in the state. The opinion of the leaders of that political party is such that the internal disturbances have not escalated enough to call for an emergency. The will of the center to enforce emergency can still be imposed upon that state (Dua 1979, 42).

2.3. Indian Federal setup and the requirement of the Article

After a year of the enforcement of the Constitution, for the first time, the Article was implemented, and it was a great example of misuse in 1951. Prime Minister Jawahar Lal Nehru led congress government in the union dismissed the government in the state of Punjab which was in majority and there was no real failure of the constitutional machinery (The model used in Daniyal 2016, 18). In the year 1954, in Andhra Pradesh, a communist government was formed and overthrown by the central government using Article 356. Therefore, it is quite evident that, since the inception, this article has been a tool in the hands of central government to overthrow the unfavorable governments in the states. Shrimati Indira Gandhi has also used the provisions of National emergency and state emergencies for political gains many times (Chandra 2017, 29). The Indian Federal set-up has been such that there exists a relationship of cooperation between the state and the union government, the reason is to maintain a good governance. In the case of '*Keshvananda Bharti v. State of Kerala*'[5] it was held by the Honorable Supreme Court of India that the Federal structure is part of the basic structure of the Indian Constitution, which is unamendable.

The makers of the Constitution intended for the federal setup where there is no supremacy of the union. Although, there exists a central tilt in the Indian style of federal setup due to which this setup has been termed to be quasi federal, but that is so to transfer the legislative and executive roles to the union in difficult times (Wheare 1945, 72). The union government should always have the best interests of the citizens in mind. In the Constituent Assembly – the chairman of the Drafting Committee – Shri Bhimrao Ambedkar commented that "It will be noticed that the committee has used the term union instead of federation."[6] This language has been picked up by the British North America Act of 1867.[7] It was thought that it is better to call India a federation, instead of a union. India on the other hand, in a true sense, is a federation.

[5] AIR 1973 SC 1461 para 16.

[6] Constitutional Assembly Debates 1949, Vol I, p. 121, Lok Sabha Secretariat, Govt. of India.

[7] British North America Act, 1867, ss 1867, c. 3 (U.K.)

3. ESSENTIAL ATTRIBUTES OF THE ARTICLE

A particular wing of the government or a political party cannot dominate over others in India. The separation of powers as well as distribution of powers exists. The central government has supremacy over just a few matters, which shows that the Indian federal structure has a central tilt, e.g. the residuary power of law making is vested with the Parliament at the center.[8]

The matters enumerated in the third list of the seventh schedule of the Indian Constitution has the provision that both the state as well as union government can make laws regarding the entries mentioned in that lists. In case of any repugnancy between the laws made by the union and the state, the laws made by the union shall prevail.[9] Apart from this, in the case of emergency, whether national[10], financial[11] or due to the failure of constitutional machinery[12], the union government takes over the state's machinery, but there is no justification to use these powers arbitrarily.

The purpose of incorporation of Article 356 and 365 was that the central government is able to guard the states because in a culturally diversified country such as India, as some tensions, where the intervention of the central government is required, are bound to rise. The goal is also not to overthrow the elected government, but to support it. As stated in *Keshvananda Bharti's Case* since India is a federation, sabotaging the federal government would be an infringement of the basic structure of the constitution.

There are two vital components of the said Article; the first one is that the President of India can impose emergency in a particular state by placing reliance over the report of the Governor of that state and secondly, he can do that also if in the opinion of Council of Ministers, it is important to do so for the protection of that state. The interpreted meaning of the term 'failure of constitutional machinery' is that the state government has become incapable of carrying out the assigned functions in accordance with the Indian Constitution. The scope of the Article has not been, until now, defined entirely and pre-

[8] Article 248, The Constitution of India, 1950.
[9] Article 254, The Constitution of India, 1950.
[10] Article 354, The Constitution of India, 1950.
[11] Article 360, The Constitution of India, 1950.
[12] Article 356, The Constitution of India, 1950.

cisely – which makes it very wide and susceptible to subjective interpretations, depending on the facts of a particular situation (The model used in Siwach 1985, 161).

4. DOCTRINE OF PLEASURE IN RELATION TO THE ARTICLE

It must be noted that the Governor is the executive head of a State in India. He is appointed by the President by warrant under his hand and seal.[13] The executive power in a state shall be exercised by the Governor and the officers subordinate to him.[14] The powers of the Governor are similar to the powers of the Indian President. The Governor is also a constitutional post just as the President. He/she has a variety of duties which can broadly be classified as executive, legislative, financial, and judicial.

Some of these powers are discretionary under Article 163(1), where the Governor has to exercise his own prudence, which is absent in the case of the President. The discretionary powers of the Governor in a state are broader, in comparison to the powers of the President at the center. Article 164 provides that, "there shall be a Council of Ministers in each state with the Chief Minister as the head, to aid and advise the Governor in exercise his functions and the Governor should act on such aid and advice". However, wherever the Governor is needed to exercise the discretion, it will fall under the exception to the rule under Article 164. Also, the question of whether a matter falls within the Governor's discretion or not falls outside the purview of the power of judicial review of the higher courts. Under Article 356 the Governor also has the power to exercise his discretion regarding recommendation through a report to the President about the failure of the constitutional machinery in the state.

In each state a Governor holds his office by the pleasure of the President, even though he has a fixed term of five years. The pleasure of the President means that the President can also remove or transfer the Governor before his/her five-year term ends. The Doctrine of Pleasure has its origin in the English Law and first got recognized in

[13] Article 155, The Constitution of India, 1950.

[14] Article 154, The Constitution of India, 1950.

the case of *Dunn v. Queen.*[15] It was held that the public servants under the crown do not have any tenure but serve on the pleasure of the crown. The doctrine was also extended to India in the case of *Union of India v. Tulsiram Patel*[16], stating that all public servants hold the office *durante bene placito,* i.e. at the good pleasure of the Crown. If a person is a public servant his appointment can be canceled without giving of any reason if deemed fit.

There was a clear difference indicated between the colonial doctrine and the doctrine that was incorporated into the text of the Constitution, under Article 310, after India became independent. The distinction was drawn in the case of *B. P. Singhal v. Union of India.*[17] The Court observed that the nineteenth century was feudal, therefore the crown had unconstrained powers. Now in the democratic era, everything is governed by the rule of law, so the doctrine of pleasure shall not be taken as an authorization to act on one's own whims.

The judicial power to review the decision of the President in case of removal of the Governor is also limited. It was also settled by the bench in the *B. P. Singhal's* case that "As there is no need to assign reasons, any removal as a consequence of withdrawal of the pleasure will be assumed to be valid and will be open to only a limited judicial review. If the aggrieved person is able to demonstrate prima facie that his removal was either arbitrary, mala fide, capricious or whimsical, the court will call upon the Union Government to disclose to the court, the material upon which the President had taken the decision to withdraw the pleasure. If the Union Government does not disclose any reason, or if the reasons disclosed are found to be irrelevant, arbitrary, whimsical, or mala fide, the court will interfere. However, the court will not interfere merely on the ground that a different view is possible or that the material or reasons are insufficient."

So, the term of the Governor under the Indian Constitution depends on the pleasure of the President who works on the aid and advise of the Council of Ministers (as per the mandate under Article 74). The council of ministers belongs to the party in power. This suggests that, even the report of the Governor can be a means to establish the agendas of the party which is in power at the center, and it is quite easy to ensure that. Most of emergencies were imposed during the tenure of

[15] 1896 (1) QB 116.
[16] 1985 3 SCC 398.
[17] 2010 6 SCC 331.

Shrimati Indira Gandhi as the Prime Minister and ninety out of one hundred times, it was implemented over those states where the opposition government was in power.[18]

In the Twenty-first century, with numerous parties having distinct ideologies, the Governors are compelled to act more as an agent of the center. Particularly when the party in power at center and state are of opposite ideologies. They are forced to dance accordingly to the center's tune. They overlook their role as an impartial referee and misuse their powers to please their masters in the center. Due to all these ill happenings, in the case of *S. R. Bommai v. Union of India*, the Supreme Court has held that the courts have the authority to examine the report presented by the Governors.

5. JUDICIAL THOUGHT

In the case of *S.R. Bommai v. Union of India*, a very serious question was posed before the Supreme Court relating to the misuse of the provisions of Article 356 of the Constitution of India. The facts were that the Chief Minister of the state of Karnataka was dismissed, he was not given a chance to prove his majority in the house through the floor test. Later on, the President's rule was imposed. The Supreme Court stated the following: "generally the president's satisfaction is not questionable, but the governor's report can be examined to ascertain the grounds for the President's satisfaction." The court further held that "the President's satisfaction has to be based on objective material, that material may be available in the report sent to him by the Governor or otherwise or both from the report and other sources. Further, the objective material so available must indicate that the government of the State cannot be carried on in accordance with the provisions of the Constitution. Thus, the existence of the objective material showing that the government of the State cannot be carried on in accordance with the provisions of the Constitution is a condition precedent before the President issues the proclamation. Once such material is shown to exist, the satisfaction of the President based on the material is not open to question."[19] Also, "The power conferred by article 356 is a conditioned power; it is not an absolute power to be exercised in the discre-

[18] This model is used in: Venkath 2016, 5.

[19] 1994 3 SCC para 32.

tion of the President. The condition is the formation of satisfaction – subjective, no doubt, that a situation of the type contemplated by the clause has arisen. This satisfaction may be formed on the basis of the report of the Governor or on the basis of other information received by him, or both. The existence of relevant material is a pre-condition to the formation of satisfaction. The use of the word "may" indicates not only discretion but an obligation to consider the advisability and necessity of the action" which suggests the court's intention to declare that the power of the President under Article 356 is not an absolute power, it is subject to the provisions of the Indian Constitution. The position a President holds is a constitutional one, and he must adhere to the principles of the constitution and act accordingly.

It was further held that the Proclamation under clause (1) of Article356 is not immune to judicial review and the higher courts can strike down the Proclamation if it is found to be based on wholly irrelevant grounds or mala fide. The deletion of clause (5) [which was introduced by 38th (Amendment) Act, 1975] by the 44th (Amendment) Act, in 1978, clears the doubts on the reviewability of the decision of the President. When called upon, the Union of India has to produce the material on the basis of which the decision was taken. The court will not go into the adequacy or correctness of such material, but rather limit its enquiry to the relevance of the material to the decision. The court cannot interfere if there is some material which is relevant to the action taken, even though part of the material is irrelevant. If the court strikes down the proclamation, then it has the power to restore the dismissed government and revive the dissolved or suspended Legislative Assembly. In such a case, the court will have the power to declare the acts done, orders passed and laws made, during the period the Proclamation was in effect, to remain unaffected and be treated as completely valid. Such declaration, however, shall not preclude the Legislative Assembly of the state to repeal, review or modify such acts, orders or laws, as the case may be.

The same was reiterated in the case of *Rameshwar Prasad v. State of Bihar.*[20] In this case the court disqualified the proclamation by the President and held it to be unconstitutional after the due examination of the report of the Governor. It was also pointed out that there was no substantial objectivity in the report which would have led to the satisfaction of the President. So, when the decision of the President

[20] AIR 2006 SC 980 para 43.

lacks sensible grounds, it can be questioned in the court. The objectivity in the report means providing the access of those circumstances which resulted in obstructing the swift working of the constitutional machinery. It must also be shown that without the interference of the Union government the swift working of the constitutional machinery cannot be resorted (had appeared in *Ncrwc* 2001). It was further said that the proclamation of emergency by the President should be kept as the very last means and before that, the Governor must have resorted to all the other means to safeguard the smooth working of the constitutional machinery in that state.

It can be clearly understood that the extraordinary power which is granted to the President is only meant for the crisis of a serious kind and even after the judgement given in the *S. R. Bommai case* and the courts reviewing the reports presented by the Governors of respective states, the misuse of this provision still continues. This is due to its wide scope, which is provided to the Article. Until now, there has been no specific definition as to what situations will be included by the term 'failure of constitutional machinery' and 'otherwise'.

6. RECENT CASES OF IMPOSITION OF PRESIDENT'S RULE UNDER ARTICLE 356 IN INDIA

6.1. President's rule in the state of Arunachal Pradesh

In 2016, political turmoil in Arunachal Pradesh arose when fourteen members of the legislative assembly from the ruling party joined the Bhartiya Janata Party and two independent MLAs revolted against the Chief Minister Nabam Tuki. Those fourteen MLAs claimed to have the majority in the legislative assembly of the state and thereupon, the Governor, without giving any information to the Chief Minister, called for a session in the legislative Assembly and removed the speaker of the Assembly. The speaker, then, disqualified those rebel MLAs due to defection. Although, the High Court of Guwahati stayed the mentioned order of the Governor. This was the official opinion in the case of *Nabam Rebia v. Deputy Speaker Arunachal Pradesh Legislative Assembly*[21]. Meanwhile, Governor Rajkhowa gave a report to the president stating that a situation has arisen where it is impossible

[21] 2017 13 SCC 326 para 18.

for the state government to carry out the functionalities in accordance with the provisions of the Constitution of India. After receiving such a report, the president fired the government and also suspended the Assembly. After this, the Congress party filed a petition before the Supreme Court which challenged the imposing of the president's rule in the state of Arunachal Pradesh. The Supreme Court rejected Congress's plea to stop the swearing-in ceremony of the new Chief Minister and also upheld the High Court's staying of disqualification of those rebel Congress Members of Legislative Assembly. The President's rule lifted in the state on 19th February 2016 and the new government was formed under the Chief Minister 'Kalikho Pul', prior to the decision of the Supreme Court.

The first question that comes to mind is whether there is the real failure of constitutional machinery in the state and, if so, whether the Governor Rajkhowa has taken all other effective measures before sending the report to the President which resulted in an emergency. After reviewing the report of the Governor, the court observed that the primary reason for the failure of the constitutional machinery in the state was the cow slaughter. Although, in India, cows are religiously significant for Hindus, but the paradox is that the violation of animal rights is a very small issue generally. Citing cow slaughter as a reason for the breakdown of law and order to impose president's rule cannot be considered to be a valid reason. It must also be noted that slaughter of cows has not been outlawed in the state of Arunachal Pradesh and therefore emphasizing such an issue in the report is a strong example of the misuse of article 356 of the Constitution of India.

Another major reason which has been cited by the Governor is that due to the defection of certain members, the ruling party lost. This reason cannot be admitted because, even before sending the report, the Governor must definitely have requested the ruling party to prove its majority through the floor test. As stated in the S. R. Bommai's *case "the president's rule should be the last resort and it can only be imposed after resorting to all other effective remedies*." The defection of fourteen MLAs is an intra-party issue and is not a case of failure of the constitutional machinery in the state.

On 13th July 2016, the constitutional bench of the Supreme Court of India held that the governor's order is unconstitutional, as the reasons for concluding is the failure of constitutional machinery in the state were not sufficient. The court observed that "the activities within

a political party confirming turbulence or unrest within its ranks are beyond the concern of the Governor." Therefore, even if there is a presumption that the ruling party has lost its majority, a floor test is mandatory before resorting to the option imposing an emergency. A floor test is a mechanism under which an appointed Chief Minister can be asked by the Governor to prove the majority on the floor of the legislative Assembly. It is basically to know whether the government still enjoys the confidence in the assembly or not. The test is conducted by passing of Confidence motion by the Chief Minister where all the Members of legislative Assembly vote in for or against. The Chief Minister has to resign if he fails to pass the confidence motion.[22] After perusing all these things, the Supreme Court of India had struck down the ongoing President's rule and restored the Nabam Tuki lead Congress government in the state.

6.2. Crisis in the state of Uttarakhand

In 2016, nine members of legislative Assembly of the ruling Congress Party defected from the party and joined the Bhartiya Janata Party. As a result of which the majority of the Harish Rawat government was challenged and thereupon, Governor K.K. Paul asked him to prove his majority through the floor test. Meanwhile, the President at that time, Pranab Mukherjee, imposed the President's rule in the state on the receipt of the report of Governor regarding the failure of the constitutional machinery in the state and consequently, the government was terminated, and the Legislative Assembly suspended. This was the case of *Harish Chandra Rawat v. Union of India*.[23]

In this case the central issue was whether the order of the President to impose the emergency, without even awaiting the floor test, is constitutional or not. The floor test is said to be the cornucopia and a solution of all the political turmoil but the same was prevented to be conducted by the President. The ruling party challenged the President rule before the Uttarakhand High Court and the Court struck down the president's rule and ordered the floor test. The Honorable Chief Justice of the Uttarakhand High Court observed that "even though the President is a constitutional post, the imposition of the President rule is not an absolute power". It also seemed to him that the Centre is act-

[22] Article 175(2), The Constitution of India, 1950.

[23] 2016 AIR CC 2455 para 58.

ing like a "private party" i.e., acting for its own political interest. Time and again it has been reiterated that the president's rule should be the final resort and its imposition without the floor test done should not be allowed without any other reasonable ground.

6.3. President's rule in the state of Delhi after resignation of the Chief Minister

Chief Minister of Delhi Arvind Kejriwal resigned along with all of his members of the Council of Ministers because they were not able to pass the Lokpal Bill intended for battling corruption. No other party was in a position to form the government, so the Lt. Governor prepared a report for the President to take over and bring stability. The government that resigned was kept in suspended animation, meaning that the party still had the chance to undergo the floor test, prove majority and form the government. This was the situation where the imposition of President's rule was quite justified, as it was imposed on reasonable grounds.

This case is an example of all the steps being adopted. Before the President's rule was imposed the parties were called to form government, and it couldn't happen. Due to this situation the failure of constitutional machinery became quite clear. Here, the Lt. Governor took the necessary steps for avoiding unnecessary imposition of the President's rule (had appeared in *The Hindu* 2014).

6.4. President's rule in the state of Jammu and Kashmir

The Governor of Jammu and Kashmir issued a proclamation on 20th June 2018 under Section 92 of the Constitution of Jammu and Kashmir. The proclamation was issued with the concurrence of the President of India which granted the power related to the functions of the Government and the Legislature of the State to the Governor of the state. This occurred after the split between coalition government of Peoples Democratic Party and Bhartiya Janata Party and as no other political party had the majority to form an alternative government in the state, there was failure of the constitutional machinery in the state and resultantly, the President's rule was imposed in the state on 3rd January 2019 (The model used in Dhawan 2018, 9).

Until that moment everything seemed normal, but the problem had arisen when the president's rule was extended for a further period of six months, even though the political parties claimed their majority

in the legislative Assembly of the state. On the one hand, the Peoples Democratic Party along with the National Conference and Indian National Congress claimed their majority, and on the other hand, Sajjad Lone of the People's conference along with Bhartiya Janata Party and others also claimed to have majority. Ideally, the Governor Satya Pal Malik should have called either Mehbooba Mufti or Sajjad Lone to prove their majority through the floor test in accordance with the *S. R. Bommai case* and the one who can show their majority should have been allowed to form the state government. However, the Governor dismissed the claim of Mehbooba Mufti to form the government citing two reasons: she won't be able to form a responsive Government and horse trading would hamper Indian democracy. Both of these reasons were unjustifiable. The main reason to keep the assembly in suspended animation is to form a new government so that it can carry out its functions and when such an option is available, the Governor arbitrarily rejected it which is not in consonance with the Constitution. In this case, even though, initially, the imposition of the emergency seems valid, the extension of the president's rule before allowing the floor test is unacceptable and unlawful.

6.5. Political Crisis in the state of Maharashtra

There was a struggle for the post of Chief Minister among the Bhartiya Janata Party, Shiv Sena and Nationalist Congress Party along with Congress. No political party could prove majority and the President's rule was imposed. The Governor did not resort to all the steps which he must have before asking to impose emergency. In the case of *H. S. Jain v. Union of India*[24] it was held that the Governor before calling for emergency must resort to all steps including calling all the political parties to the house and to ask them to solve the political crises on their own reasonably as (had appeared in *The Hindu* 2019).

7. CONCLUSION

Countries like India where a multi-party system exists, are bound to have different governments in the center as well as in the states. The reason of misuse is always the motive of the government in center who wish to gain control over the states ruled by the opposition

[24] 1997 1 UPLBEC 594.

government, in most of the cases. Although, it cannot be denied that the mechanism has proved to be helpful and has served in crisises as well. The major reason of misuse is seen to be the subjective nature of the Article 356. The terms 'otherwise' and 'failure of constitutional machinery' are extremely broad that it tends to include a variety of reasons into it as held in the case of "*Reddi Govinda Rao v. State of Andhra Pradesh*."[25]

The Article fails to define the said phrases, which leaves the space for the political parties to impose emergency, even on very petty grounds. An understanding needs to be developed about the Article and the scope of its usage must be well determined because misuse of it has a direct implication over the federal structure of India. Also, the provision cannot be completely repealed as the situation will turn worse, the states will start to exercise indiscriminate autonomy and development of secessionist ideologies can take place. So, the need of the hour is to fix the scope of the Article and a clear determination of what will constitute to be 'the failure of constitutional machinery' and that of the term 'otherwise' must be made. This is the task of the legislature to define the said terms and to fix justifiable grounds for the same.

By the *Sarkaria Commission Report* of 1990 and in the case of '*S.R. Bommai v. Union of India*'[26] it was recommended that the said Article must be amended in order to protect the Constitution of India, but no ruling party seems to be interested in implementation of these recommendations. The argument is that, even if the Article is amended, it will still depend on the efficacy of the implementation by the governments. Therefore, if the President's rule is being opted, it must be kept in mind that it is used in the rarest of the rare cases and is implemented '*stricto sensu*', keeping the spirit of federalism intact.

For a multicultural and multilingual society, it is assumed that an asymmetrical federal setup is the most ideal one. The premise is that the people locally best realize what is suitable for them in the fields of resources, power, administration, policing, criminal justice etc, and how to manage it. Both the states and the union government have supremacy over their respective domain and the subjects which are enumerated in the state as well as union lists under the seventh schedule[27]

[25] 2020 SCC AP 961.

[26] 1994 SCC (3) Para 28.

[27] The Seventh Schedule to the Constitution of India defines and specifies allocation of powers and functions between Union & States in order to make law. It contains three lists; i.e. 1) Union List, 2) State List and 3) Concurrent List.

of the Indian Constitution. It is against the federal system, if the union government encroaches upon the state government's domain, without any just and reasonable cause. On the other hand, the Indian federal system, unlike the USA, has a tendency towards the union government, since India has remained united as "*Akhand Bharat*"[28], ever since the ancient times. Therefore, the Indian federal structure was bound to have the element of a central tilt, which is very evident in the Constitution of India. But this cannot be the justification of an unacceptable political agenda which is exploited with Article 356.

Hence, to protect the federal structure of the country, it is needed for the Article 356 to be duly amended in line with the recommendations posed by the *S.R. Bommai's cas*e as well as by the *Sarkaria Commission Report of 1990*. The few recommendations by the Commission regarded the appointment and removal of the Governor as well. The Commission stated that "The Vice President of India and the Speaker of the Lok Sabha should be consulted by the prime minister in the selection of Governor. Such consultation, the commission felt, will greatly enhance the credibility of the selection process. Also, his tenure of office must be guaranteed and should not be disturbed except for extremely compelling reasons and if any action is to be taken against him he must be given a reasonable opportunity for showing cause against the grounds on which he is sought to be removed." This is due to the dependence on the pleasure of President which makes him a puppet in the hands of central government.

The commission also suggested that the Governor must be appointed with the consultation of the Chief Minister of that state and there must be a harmonious relationship between them so that work is conducted smoothly. This is so that the possible threat to the stability of the government can be avoided. Also, Governors should not be removed before their five-year tenure, except in rare and compelling circumstances. The commission had the opinion that the procedure of removal must allow the Governors to have an opportunity to explain their conduct, and the central government must give fair consideration to such explanations. It was further also recommended that Governors should be informed about the grounds of their removal. The warnings must also be given to the state government that there are indications that the state government is not working as per the constitutional mandate, and a timeframe must be set for them to correct the default.

[28] Refers to the idea of one undivided India.

Even after the amendment, it is needed that the implementation of the Article is properly carried out. If it is not properly implemented, there can be chances of abuse of the provision. Also, the spirit of cooperative federation should be maintained.

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FINANSIJSKA PODRŠKA PORODICI SA DECOM – KLJUČNI RADNOPRAVNI I SOCIJALNOPRAVNI INSTRUMENTI**

Savremena porodica se susreće sa brojnim izazovima. Kulturološkim, ideološkim, religijskim, finansijskim. Porodica je stalno suočena sa borbom za egzistenciju, što joj često otežava da ostvaruje svoju primarnu funkciju koja se tiče brige o deci. Porodica bi trebalo da predstavlja utočište i izvor sigurnosti za svakog pojedinca s obzirom na to da su zdravi pojedinci u zdravim porodicama esencija uspešnog društva. Autorka ovog rada nastoji da ukaže na finansijske aspekte društvene brige o porodici sa decom analizom aktuelnih pravnih propisa. Centralni deo rada odnosi se na rešenja Zakona o finansijskoj podršci porodici sa decom. U njemu se analiziraju pojedina rešenja jedinica lokalne samouprave koja se tiču finansijske podrške porodici sa decom. Kako bi ostvarila svoju ulogu koja se tiče vaspitavanja dece, pružanja ljubavi, podrške, sigurnosti, neophodno je da postoji i stabilna finansijska potpora. Ta potpora omogućava porodici da njen primarni cilj ne bude borba za egzistenciju.

Ključne reči: *porodica – finansijska podrška – egzistencija – porodiljsko odsustvo – naknada zarade.*

1. UVODNA RAZMATRANJA

Porodica – pojam koji nije jednostavno definisati na jedan univerzalan način. Nesporan je njen veliki značaj i za pojedinca i za društvo u celini. Porodica je možda jedna od najstarijih društvenih institucija – od svojih početaka ljudi su se grupisali u porodice kako bi osigurali emotivnu, fizičku bliskost i pripadnost kolektivu (DeFrain *et*

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** Članak je zasnovan na master radu pod istim naslovom koji je autorka odbranila 28. septembra 2020. godine na Pravnom fakultetu Univerziteta u Beogradu pred komisijom prof. dr Ljubinka Kovačević (mentor) i doc. dr Filip Bojić.

al. 2008). Iako se koncept porodice menjao tokom istorije, njena važna uloga je opstala u svim epohama razvoja ljudskog društva – od njegovog nastanka do danas. Bez obzira na doba koje se posmatra, ona je bila i ostala noseći stub jednog društva, nastavljajući da se menja, razvija i prilagođava epohi u kojoj se nalazi. Čuvena maksima da je porodica osnovna ćelija društva ovekovečena je i u Opštoj deklaraciji o ljudskim pravima iz 1948. Godine, u kojoj se ističe da je to prirodna i osnovna društvena jedinica koja ima pravo na zaštitu društva i države.[1] Primarni je izvor zaštite i sigurnosti za dete te simbolizuje svojevrsno utočište pojedincu i kao takva ona je neraskidiva spona između pojedinca i društva.

Politika koja je usmerena na zaštitu porodice, odnosno društvena briga o deci i porodici proizilazi iz shvatanja da ta društvena grupa ima veliki značaj za društvo. Vitalni procesi socijalizacije započinju i odvijaju se u okviru nje. Kako ističe Šunderić (2009, 128), porodica u svakom društvu predstavlja osnovnu društvenu grupu u kojoj se obavljaju tako značajne funkcije kao što su: reproduktivna, nega i čuvanje deteta, razvojna, vlastita, kao i kulturna. Društvena briga o deci i porodici stoga predstavlja deo društvene politike koji je usmeren na pružanje podrške porodici i deci (Jašarević 2010). Jašarević (2010, 310–311) tu oblast društvene politike definiše kao oblast koja podrazumeva organizovane ekonomske, političke, pravne, institucionalne i druge aktivnosti države i drugih društvenih organizacija sa ciljem da se unaprede rađanje, nega, odgoj i obrazovanje, da se obezbede uslovi za svestrani intelektualni, emocionalni, fizički i socijalni razvoj dece i da se ujednače osnovni uslovi za njihovu socijalnu sigurnost, te da se mere socijalno ekonomske zaštite u ovoj oblasti kreću u dva pravca, a to su podrška porodici i zaštita dece. Čini se ipak da se te mere suštinski preklapaju i da čine dve strane iste medalje, štaviše, stiče se utisak da je podšrka porodici na neki način inspirisana društvenom brigom o deci.

U pravnoj teoriji se pominju tri konstitutivna elementa države – teritorija, suverena vlast i stanovništvo. Zato država odnosno društvo koje ne vodi računa o reprodukciji stanovništva ugrožava osnove svog postojanja (Šunderić 2009). Socijalni i ekonomski progres su uslovljeni stabilnom porodicom (Jašarević 2010). Prosperitet društva je u tesnoj korelaciji sa individuama koje ga čine i zato se dâ zaključiti da među ključne nacionalne interese treba svrstati rađanje i vaspitavanje dece. Iz tog razloga država donosi brojne akte koji imaju cilj da se podstiče

[1] Univerzalna deklaracija o ljudskim pravima, 1948, čl. 16, st. 3.

rađanje, sa ciljem sprovođenja odgovarajuće populacione politike (Samardžić 2011, 716).

Menjale su se uloga i aktivnosti države koje su usmerene ka pružanju različitih vidova pomoći porodici i deci. Danas se sve savremene države u značajnoj meri angažuju na socijalnoj zaštiti dece, na šta ih obavezuje i Konvencija o pravima deteta koju su potpisale gotovo sve zemlje (Matković, Mijatović, Stanić 2014, 4). I pored različitih stavova o tome koju ulogu država i društvo treba da imaju u sferi socijalne zaštite, te razlike su manje kada je reč o deci, pa intervencija države postaje prihvatljiva čak i sa paternalističkim obrazloženjem (Matković, Mijatović, Stanić 2014, 4).

Čini se da država ima nemerljivo značajnu ulogu u pružanju različitih vidova podrške porodici, pre svega zato što ona koja donosi zakone i druge propise, stvaralac je pravnih okvira, koji će, direktno ili indiretkno, uticati na položaj porodice u posmatranom društvu.

2. FINANSIJSKA PODRŠKA PORODICI SA DECOM

2.1. Opšta razmatranja

Finansijska podrška porodici sa decom podrazumeva određene aktivnosti države koje su usmerene na odgovarajuća novčana davanja. Pravni osnov za ta novčana davanja je različit. Suštinski, prava po osnovu finansijske podrške porodici sa decom mogu se najšire podeliti u dve kategorije. Prva kategorija se tiče onih prava koja su povezana sa ostvarivanjem prihoda – ili u vidu zarade po osnovu radnog odnosa ili u vidu ostvarvanja prihoda na neki drugi način kao što bi, na primer, bilo obavljanje samostalne delatnosti, ugovori kojima se ne zasniva radni odnos, poljoprivredna delatnost i slično. U prvu kategoriju spadaju naknade zarade zbog porodiljskog odsustva, odsustva sa rada radi nege deteta, odsustva sa rada radi posebne nege deteta. Drugu kategorija prava u osnovi čine mere populacione politike i socijalne mere. U tu grupu valja svrstati pravo na roditeljski dodatak, pravo na dečji dodatak i prava na različite naknade troškova.

U ovom segmentu, na republičkom nivou, relevantan pravni propis je Zakon o finansijskoj podrški porodici sa decom koji je stupio na snagu 1. jula 2018. godine. Prethodni pravni propis bio je Zakon o finansijskoj podrški porodici sa decom iz 2002. godine koji je u to vre-

me bio, kako Vuković ističe, jedan od prvih reformskih zakona u oblasti programa pomoći siromašnima (Vuković 2002, 346). Naš zadatak je da analiziramo važeće rešenje, a u pojedinim segmentima ćemo ga uporediti sa prethodnim propisom. Takođe treba ukazati i na probleme koje su pojedina njegova rešenja izazvala u praksi.

Krenimo redom. Na samom početku dati su ciljevi kojima se teži ovim zakonom, pa se tako u članu 1 navodi da se finansijska podrška porodici dodeljuje radi 1) poboljšanja uslova za zadovoljavanje osnovnih potreba dece; 2) usklađivanja rada i roditeljstva; 3) posebnog podsticaja i podrške roditeljima da ostvare željeni broj dece; 4) poboljšanja materijalnog položaja porodica sa decom, porodica sa decom sa smetnjama u razvoju i invaliditetom i porodica sa decom bez roditeljskog staranja.[2] Njihova je svrha povezana sa institutima iz radnog zakonodavstva i da odišu idejom populacione politike, odnosno podsticanja rađanja i podizanja dece te povećanje prirodnog priraštaja u našoj zemlji, čija negativna stopa predstavlja jedan od ključnih demografskih problema Srbije.[3]

2.2. Prava koja su povezana sa ostvarivanjem prihoda po osnovu radnog odnosa

2.2.1. Naknade zarada za zaposlene s porodičnim dužnostima

Na ovom mestu ćemo pomenuti Zakon o radu sa ciljem da sagledamo koja su prava osnov za ostvarivanje naknade zarade. Zakonodavac je, imajući u vidu osetljivost zaposlenih žena koje su trudne ili postale majke, tu kategoriju lica svrstao u kategoriju zaposlenih lica kojima se pruža posebna zaštita. Zato se u članu 12 Osnovnih odredaba navodi da zaposlena žena ima pravo na posebnu zaštitu za vreme trudnoće i porođaja.[4] Tim zakonom se u delu koji se zove „Zaštita materinstva" detaljno utvrđuju prava koja pripadaju zaposlenoj ženi koja je trudna, koja se porodila, odnosno koja doji dete. Prava koja su regulisana Zakonom o radu u toj oblasti i koja su za potrebe ovog

[2] Zakon o finansijskoj podršci porodici sa decom – ZFPPD (1), *Službeni glasnik RS* 113/17 i 50/2018, čl. 1.

[3] Prema Republičkom zavodu za statistiku, u Republici Srbiji, u periodu januar–septembar 2020. godine, broj živorođenih je iznosio 46.270. Broj umrlih u Republici Srbiji u istom periodu iznosio je 78.445.

[4] Zakon o radu – ZOR, *Službeni glasnik RS* 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – odluka US i 113/207, čl. 12.

rada relevantna odnose se na porodiljsko odsustvo, odsustvo sa rada radi nege deteta, odsustvo sa rada radi posebne nege deteta. U kratkim crtama će biti izloženo šta obuhvataju ta prava.

Shodno navedenom, zaposlena žena ima pravo na odsustvo sa rada zbog trudnoće i porođaja – porodiljsko odsustvo čije korišćenje može da otpočne na osnovu nalaza nadležnog zdravstvenog organa najranije 45 dana, a obavezno 28 dana pre vremena određenog za porođaj, dok porodiljsko odsustvo traje do navršena tri meseca od dana porođaja.[5]

Pravo na odsustvo sa rada radi nege deteta je pravo koje sukcesivno nastupa nakon isteka prodiljskog odsustva. Zaposlena žena, po isteku porodiljskog odsustva, ima pravo na odsustvo sa rada radi nege deteta do isteka 365 dana od dana otpočinjanja porodiljskog odsustva, a to pravo ima i otac deteta.[6] Pravo na dve godine odsustva imaju i žene koje su prilikom prvog porođaja rodile troje ili više dece, kao i one koje su rodile jedno, dvoje ili troje dece pa u narednom porođaju rodile dvoje ili više dece.[7]

Odsustvo sa rada radi posebne nege deteta podrazumeva da je reč o detetu sa teškim psihofizičkim ometenostima u razvoju, o čemu je neophodan izveštaj lekara specijaliste. To odsustvo, zbog prirode situacije, traje duže. U tom slučaju samo jedan roditelj može da odsustvuje sa rada do pete godine života deteta ili da radi sa polovinom radnog vremena.[8]

Zakonom o radu garantuje se pravo na odgovarajuću naknadu zarade tokom korišćenja pomenutih odsustava sa rada, što je, razume se, u skladu sa međunarodnim radnim standardima, u konkretnom slučaju sa Konvencijom broj 183 Međunarodne organizacije rada (MOR) o zaštiti materinstva, čije će pojedine odredbe biti pomenute nešto kasnije. Podsetimo se, naknada zarade jeste iznos na koji zaposleni ima pravo za vreme odsustva sa rada. Pravo na naknadu zarade se po pravilu priznaje zakonom i redovno spada u rang osnovnih socijalnih prava, kao deo socijalnog javnog poretka, odnosno kao neotuđivo pravo zaposlenog (Lubarda 2013, 438). Rezon je da zaposleni koji odsustvuje zbog porodičnih dužnosti ima plaćeno odsustvo. Finansij-

[5] ZOR, čl. 94.
[6] ZOR, čl. 95.
[7] ZOR, čl. 94a.
[8] ZOR, čl. 96.

ski položaj porodice je veoma delikatno pitanje kada se posmatra iz ugla obezbeđivanja adekvatne naknade zarade tokom odsustva sa rada zbog porodičnih dužnosti. Ta delikatnost je prepoznata i u Konvenciji MOR-a broj 102, u kojoj se materinstvo i izdržavanje porodice ubrajaju u devet socijalnih rizika. Lubarda (2017, 446) ističe da je socijalni rizik zakonom unapred predviđen budući, neizvestan događaj koji je izvan volje lica u pitanju i koji pogađa sposobnost za sticanje dohotka radom ili izaziva nedostatak prihoda kao rezultat bolesti izdržavaoca ili usled posebnih troškova u vezi sa podizanjem i staranjem o deci ili drugim izdržavanim članovima porodice, ili potrebe za pokrivanjem troškova lečenja, čijim nastupanjem se stiče pravo na socijalne prestacije. Upravo zbog toga je finansijsko obezbeđenje imperativ koji se mora obezbediti zaposlenoj ženi, odnosno porodici. Ekonomska sigurnost, to jest materijalno obezbeđenje žene za vreme porodiljskog odsustva jedno je od najvažnijih pitanja zaštite žena za slučaj materinstva (Lubarda 2013, 40). Sva detaljnija regulativa pitanja naknade zarade za vreme korišćenja odsustva u vezi sa porodičnim dužnostima – utvrđivanje, obračun, visina, data je u Zakonu o finansijskoj podršci porodici sa decom.

Reč je o sledećim pravima:

1. naknada zarade odnosno plate za vreme porodiljskog odsustva (suštinski razlika između zarade i plate je terminološke prirode. Ipak, reč zarada se koristi da označi novčanu prestaciju po osnovu radnog odnosa u privatnom, a reč plata u javnom sektoru);
2. naknada zarade, odnosno plate za vreme odsustva sa rada radi nege deteta;
3. naknada zarade, odnosno plate za vreme odsustva sa rada radi posebne nege deteta.[9]

Titulari tih prava jesu zaposleni kod pravnih odnosno fizičkih lica. Za njihovo ostvarivanje neophodno je da postoji radni odnos. Pravo na naknadu zarade je u korelaciji sa korišćenjem pomenutih prava iz Zakona o radu.

Budući da, načelno, samo trudna žena ima pravo da koristi pravo na porodiljsko odsustvo, po prirodi stvari, ona će ujedno biti i titular prava na odgovarajuću naknadu zarade. Otac deteta može da koristi porodiljsko odsustvo samo kada majka nije u mogućnosti da koristi

[9] ZFPPD (1), čl. 11.

porodiljsko odsustvo, odnosno nije u mogućnosti da brine o detetu (situacije kada je majka napustila dete, kada je umrla, kada je teško bolesna i slično). Tada će on biti titular prava na naknadu zarade zbog porodiljskog odsustva. Takođe, otac deteta ima pravo da koristi pravo na odsustvo sa rada radi nege deteta ili odsustvo sa rada radi posebne nege deteta. On će koristiti i pravo na naknadu zarade, a kao titulari se mogu naći i jedan od usvojitelja, hranitelj, odnosno staratelj deteta.[10]

2.2.2. Način utvrđivanja, obračunavanja i ostvarivanja prava na naknadu zarade

Značajno je naglasiti da su sredstva za naknade zarada obezbeđena budžetom Republike Srbije. Dakle, iz budžeta se vrši isplata sredstava na račun korisnika. Te uplate će vršiti ministarstvo nadležno za socijalna pitanja, pri čemu će se iznos isplaćivati u vidu naknada zarada bez pripadajućih poreza i doprinosa, a oni će biti uplaćivani na način koji je predviđen zakonom. Prethodno rešenje je bilo drugačije, te se sredstva iz budžeta nisu direktno uplaćivala na račun korisnica već je te uplate vršio poslodavac, koji bi kasnije stekao pravo na refundaciju uplaćenih sredstava.

Jedna od novina je način obračunavanja mesečne naknade zarade za vreme korišćenja nekog od prava zagarantovanih Zakonom o radu: već su pomenuti – porodiljsko odsustvo, odsustvo sa rada radi nege deteta, odsustvo sa rada radi posebne nege deteta.

Na ovom mestu će biti reči o prethodnom pravnom propisu iz ove oblasti kako bi se sprovela uporedna analiza. Tako, naknada zarade za zaposlene kod pravnih i fizičkih lica ranije se utvrđivala u visini prosečne osnovne zarade zaposlenog za 12 meseci koji su prethodili mesecu u kome otpočinje korišćenje odsustva, uvećane po osnovu vremena provedenog na radu, za svaku punu godinu rada ostvarenu u radnom odnosu u skladu sa Zakonom, a najviše do pet prosečnih mesečnih zarada u Republici Srbiji.[11] Bila je regulisana i situacija kada su lica bila u radnom odnosu u periodu kraćem od 12 meseci, te se takva naknada zarade utvrđivala tako što se za mesece koji su nedostajali do 12 meseci kao zarada uzimalo 50% prosečne mesečne zarade u Republici Srbiji, prema podacima koje je objavljivao republički organ nadležan za poslove statistike, u mesecu koji prethodi mesecu otpočinjanja

[10] ZOR, čl. 95.

[11] Zakon o finansijskoj podršci porodici sa decom – ZFPPD (2), *Službeni glasnik RS* 16/2002, 115/2005 i 107/2009, čl. 11.

odsustva.[12] Zakonom je nedvosmisleno bio zagarantovan pun iznos naknade zarade licima koja su neposredno pre ostvarivanja tog prava u periodu od šest meseci neprekidno ostvarivala zaradu ili naknadu zarade po osnovu radnog odnosa.[13] Takođe, licima koja su zaradu, to jest naknadu zarade po osnovu radnog odnosa ostvarivala u periodu od tri do šest meseci, neprekidno i neposredno pre ostvarivanja pomenutog prava, pripadao je iznos naknade od 60% od punog utvrđenog iznosa, dok je za period do tri meseca bio predviđen iznos od 30% od punog utvrđenog iznosa. Takođe, zakonom je bila predviđena i donja granica ispod koje se nije moglo ići, a ona je bila minimalna zarada utvrđena za mesec u kojem se isplata vrši. Donja granica je bila postavljena bez bilo kakvih uslova i odnosila se na sva pomenuta odsustva, što je u sadašnjem rešenju promenjeno.[14]

Tabela 1. Primer obračuna

Broj ostvarenih zarada na koje su plaćani porezi i doprinosi u skladu sa zakonom u u poslednjih 12 meseci	Iznos neto zarade izražen u dinarima	Računska operacija	Iznos koji će se primati na ime naknade zarade izražen u dinarima
12	80.000,00[15]	(12*80.000,00)/12	80.000,00
6	80.000,00	(12*80.000)/12	80.000,00
3–6	80.000,00	((12*80.000)/12)*0,6	48.000,00
do 3	80.000,00	((12*80.000)/12)*0,3	24.000,00[16]

Jedan od argumenata za donošenje rešenja koja su predviđena važećim zakonom, o čemu će dalje biti reči, bio je i da se spreče različite zloupotrebe. Ministarstvo za rad, zapošljavanje, boračka i socijalna prava u tom smislu ističe da je pravo na naknadu zarade mera usklađivanja rada i roditeljstva i namenjena je podršci ženi koja stvarno radi, a ne ženi koja se fiktivno zapošljava da bi ostvarila pravo na naknadu zarade, odnosno naknadu plate, te da naknada zarade nije socijalna

[12] ZFPPD (2), čl. 11, st. 2.

[13] ZFPPD (2), čl. 12, st. 1.

[14] ZFPPD (2), čl. 12.

[15] Radi ilustracije biće data zamišljena neto zarada u iznosu od 80.000,00 dinara i taj iznos će se koristiti i u daljim objašnjenjima.

[16] Ako iznos nije niži od minimalne mesečne zarade.

mera koja bi pomogla nezaposlenim majkama koje su rodile decu i snašle se da se fiktivno zaposle i ostvaruju naknadu zarade i budu u povoljnijem položaju od nezaposlenih žena koje to nisu uradile ili žena koje su stvarno radile (2018). Iako se stiče utisak da je postignut uspeh u sprečavanju zloupotreba, na drugoj strani je otvorena „Pandorina kutija" te su se javili brojni problemi, počev od diskriminacije određenih kategorija, pa do dovođenja u pitanje egzistencije porodice.

Naime, prema slovu zakona, osnovica naknade zarade se utvrđuje tako što se uzima zbir mesečnih osnovica koje imaju karakter zarade, a na koje su u poslednjih 18 meseci uredno plaćani doprinosi, pri čemu posmatranih 18 meseci prethode prvom mesecu otpočinjanja korišćenja odsustva sa rada zbog komplikacija u vezi sa održavanjem trudnoće odnosno porodiljskog odsustva ako odsustvo sa rada u vezi sa održavanjem trudnoće nije korišćeno.[17] Posmatrani period od 18 meseci ne obuhvata period odsustva sa rada zbog privremene sprečenosti za rad usled održavanja trudnoće i takvo rešenje je problematično budući da na taj način diskriminiše žene koje imaju rizične trudnoće. Šta to praktično znači? Ukoliko je žena koristila odsustvo sa rada zbog privremene sprečenosti za rad usled bolesti ili komplikacija koje se odnose na održavanje trudnoće, period u kome po tom osnovu dobija naknadu zarade uopšte se ne uzima u obzir. O tom odsustvu će biti više reči nešto kasnije, u analizi Zakona o zdravstvenom osiguranju. Podrazumeva se da je zaposlena uredno plaćala doprinose na svoja primanja koja imaju karakter zarade, i to u periodu od 18 meseci pre meseca u kome je otpočela da koristi neko od pomenutih odsustava. Kako se prva pretpostavka tiče perioda uplaćivanja poreza i doprinosa na primanja koja imaju karakter zarade, nadležni organ jedinice lokalne samouprave će najpre proveriti evidentirane uplate u bazi podataka Centralnog registra za socijalno osiguranje. Sledeći korak pri obračunu je da se evidentirane mesečne osnovice sabiraju, dobijeni zbir se potom deli sa brojem 18 i količnik te računske operacije predstavlja iznos naknade koja će se primati za vreme korišćenja pomenutih odsustava. Dakle, za svaki mesec u kojem nije ostvaren prihod računa se osnovica od nula dinara, što utiče na naglo spuštanje osnovice i dovodi do toga da se pravo obesmišljava u praksi, jer ne samo da taj iznos nije dovoljan za normalan život, već je u pojedinim slučajevima i apsurdno nizak (Urdarević *et al*. 2019, 139).

[17] ZFPPD (1), čl. 13.

Tabela 2. Primer obračuna

Broj ostvarenih zarada na koje su plaćani porezi i doprinosi u skladu sa zakonom u u poslednjih 18 meseci	Iznos neto zarade izražen u dinarima	Računska operacija	Iznos koji će se primati na ime naknade zarade izražen u dinarima
18	80.000,00	(18 x 80.000)/18	80.000,00
12	80.000,00	(12 x 80.000)/18	53.333
7	80.000,00	(7 x 80.000)/18	31.111

Načelno, postavljena je donja granica koja je jednaka iznosu minimalne zarade na dan podnošenja zahteva. Prema ZFPPD, pod minimalnom zaradom se podrazumeva iznos koji se dobija kada se minimalna cena rada po satu pomnoži sa 184 i uveća za pripadajuće poreze i doprinose.[18] Međutim, donja ganica je propisana samo za vreme porodiljskog odsustva. Dakle, ona ne postoji za naknade zarade zbog odsustva sa rada radi nege deteta ili odsustva sa rada radi posebne nege deteta, što nije bio slučaj u prethodnom zakonu i predstavlja očigledan i veliki propust. Takođe, stručna javnost je naročito kritikovala rešenje koje se ticalo propisivanja donje granice za vreme porodiljskog odsustva samo ako su ispunjeni odgovarajući uslovi. Dakle, iako je načelno postojala, iznos minimalne zarade ipak nije zagarantovan svim podnosiocima zahteva, što dodatno obesmišljava njenu svrhu. Iznos minimalne zarade su primala samo ona lica za koja je nadležni organ jedinice lokalne samouprave utvrdio da je evidentirano najmanje šest najnižih osnovica na koje se inače plaćaju pripadajući doprinosi na primanja koja imaju karakter zarade. Prethodni zakon nije imao takvo rešenje. Znači, da bi porodilja ostvarila pravo na naknadu zarade bar u iznosu minimalne mesečne zarade tokom trajanja porodiljskog odsustva (tri meseca od rođenja deteta), nepohodan uslov je da je u Centralnom registru obaveznog socijalnog osiguranja evidentirano najmanje šest najnižih osnovica na koje su uplaćivani porezi i doprinosi. Ipak, završnu reč na ovu priču stavio je Ustavni sud svojom odlukom[19] kojom je takvo rešenje okarakterisao kao neustavno, te su stupile i odgovarajuće

[18] ZFPPD (1), čl. 14, st. 9.

[19] Odluka US IUz 247/2018 od 17. decembra 2020. godine, *Službeni glasnik RS* 51/2021.

izmene zakona u ovom segmentu. Sadašnjim rešenjem je propisan zagarantovan iznos minimalne zarade tokom trajanja porodiljskog odsustva svim podnosiocima zahteva. Ipak, važno je istaći brojne probleme u praksi koji su se javljali zbog sprone odredbe dok je ona bila na snazi.

Tabela 3. Primer obračuna

Broj ostvarenih zarada na koje su plaćani porezi i doprinosi u skladu sa zakonom u poslednjih 18 meseci	Iznos neto zarade izražen u dinarima	Računska operacija	Iznos koji će se primati na ime naknade zarade izražen u dinarima
7	80.000,00	(7 x 80.000)/18	31.111,11
4	80.000,00	(4 x 80.000)/ 18	17.777,77
3	80.000,00	(3 x 80.000)/18	13.333,33

Izuzetno loša, a sada i zvanično neustavna formulacija ranijeg rešenja o propisivanju donje granice pod određenim uslovom iznedrila je brojne probleme u praksi. Još uvek je otvoreno pitanje zašto je zakonodavac ponovo propustio da propiše donju granicu i za odsustvo sa rada radi nege deteta i odsustvo sa rada radi posebne nege deteta. Logika nameće zaključak da njenim postojanjem iste treba da se obezbedi neki minimum ispod koga se ne sme ići. Međutim, takvom zakonskom formulacijom se otvorio put ka prilično degradirajućim iznosima, čak apsurdno niskim jer, iako načelno postoji pravo, čini se da je zbog pooštrenih uslova nekima ono nedostižno. U daljem izlaganju će biti priložena pojedina rešenja jedinica lokalne samouprave kojima se priznaje pravo na naknadu u određenom iznosu radi ilustracije realnih problema u praksi. Tako, prema rešenju jedinice lokalne samouprave grada Požarevca broj 06–183–407/2020 izdatog 21. februara 2020. godine, „priznato je pravo na naknadu zarade odnosno plate za vreme porodiljskog odsustva podnosiocu zahteva K.P. u trajanju od 10. 1. 2020. do 30. 4. 2020. godine u iznosu od bruto 3 986,83 dinara i odsustva sa rada radi nege deteta u trajanju od 1. 5. 2020. do 10. 1. 2022. godine, u iznosu od bruto 3 986,83 dinara, što predstavlja prosečnu osnovicu na koju su plaćeni doprinosi za obavezno socijalno osiguranje na primanja koja imaju karakter zarade u smislu člana 13 Zakona o finansijskoj podršci porodici sa decom“.[20] Još jednim rešenjem, iz-

[20] Rešenje lokalne samouprave Grada Požarevca 06–183–407/2020.

datim od nadležnog organa lokalne samouprave grada Požarevca broj 06–183–876/2020, utvrđeno je da se „priznaje pravo na naknadu zarade, odnosno naknadu plate za vreme porodiljskog odsustva podnosiocu zahteva M. A. u trajanju 15. 11. 2019. do 18. 3. 2020. u iznosu od bruto 7 689,86 dinara odsustva sa rada radi nege deteta u trajanju od 19. 3. 2020. do 13. 11. 2020. od iznosa od bruto 7 689,86 dinara što predstavlja prosečnu osnovicu na koju su plaćeni doprinosi za obavezno socijalno osiguranje na primanja koja imaju karakter zarade u smislu člana 13 Zakona o finansijskoj podršci porodici sa decom".[21] Takvi iznosi su daleko ispod iznosa minimalne zarade i daleko od dovoljnih za život dok traje odsustvo sa rada. Upitna je mogućnost dostojanstvene egzistencije porodice, na šta još treba dodati činjenicu da novi član podrazumeva nove i, samim tim, veće troškove. Takođe, to direktno pogađa i zaposlenu ženu – radnicu koja je postala majka, kojoj je na taj način dodatno otežano da uskladi svoje poslovne i porodične dužnosti. Iako je početna premisa izbegavanje zloupotreba koje su se ticale fiktivnog zapošljavanja, treba se zapitati po koju cenu je to učinjeno. Takođe, ako pođemo od pretpostavke da su lica savesna te da nikakva zloupotreba prava nije bila nameravana, dolazimo do toga da su žene koje su radile u periodu kraćem od 18 meseci u prilično nezavidnom položaju jer će kao naknadu primati svakako manje od onog što su zarađivale, a biće i situacija kada je iznos tih naknada daleko manji od onog „dovoljnog". Opravdano se postavlja pitanje da li su žene koje su radile u periodu kraćem od 18 meseci neopravdano stavljene u nepovoljniji položaj. Takva rešenja su u suprotnosti sa jednim od osnovnih ciljeva Zakona, a to je da se pruže poseban podsticaj i adekvatna podrška roditeljima da ostvare željeni broj dece.

Na drugom polu, postavljena je i gornja granica tog iznosa, što je pune tri godine pravilo brojne probleme i bilo podložno kritikama sve do stupanja na snagu izmenjenog rešenja. Rešenje se ticalo punog mesečnog iznosa naknade zarade koji nije mogao biti veći od tri prosečne mesečne zarade u Republici Srbiji, što se razlikovalo od ranijeg zakona kojim je bilo predviđeno pet. Postavljanje gornje granice, iako nužno zbog ograničenih sredstava u budžetu, okarakterisano je kao čin diskriminacije. To je istaknuto u Inicijativi za izmenu Zakona o finansijskoj podršci porodici koju je podnela poverenica za zaštitu ravnopravnosti. Naime, stav poverenice je da je takvom odredbom izvršena posredna diskriminacija te odredba, iako na prvi pogled deluje neutralno, zapravo

[21] Rešenje lokalne samouprave Grada Požarevca 06–183–876/2020.

stvara neravnopravan položaj (2018). Kao takva, nesrazmerno teže pogađa žene koje ostvaruju zaradu veću od tri prosečne mesečne zarade u Republici Srbiji, što „predstavlja diskriminaciju žena na osnovu ličnih svojstava – pola i imovinskog stanja" (2018). Uočljivo je i da gornja granica nije u skladu sa najvišom osnovicom na koju se plaćaju porezi i doprinosi, što je vidljivo iz člana 42 Zakona o doprinosima za obavezno socijalno osiguranje gde najvišu mesečnu osnovicu doprinosa čini petostruki iznos prosečne mesečne zarade.[22] Na ovom mestu valja napraviti malu digresiju i podsetiti se prepreka sa kojima se žene na tržištu rada neretko suočavaju. U literaturi se koristi termin „efekat staklenog plafona" (eng. *glass ceiling*), koji označava nepisano pravilo da žene ne mogu da napreduju u poslovnoj hijerarhiji. Naime, iako žene i muškarci svoje karijere započinju sa iste početne tačke, iznenada se pojavljuje nevidljiva barijera koja se odražava na napredovanje žena u odnosu na vertikalnu mobilnost u poslu, što termin stakleni plafon čini jednom od najjačih metafora za analizu nejednakosti muškaraca i žena na radnom mestu (Nešić 2017). Neke žene su, ipak, uprkos takvim preprekama, uspele da se izbore za visok položaj na tržištu rada te je jasno da je gornja granica naknade zarade, ovako postavljena, za te žene svojevrstan poraz, budući da su poreze i doprinose plaćale do maksimalnog iznosa, u svemu poštujući važeće propise. Upravo zbog svega toga su izvršene odgovarajuće izmene, koje se primenjuju od 1. januara 2022. godine. Tako zakonodavac navodi da za prava ostvarena od 1. januara 2022. godine (naknada?) ne može biti veća od pet prosečnih mesečnih zarada u Republici Srbiji, prema poslednjem objavljenom podatku republičkog organa nadležnog za poslove statistike na dan početka ostvarivanja prava.[23]

2.3. Prava koja su povezana sa ostvarivanjem prihoda van radnog odnosa

2.3.1. Ostale naknade

Odeljak pod nazivom „Ostale naknade" je novina koju je doneo važeći Zakon. Prethodni pravni propis je u krug lica koja ostvaruju pravo

[22] Zakon o doprinosima za obavezno socijalno osiguranje, *Službeni glasnik RS* 84/2004, 61/2005, 62/2006, 5/2009, 52/2011, 101/2011, 7/2012 – usklađeni din. izn., 8/2013 – usklađeni din. izn., 47/2013, 108/2013, 6/2014 – usklađeni din. izn., 57/2014, 68/2014 – dr. zakon, 5/2015 – usklađeni din. izn., 112/2015, 5/2016 – usklađeni din. izn., 7/2017 – usklađeni din. izn., 113/2017 i 7/2018 – usklađeni din. iznosi.

[23] Zakon o izmenama i dopunama Zakona o finansijskoj podršci porodici sa decom, *Službeni glasnik RS* 66/2021.

na naknadu zarade svrstavao i lica koja su u radnom odnosu kod fizičkih odnosno pravnih lica i lica koja obavljaju samostalnu delatnost. Međutim, novim rešenjem se pravi razlika između te dve kategorije lica. Tako se razdvajaju lica koja pravo na naknadu zarade ostvaruju na osnovu radnog odnosa i lica koja prihode ostvaruju po nekom drugom osnovu koje zakonodavac prepoznaje kao važne, te ta lica postaju titulari prava na „ostale naknade". Osnov za ostvarivanje prava na ostale naknade ne nalazi se u radnom odnosu već u tome da su lica ostvarivala prihode na neki drugi način i po osnovu tih prihoda bila osigurana.

Koje kategorije lica zakonodavac svrstava u one koje imaju pravo na ostale naknade po osnovu rođenja i nege deteta i posebne nege deteta? Prvenstveno ovde spada majka koja je u posmatranom periodu od 18 meseci pre rođenja deteta ostvarivala prihode po nekom od sledećih osnova: 1) po osnovu samostalnog obavljanja delatnosti; 2) kao nosilac porodičnog poljoprivrednog gazdinstva koje ima status lica koje samostalno obavlja delatnost prema zakonu kojim se uređuje porez na dohodak građana; 3) po osnovu ugovora o obavljanju privremenih i povremenih poslova; 4) po osnovu ugovora o delu; 5) po osnovu autorskog ugovora; 6) po osnovu ugovora o pravima i obavezama direktora van radnog odnosa.[24] Ovde takođe spada i ona majka koja je u pomenutom periodu ostvarivala prihode, ali je u momentu rođenja deteta nezaposleno lice, a nije ostvarila pravo na novčanu naknadu za slučaj nezaposlenosti.[25] Isto to vredi i za majke koje su bile poljoprivredni osiguranici. Pravo na ostale naknade po nekom od navedenih osnova može da ostvari i otac deteta onda kada majka nije živa, ako je napustila dete ili ako je iz objektivnih razloga sprečena da neposredno brine o detetu, a pravo može ostvariti i žena koja je usvojitelj, hranitelj ili staratelj deteta.[26]

Uočljiv je pozitivan momenat koji se tiče proširivanja titulara prava. Posebno je značajno to što se pokazalo interesovanje za poljoprivrednice, ali i za žene koje prihode ostvaruju po osnovu nekog ugovora kojim se ne zasniva radni odnos. Ipak, čini se da i ovde postoje brojni problemi koje bi valjalo prevazići.

2.3.2. Način obračunavanja i visina prava na ostale naknade

Osnovica za ostale naknade po osnovu rođenja i nege deteta utvrđuje se na isti način kao i za naknadu zarade. Dakle, posmatra se period za poslednjih 18 meseci koji prethode prvom mesecu u kome

[24] ZFPPD (1), čl. 17.
[25] ZFPPD (1), čl. 17.
[26] ZFPPD (1), čl. 17, st. 3 i 7.

otpočinje porodiljsko odsustvo ako se nije koristilo odsustvo sa rada zbog komplikacija u vezi sa održavanjem trudnoće ili ako je reč o rizičnoj trudnoći, onda od otpočinjanja tog odsustva. Za taj posmatrani period se najpre sabiraju osnovice na koje su plaćani doprinosi za koje se podrazumeva da su evidentirane od Centralnog registra za socijalno osiguranje i Poreske uprave. Iznos mesečne osnovice se dobija kada se dobijeni zbir podeli sa 18, a potom se taj iznos podeli koeficijentom 1,5. Tako dobijeni broj je iznos koji se korisniku uplaćuje direktno na tekući račun. Deljenjem brojem 18 dolazi se do sličnih problema kao i u slučaju naknade zarade čiji je osnov radni odnos u situaciji kada su se prihodi ostvarivali u periodu kraćem od 18 meseci, a u ovom slučaju postoji još jedna računska operacija, a to je deljenje koeficijentom 1,5.

Epilog još jedne diskriminatorne odredbe Zakona rezultirao je njegovim izmenama. Tako, zakon u krug lica koja imaju pravo na ostale naknade ubraja i majke koje su u periodu pre rođenja deteta 18 meseci bile poljoprivredni osiguranici, odnosno plaćeni su doprinosi za obavezno penzijsko i invalidsko osiguranje. Ranije rešenje, potpuno neutemeljeno i krajnje nejasno, traži staž osiguranja od 24 meseca, i to jedino za poljoprivredne osiguranice. Da je reč o diskriminaciji žena iz ruralnih krajeva, bio je stav i poverenice za zaštitu ravnopravnosti u pomenutoj Inicijativi za izmenu predmetnog zakona.

2.4. Predlozi *de lege ferenda* za unapređenje pravnog okvira zaštite porodice s decom

Nakon analize rešenja, logika nameće zaključak da je sporne zakonske odredbe važno izmeniti. Ako je jedan od glavnih ciljeva zakona da se pruži podrška porodici i da se utiče na povećanje stope prirodnog priraštaja, onda i odredbe zakona moraju biti u skladu sa njegovim osnovnim ciljevima. Svi problemi koji su nastali donošenjm novog Zakona o finansijskoj podršci, a tiču se naknade zarade ili ostalih naknada, okarakterisani su kao suprotni Konvenciji MOR broj 183 o zaštiti materinstva, i to prevashodno zbog toga što njihovo ukupno delovanje potpuno obesmišljava prava na naknadu zarade svih onih žena koje ne ispunjavaju pooštrene uslove koji nisu realni i koji nisu u skladu sa očekivanim uslovima koje bi korisnici tih prava trebalo da ispune (Urdarević *et al*. 2019, 140). Prava koja su zagarantovana zakonom, zbog pooštravanja uslova za njihovo ostvarivanje, u praksi deluju nedostižna i veoma teška za ostvarivanje. Samim tim, cilj zbog kojih su ta prava

i uspostavljena – „da se pruži porodici šansa za normalan život u periodu neposredno nakon rođenja deteta“[27] – ne može biti dostignut. Prema čl. 2 pomenute konvencije, iznos novčane naknade zarade treba da bude takav da obezbedi održavanje dobrog zdravlja žene i deteta uz odgovarajući životni standard.[28] Ako se prisetimo niskih i degradirajućih iznosa naknada zarada, čini se da taj međunarodni standard nije ispoštovan. Takođe, uzimajući u obzir Konvenciju MOR-a broj 102, u kojoj su navedeni socijalni rizici, čini se da je važećim odredbama u Srbiji potpuno zanemaren osetljiv i delikatan položaj zaposlene žene koja je majka odnosno pojedinca sa porodičnim dužnostima. Period koji se uzima za prosek primanja koji je sa 12 povećan na 18 treba izmeniti, budući da nijedna evropska država ne zahteva toliku dužinu staža osiguranja. Kako ukazuje studija koju je sproveo Savet Evrope, od svih zemalja članica te organizacije, samo Andora ima period prethodnog staža osiguranja duži od 12 meseci, dok neke države uopšte ne zahtevaju kao uslov ostvarivanje perioda prethodnog staža osiguranja (Urdarević *et al*. 2019, 139). Takvi uslovi u državi sa veoma niskim prirodnim priraštajem, kao što je naša, potpuno su kontraproduktivni. Za mlade ljude koji žele da se ostvare kao roditelji to može biti prilično demotivišuće jer se stiče utisak da žena mora da radi određen broj meseci, u našem slučaju 18, pre nego što zasnuje porodicu, jer će samo na taj način biti u situaciji da prima pun iznos naknade zarade. Uslov koji se tiče staža osiguranja treba da bude u skladu sa evropskom praksom i da obračunski period obuhvata maksimalno 12 meseci obaveznog staža osiguranja. U *Novoj ekonomiji* je istaknuto da evropska praksa preporučuje da obračunski period obuhvata maksimalno 12 meseci, a to potvrđuju i podaci OECD, prema kojima i evropske države, ali i države sa drugih kontinenata, u obračun uzimaju najviše godinu dana pre otvaranja odsustva (2019). Nije na odmet pomenuti i pojedine direktive EU za koje se Republika Srbija obavezala da će implementirati u svoje zakonodavstvo, a sa kojima su sporna rešenja u suprotnosti. Na prvom mestu je Direktiva Saveta 92/85/EEZ o uvođenju mera kojima se podstiče unapređenje bezbednosti i zdravlja na radu trudnih radnica, radnica koje su nedovano rodile ili doje, doneta 1992. godine.[29]

[27] ZFPPD (1), čl. 17, st. 3 i 7.

[28] K183 Konvencija o zaštiti materinstva, 2000. Konvencija o reviziji Konvencije o zaštiti materinstva (revidirane), 1952, čl. 6.

[29] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth indivi-

U čl. 11 te direktive propisana su prava zaposlene žene, među kojima je i pravo na adekvatnu novčanu naknadu (*allowance*). Uzimajući u obzir ograničenja koja su propisana nacionalnim zakonodavstvima, direktiva pod adekvatnom novčanom naknadom smatra ekvivalent naknadi koju bi zaposlena imala u slučaju da odsustvuje sa rada iz razloga koji su povezani sa zdravstvenim stanjem.[30] Kako će se videti u delu koji je posvećen Zakonu o zdravstvenom osiguranju, kojim se reguliše pitanje naknade zarade za vreme odsustva sa rada zbog privremene sprečenosti za rad koji za posmatrani period uzima prethodnih 12 meseci, uočljivo je da se u našem zakonodavstvu dogodila izvesna kolizija i jasno je da standard koji je postavljen dikrektivom nije ispoštovan. U svetlu „ostalih naknada" na koje imaju pravo roditelji koji obavljaju samostalnu delatnost, osvrnućemo se još i na Direktivu 2010/41 EU Evropskog parlamenta i Saveta o primeni načela jednakog postupanja prema muškarcima i ženama koji su samozaposleni, donetu 7. jula 2010. godine, kojom se stavlja van snage Direktiva Saveta 86/619/EEZ.[31] Član 8 predmetne direktive nosi naziv „*Maternity benefits*" i njime se predviđa da su države članice obavezne da preduzmu mere koje su neophodne da bi se samozaposlenim ženama, suprugama i životnim partnerkama omogućilo da primaju dovoljnu naknadu za materinstvo, koja bi im pružila mogućnost da prekinu svoje profesionalne aktivnosti zbog trudnoće ili majčinstva u trajanju od najmanje 14 nedelja.[32] Dalje, prema toj direktivi, te naknade se smatraju adekvatnim ako je zagarantovani prihod bar jednak: 1) naknadi koju bi lice imalo u slučaju da dođe do prekida profesionalnih aktivnosti usled razloga koji su povezani sa zdravstvenim stanjem; 2) prosečnom gubitku prihoda ili dobiti u odnosu na uporedivi prethodni period, pri čemu treba voditi računa o ograničenjeima koja postoje u nacionalnom zakonodavstvu; 3) bilo kojoj drugoj porodičnoj naknadi u skladu sa nacionalnim zakonodavstvom.[33] Kada se dalje ukazuje na neophodnost izmena odredaba zakona koje su sporne, ne sme se izostaviti propisivanje donje granice naknade zarade na pravilan način. To podrazumeva da se

dual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31992L0085, poslednji pristup 13. novembra 2022.

30 *Ibid.*, čl. 11.

31 Directive (EU) No. 2010/41/EU on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive No. 86/613/EEC, 7 July 2010.

32 *Ibid.*, čl. 8.

33 *Ibid.*

ispuni njena suština, a to je da se osigura neki minimum ispod koga se ne sme ići, a cilj minimuma je da on omogućava, bar delimično, zadovoljenje osnovnih egzistencijalnih potreba jedne porodice. U tom smislu, valja pohvaliti izmene koje se tiču ukidanja uslova za ostvarivanje iznosa minimalne zarade za vreme porodiljskog odsustva, ali još uvek je neophodno to isto učiniti za sve ostale vrste odsustva sa rada zbog vršenja porodičnih dužnosti. Valja pohvaliti i izmene koje se tiču ukidanja brojnih odredaba koje su u sebi nosile diskriminatorsku notu budući da je načelo zabrane diskriminacije najpre ustavno načelo naše države i civilizacijska tekovina. Ipak, nije na odmet zapitati se zašto je do takvih odredaba moralo i doći i zašto se toliko dugo čekalo na njihovu izmenu.

2.5. Prava čiji osnov ne proizilazi iz ostvarivanja prihoda – mere populacione politike

2.5.1. Roditeljski dodatak

Roditeljski dodatak je jedan od instrumenata populacione politike. Kao takav, predstavlja meru populacione politike čiji je cilj podsticaj rađanja dece i s obzirom na to da nije usmerena samo na siromašnije slojeve stanovništva, danas imamo veliki broj korisnika tog prava (Tanasijević 2016, 126). To je novčano davanje čiji je jedan od ciljeva da se poveća stopa rasta prirodnog priraštaja. Kako se rođenjem deteta povećavaju troškovi i opterećenje kućnog budžeta, to davanje treba da predstavlja finansijsku pomoć koju pruža država, ne bi li se u neku ruku porodici pomoglo da se lakše nosi sa novim izdacima.

Roditeljski dodatak ostvaruje majka za prvo, drugo, treće i četvrto dete, pod uslovom da je državljanin Republike Srbije i da ima prebivalište u Republici Srbiji.[34] Vidi se da novčana davanja po osnovu roditeljskog dodatka imaju svoju granicu jer se to pravo ostvaruje za četiri deteta. Takvo rešenje daje izvestan prostor za kritiku budući da diskriminiše porodicu sa više od četiri deteta, ali s druge strane je jasno da je negde morala da se povuče granica. Izuzetno, ako majka koja ima troje dece u sledećem porođaju rodi dvoje ili više dece, ostvariće pravo na roditeljski dodatak i za svako rođeno dete u tom porođaju, na osnovu posebnog rešenja ministarstva nadležnog za socijalna pitanja.[35]

[34] ZFPPD(1), čl. 22, st. 1.
[35] ZFPPD(1), čl. 22, st. 3.

Takođe, titular prava može biti i majka koja nije državljanin Republike Srbije, sa statusom stalno nastanjenog stranca ukoliko je dete rođeno na teritoriji Republike Srbije.[36] *Ratio legis* tog novčanog davanja je i da detetu budu pružene i obezbeđene adekvatna briga i nega, što kazuje čl. 22, st. 4 ZFPPD, te pravo na roditeljski dodatak ostvaruje majka koja neposredno brine o detetu za koje je podnela zahtev, čija deca prethodnog reda rođenja nisu smeštena u ustanovu socijalne zaštite, hraniteljsku, starateljsku porodicu ili nisu data na usvojenje i koja nije lišena roditeljskog prava u odnosu na decu prethodnog reda rođenja, a izuzetno će se priznati i ukoliko je dete prethodnog reda rođenja smešteno u ustanovu zbog potrebe kontinuirane zdravstvene zaštite i nege, a po prethodno pribavljenom mišljenju ministarstva nadležnog za socijalna pitanja.[37] Prema odredbama ZFPPD, neposredna briga o detetu podrazumeva neposredno staranje o njegovom životu, zdravlju, vaspitanju, obrazovanju. Titular prava može biti i otac ako je majka deteta strani državljanin, nije živa, napustila je dete, lišena je roditeljskog prava ili je iz objektivnih razloga sprečena da neposredno brine o detetu.[38] Ideja je da su deca krajnji korisnici tog vida novčanog davanja.

2.5.1.1. Visina roditeljskog dodatka i način isplate

Zanimljive su najnovije izmene Zakona koje se tiču tog pitanja. Naime, do stupanja pomenutih izmena 1. januara 2022. godine, roditeljski dodatak za prvo dete rođeno 1. jula 2018. godine i kasnije, utvrđivan je se u visini od 100.000,00 dinara i isplaćivan je jednokratno, a njihovim stupanjem na snagu roditeljski dodatak za prvo dete rođeno 1. januara 2022. i kasnije utvrđuje se u visini od 300.000,00 dinara i isplaćuje se jednokratno,[39] za drugo dete rođeno 1. jula 2018. i kasnije utvrđuje se u visini od 240.000,00 dinara i isplaćuje se u 24 jednake mesečne rate po 10.000,00 dinara, za treće dete rođeno 1. jula 2018. i kasnije utvrđuje se u visini od 1.440.000,00 dinara i isplaćuje se u 120 jednakih mesečnih rata po 12.000,00 dinara i, najzad, za četvrto dete rođeno 1. jula 2018. i kasnije utvrđuje se u visini od 2.160.000,00 dinara i isplaćuje se u 120 jednakih mesečnih rata po 18.000,00 dinara. Prema starom Zakonu o finansijskoj podršci porodici sa decom, iznosi

[36] ZFPPD(1), čl. 22, st. 2.

[37] ZFPPD(1), čl. 22, st. 4 i 5.

[38] ZFPPD (1), čl. 22, st. 7.

[39] Zakon o izmenama i dopunama Zakona o finansijskoj podršci porodici sa decom, *Službeni glasnik RS* 130/2021.

su bili regulisani na sledeći način: za prvo dete ta naknada je bila jednokratna i iznosila je 20.000,00 dinara, a za drugo, teće i četvrto je bila isplaćivana u 24 jednake mesečne rate u ukupnom iznosu od 50.000,00 dinara, 90.000,00 dinara i 120.000,00 dinara. Ako upoređujemo iznose, uočljiv je jedan pozitivan momenat, a to je da su iznosi znatno povećani. Takođe, visina roditeljskog dodatka je uvećana za paušalni iznos od 5.000 dinara, koji je predviđen za nabavku opreme za bebe – što se primenjuje za decu rođenu nakon 1. jula 2018. godine.

Zakonodavac je, međutim, propustio da reguliše pojedina pitanja koja se tiču rođenja blizanaca ili više dece prvim porođajem. Na tom mestu otvoren je put ka različitim nejasnoćama i mogućim problemima sa tumačenjem zakona u praksi.

2.5.2. Dečji dodatak

Dečji dodatak je pravo koje čiji je cilj da država materijalno pomogne podizanje dece dok ona ne dosegnu uzrast kada se očekuje da se osamostale (Jašarević 2010, 327). Za razliku od roditeljskog dodatka koji nije uslovljen materijalnim statusom porodice, dečji dotatak je usmeren upravo ka egzistencijalno ugroženim porodicama. Funkcija dečjeg dodatka je prvenstveno socijalna. Takvo rešenje, međutim, ne postoji u svim zakonodavstvima. Neke države su uvele univerzalnu zaštitu dece, bez obzira na materijalno stanje porodice, odnosno roditelja (Šunderić 2009, 130). Međutim, u državama sa ograničenim sredstvima, u koje spada i naša, primanje tog prava se uslovljava slabijim primanjima u porodici (Jašarević 2010, 327).

U Srbiji pravo na dečji dodatak pripada porodicama koje su slabijeg materijalnog statusa. Pravo na dečji dodatak je moguće dobiti za prvo, drugo, treće i četvrto dete. Vidimo da je granica u broju dece postavljena kao i za roditeljski dodatk. Kao i za roditeljski dodatak, predviđen je izuzetak, pa će tako majka koja ima troje dece a u sledećem porođaju rodi dvoje ili više dece ostvariti pravo na dečji dodatak i za svako rođeno dete u tom porođaju, na osnovu posebnog rešenja ministarstva nadležnog za socijalna pitanja. Titular prava je jedan od roditelja koji neposredno brine o detetu, koji je državljanin Republike Srbije i ima prebivalište u Republici Srbiji ili strani državljanin koji ima status stalno nastanjenog stranca u Republici Srbiji, a podnosilac zahteva može biti i staratelj, međutim, zakon propušta da u taj krug lica uvrsti i usvojitelja. Usvojitelj nema pravo na dečji dodatak, verovatno zbog rigoroznih uslova propisanih Porodičnim zakonom za zasnivanje

usvojenja te se pretpostavlja da usvojitelj u startu mora biti lice koje nije materijalno ugroženo. Ipak, ta formulacija je upitna budući da zatvara put ka tom pravu i onda kada životne okolnosti usvojitelja budu promenjene. Pravo na dečji dodatak ostvaruje se: 1) ako ukupan mesečni prihod, umanjen za poreze i doprinose, po članu porodice ostvaren u tri meseca koji prethode mesecu u kome je podnet zahtev ne prelazi utvrđeni cenzus, a ukupan mesečni katastarski prihod po članu porodice u prethodnoj godini ne prelazi iznos od 3% prosečnog katastarskog prihoda po jednom hektaru plodnog zemljišta u prethodnoj godini ili je ostvaren od zemljišta do 500 metara kvadratnih na kome je podignuta stambena zgrada; 2) ako ukupan mesečni katastarski prihod po članu porodice u prethodnoj godini ne prelazi iznos od 7% prosečnog katastarskog prihoda po jednom hektaru plodnog zemljišta u prethodnoj godini, a porodica ne ostvaruje druge prihode.[40] Dakle, postavljen je cenzus koji ne sme da bude prekoračen da bi se pravo na dečji dodatak ostvarilo. Predviđeno je da nominalne iznose i načine usklađivanja cenzusa za ostvarivanje prava na dečji dodatak propisuje Vlada na predlog ministra nadležnog za socijalna pitanja, te je u skladu sa tim doneta Uredba Vlade kojom se ta pitanja bliže regulišu. Prema Uredbi, taj cenzus iznosi 9.000 dinara, a taj iznos je za jednoroditeljske porodice (situacije kada je drugi roditelj nepoznat; kada je drugi roditelj preminuo a nije ostvareno pravo na porodičnu penziju; kada je drugi roditelj postao potpuno i trajno nesposoban za rad a nije stekao pravo na penziju)[41] uvećan za 30% i iznosi 11.700 dinara. Za jednoroditeljske porodice (u situacijama kada je „drugi roditelj preminuo, a ostvareno je pravo na porodičnu penziju; kada je drugi roditelj na izdržavanju kazne zatvora duže od šest meseci; kada drugi roditelj ne vrši roditeljsko pravo po odluci suda; kada drugi roditelj ne doprinosi izdržavanju deteta, a izvršenje obaveze izdržavanja nije bilo moguće obezbediti postojećim i dostupnim pravnim sredstvima i postupcima“)[42], staratelje i roditelje dece sa smetnjama u razvoju ili sa invaliditetom koje ne koriste usluge smeštaja, cenzus je uvećan za 20% i iznosi 10.800,00 dinara.[43] Prihodi koji se uzimaju kao relevantni za ostvarivanje prava na dečji dodatak su suštinski svi prihodi koje neko

[40] ZFPPD (1), čl. 26, st. 1 i 2, čl. 30, st. 1.

[41] ZFPPD (1), čl. 28, st. 1–3.

[42] ZFPPD (1), čl. 28, st. 4–7.

[43] Uredba Vlade o nominalnim iznosima i načinu usklađivanja cenzusa za ostvarivanje prava na dečiji dodatak i visini i načinu usklađivanja iznosa dečijeg dodatka, *Službeni glasnik RS* 54/18.

domaćinstvo može potencijalno da ostvari, što to pravo obesmišljava imajući u vidu da će faktički moći da ga steknu samo one porodice koje nemaju nikakva primanja (Urdarević *et al.* 2019, 142). Iznos samog dečjeg dodatka takođe propisuje Vlada na predlog ministra nadležnog za socijalna pitanja, te je i to pitanje regulisano pomenutom Uredbom Vlade. Nominalni iznos se usklađuje 1. januara i 1. jula počev od 2019. godine, na osnovu podataka republičkog organa nadležnog za poslove statistike, sa kretanjem indeksa potrošačkih cena na teritoriji Republike Srbije.[44]

Tabela 4. https://www.paragraf.rs/statistika/nominalni_iznosi_prava_na_finansijsku_podrsku_porodici_sa_decom_i_cenzusi_za_ostvarivanje_prava_na_deciji_dodatak.html, poslednji pristup 13. novembra 2022.

DEČJI DODATAK od 1. jula 2022. godine	**IZNOS**
Dečji dodatak za dete za koje je ostvareno pravo	3.569,30 RSD
Dečji dodatak za dete za koje je ostvareno pravo, za jednoroditeljske porodice i staratelje uvećan za 30%	4.640,08 RSD
Dečji dodatak za dete za koje je ostvareno pravo, za roditelje deteta sa smetnjama u razvoju i deteta sa invaliditetom i za dete koje ostvaruje dodatak za pomoć i negu drugog lica a ne koristi usluge smeštaja iznos je uvećan za 50%	5.353,96 RSD
Dečji dodatak za dete koje ispunjava uslove za uvećanje po više osnova, uvećanje je moguće najviše 80%	6.424,74RSD

Prema podacima kojima raspolaže Ministarstvo za rad, zapošljavanje, boračka i socijalna pitanja, broj korisnika dečjeg dodatka za 2017. godinu iznosio je 178.929, a to je 340.700 dece (2017).

2.5.3. Naknada troškova boravka u predškolskoj ustanovi

Odredbama ZFPPD predviđena je naknada troškova boravka u predškolskoj ustanovi za četiri kategorije dece: 1) deca bez roditeljskog staranja; 2) deca sa smetnjama u razvoju i deca sa invaliditetom; 3) deca korisnika socijalne pomoći i 4) deca iz materijalno ugroženih

[44] Uredba Vlade o nominalnim iznosima i načinu usklađivanja cenzusa za ostvarivanje prava na dečiji dodatak i visini i načinu usklađivanja iznosa dečijeg dodatka, *Službeni glasnik RS* 54/18.

porodica.[45] Predviđeno je da predškolske ustanove moraju da budu verifikovane od Ministarstva prosvete, nauke i tehnološkog razvoja.[46] Deci bez roditeljskog staranja, sa smetnjama u razvoju ili invaliditetom i deci korisnika socijalne pomoći ostvarivanje prava na naknadu troškova predškolske ustanove obezbeđuje Republika Srbija u visini učešća korisnika u ceni usluge koja se propisuje odlukom jedinice lokalne samouprave.[47] Deca koja pripadaju kategoriji materijalno ugroženih porodica imaju pravo na regresiranje troškova predškolske ustanove, pri čemu naknadu tih troškova obezbeđuje jedinica lokalne samouprave koja propisuje način i uslove regresiranja.[48]

2.6. Naknada zarade za vreme privremene sprečenosti zaposlene za rad usled bolesti ili komplikacija u vezi sa održavanjem trudnoće

U delu rada koji se ticao analize naknada zarada za vreme nekog od odsustva prema Zakonu o finansijskoj podršci porodici nagoveštено je da će posebna pažnja biti posvećena i naknadi zarade za vreme privremene sprečenosti za rad usled bolesti ili komplikacija u vezi sa održavanjem trudnoće. Na ovom mestu ćemo analizirati pravni propis kojim se to pitanje reguliše – Zakon o zdravstvenom osiguranju. Podsetimo se, prilikom obračuna osnovice za naknadu zarade, u posmatrani period od prethodnih 18 meseci ne ulazi period koji je zaposlena žena provela na odsustvu sa rada zbog privremene sprečenosti za rad usled bolesti, odnosno komplikacija u vezi sa održavanjem trudnoće. Već je istaknuto da je takvo rešenje prilično loše i da ugrožava žene koje imaju rizičnu trudnoću. Ipak, na ovom mestu ćemo analizirati odredbe Zakona o zdravstvenom osiguranju i uočiti na koji način se obračunava naknada zarade u slučaju rizične trudnoće. Pri tome, ovde treba napomenuti da su sredstva koja su predviđena za naknadu zarade obezbeđena u Republičkom fondu za zdravstveno osiguranje. Vredi istaći da je taj zakon u našoj zemlji izmenjen. Nov Zakon o zdravstvenom osiguranju stupio je na snagu 1. aprila 2019. godine, donoseći promene koje direktno utiču na visinu naknade zarade zaposlene žene koja zbog rizične trudnoće mora privremeno da odsustvuje sa rada.

[45] ZFPPD (1), čl. 34–37.
[46] ZFPPD (1), čl. 34.
[47] ZFPPD (1), čl. 34–36.
[48] ZFPPD (1), čl. 37

Pitanje sredstava koja se na ime naknade zarade isplaćuju na račun korisnika regulisano je tako da prvih 30 dana sredstva padaju na teret poslodavca, a potom prelaze na Republički zavod za zdravstveno osiguranje. Valja uočiti o kojim promenama je reč. Naime, prema ranijem rešenju, osnov za obračun naknade zarade zbog privremene sprečenosti za rad bila je prosečna zarada ostvarena u prethodna tri meseca. Što se tiče uslova koji se ticao neophodnog staža osiguranja, tražilo se da osigurano lice (trudnica u konkretnom slučaju) radi tri meseca neprekidno ili sa prekidima šest meseci u posmatranom periodu od 18 meseci.[49] Ako trudnica nije ispunjavala uslov koji se ticao prethodnog staža osiguranja, ona je primala naknadu u visini minimalne zarade za periode za koje nije ispunjavala traženi uslov. Dakle, ako je trudnica pre korišćenja prava na odsustvo sa rada zbog privremene sprečenosti za rad zbog bolesti ili komplikacije u vezi sa održavanjem trudnoće bila u radnom odnosu samo dva meseca u posmatranom periodu za prethodnih 18 meseci, za ta dva meseca će primiti naknadu koja je bila obračunavana na osnovu proseka, a za jedan mesec joj se računala minimalna zarada. Odredba novog zakona postavlja stroži uslov koji se tiče staža osiguranja. Da bi zaposlena žena koja je trudna ostvarila pravo na naknadu zarade zbog odsustva sa rada, zbog privremene sprečenosti za rad usled bolesti ili komplikacije u vezi sa održavanjem trudnoće, za iznos naknade zarade se uzima prosek u poslednjih 12 meseci.[50] Osnov za naknadu zarade koja se isplaćuje iz sredstava obaveznog zdravstvenog osiguranja čini prosečna zarada koju je osiguranik (trudnica) ostvario u prethodnih 12 meseci pre meseca u kojem je nastupila privremena sprečenost za rad (bolest ili komplikacije u vezi sa održavanjem trudnoće).[51] Kao i u prethodnom zakonu, ukoliko osiguranik ne ispunjava uslov koji se tiče obaveznog staža osiguranja, za one mesece za koje se nije ostvarivala zarada uzima se minimalna mesečna zarada. Jasno je da je pooštravanje tog uslova uticalo na naglo spuštanje osnovice. Verovatno je, kao i u prethodnim slučajevima, intencija zakonodavca bila da spreči zloupotrebe. Međutim, ako se i ovde pođe od pretpostavke da su lica savesna, opravdano se postavlja pitanje da li je takvo rešenje najbolje, naročito imajući u vidu osetljivost te kategorije lica.

[49] Zakon o zdravstvenom osiguranju – ZZO (1), *Službeni glasnik RS* 107/2005, 109/2005 – ispr., 57/2011, 110/2012 – odluka US, 119/2012, 99/2014, 123/2014, 126/2014 – odluka US, 106/2015 i 10/2016 – dr. zakon.

[50] Zakon o zdravstvenom osiguranju – ZZO (2), *Službeni glasnik RS* 25/2019.

[51] ZZO (2), čl. 87 st. 1.

3. DAVANJA KOJA SE OSTVARUJU NA OSNOVU ODLUKA JEDINICA LOKALNE SAMOUPRAVE

3.1. Uvodna razmatranja

U vršenju svoje nadležnosti jedinica lokalne samouprave donosi propise samostalno, u skladu sa svojim pravima i dužnostima utvrđenim Ustavom, zakonom, drugim propisom i statutom.[52] Tako su neke jedinice lokalnih samouprava u okviru svojih ovlašćenja donele, kolokvijalno nazvana, „proširena prava". O čemu je reč? Naime, do sada se govorilo o rešenjima koja važe na nivou celokupne teritorije Republike Srbije, a sredstva za novčana davanja po različitim osnovima, o kojima je bilo reči, obezbeđuju se iz državnog budžeta. Kako se pravo građana da neposredno upravljaju onim poslovima koji su od opšteg interesa za lokalno stanovništvo ogleda u postojanju lokalne samouprave, tako je i pravo i obaveza organa jedinica lokalnih samouprava da, u skladu sa zakonom, planiraju, uređuju i upravljaju javnim poslovima koji su u njihovoj nadležnosti i od interesa za lokalno stanovništvo.[53] U tom smislu, imajući u vidu značaj finansijske pomoći porodicama sa decom, na lokalnom nivou su donete odluke koje se tiču ove materije. Zato je izuzetno važno da i tim odlukama bude posvećena pažnja. Napomenućemo još da su ta sredstva obezbeđena iz izvornih prihoda jedinice lokalne samouprave.[54] Odabrani gradovi u ovom radu su Beograd, Požarevac i Valjevo.

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[52] Zakon o lokalnoj samoupravi, *Službeni glasnik RS* 129/2007, 83/2014 – dr. zakon, 101/2016 – dr. zakon i 47/2018, čl. 5.

[53] Zakon o lokalnoj samoupravi, *Službeni glasnik RS* 129/2007, 83/2014 – dr. zakon, 101/2016 – dr. zakon i 47/2018, čl. 2.

[54] Prema Zakonu o finansiranju lokalne samouprave, sredstva budžeta jedinice lokalne samouprave obezbeđuju se iz izvornih i ustupljenih prihoda, izvorni prihodi prema čl. 6 se obezbeđuju putem: 1) poreza na imovinu, osim poreza na prenos apsolutnih prava i poreza na nasleđe i poklon; 2) lokalnih administrativnih taksi; 3) lokalnih komunalnih taksi; 4) boravišne takse; 5) naknada za korišćenje javnih dobara, u skladu sa zakonom; 6) koncesione naknade; 7) drugih naknada u skladu sa zakonom; 8) prihoda od novčanih kazni izrečenih u prekršajnom postupku za prekršaje propisane aktom skupštine jedinice lokalne samouprave, kao i oduzeta imovinska korist u tom postupku; 9) prihoda od davanja u zakup, odnosno na korišćenje nepokretnosti i pokretnih stvari u svojini Republike Srbije, koje koristi jedinica lokalne samouprave, odnosno organi i organizacije jedinice lokalne samouprave i indirektni korisnici njenog budžeta; 10) prihoda od davanja u zakup, odnosno na korišćenje nepokretnosti i pokretnih stvari u svojini jedinice lokalne samouprave; 11) prihoda nastalih prodajom usluga korisnika sredstava budžeta jedinice lokalne samouprave čije je pružanje ugovoreno sa fizičkim i pravnim licima; 12) prihoda od kamata na sredstva budžeta jedinice

3.2. Odluka o dodatnim oblicima zaštite porodilja na teritoriji grada Beograda

Odluka je doneta 2017. godine i od tada je trpela određene izmene. Poslednje su se dogodile 29. novembra 2019.[55] U daljem izlaganju analiziraćemo rešenja koja su njome predviđena.

Na prvom mestu je pravo na novčano davanje porodilji. Reč je o jednokratnom novčanom davanju u iznosu od 10.000 dinara. Ostvaruje ga porodilja za svako rođeno dete u jednom porođaju, bez obzira na broj prethodno rođene dece.[56] Za ostvarivanje tog prava nije značajna visina prihoda, a logičan zaključak je da se kao uslov postavlja prijavljeno prebivalište na teritoriji grada Beograda. Takođe, pravo će ostvariti i porodilja koja ima prijavljeno boravište kao raseljeno lice iz Autonomne Pokrajine Kosovo i Metohija, potom porodilja koja ima status izbeglice iz Republike Hrvatske i Bosne i Hercegovine i porodilja koja je strani državljanin sa odobrenim stalnim boravkom na teritoriji grada Beograda.[57] Uslov koji se tiče prebivališta odnosno boravišta postavljen je tako da je neophodno da postoji najmanje godinu dana pre rođenja deteta.[58]

Sledeće pravo je pravo na novčano davanje nezaposlenoj porodilji. Prema tekstu odluke, titular je nezaposlena porodilja. Ona ostvaruje pravo na jednokratno novčano davanje u iznosu od 25.000 dinara bez obzira na broj prethodno rođene dece.[59] Uslov koji se tiče prebivališta ili boravišta postavljen je identično te se na ovom mestu neće ponavljati. Postavljen je još jedan uslov, a on se tiče ukupnog mesečnog prihoda po članu domaćinstva. On po članu domaćinstva, uključujući i novorođenče, mora biti manji od 10.000 dinara za posmatrani period od tri meseca koja prethode rođenju deteta.[60]

Sledeća prava su pravo na novčano davanje porodilji za prvorođeno dete, pravo na novčano davanje porodilji za drugorođeno dete, pravo na novčano davanje porodilji za trećerođeno dete i, najzad, pra-

lokalne samouprave; 13) prihoda po osnovu donacija jedinici lokalne samouprave; 14) prihoda po osnovu samodoprinosa.

[55] Grad Beograd – Odluka o dodatnim oblicima zaštite porodilja na teritoriji grada Beograda, *Službeni list grada Beograda* 44/17.

[56] *Ibid.*

[57] *Ibid.*

[58] *Ibid.*

[59] *Ibid.*

[60] *Ibid.*

vo na novčano davanje porodilji za blizance. Prava se ostvaruju bez obzira na visinu prihoda, pri čemu su uslovi koji se tiču prebivališta odnosno boravišta postavljeni na identičan način kao i za prethodna novčana davanja. Iznosi se isplaćuju jednokratno i postavljeni su na sledeći način: za prvorođeno dete 10.000 dinara, za drugorođeno dete 10.000 dinara, za trećerođeno dete 30.000 dinara i za blizance 25.000 dinara po detetu, što ukupno čini 50.000 dinara.[61]

3.3. Odluka grada Požarevca o finansijskoj podršci porodici sa decom[62]

Grad Požarevac je ovu odluku doneo 2018. godine i ona je trenutno na snazi. Njome se utvrđuju uslovi i način ostvarivanja prava na novčanu naknadu u iznosu od 40.000 dinara za prvorođeno dete, porodicu u kojoj se rode blizanci, trojke ili četvorke i regresiranje troškova boravka dece u predškolskoj ustanovi i prava na novčanu naknadu deci nastradalog roditelja u vršenju službene dužnosti.[63]

Što se tiče naknade za prvorođeno dete, ona iznosi 40.000 dinara i pravo na tu naknadu ostvaruje majka, ukoliko ona ili otac deteta imaju prebivalište na teritoriji grada Požarevca duže od šest meseci pre rođenja deteta, pod uslovom da dete ima prijavljeno prebivalište na teritoriji grada Požarevca i koja je ostvarila pravo na roditeljski dodatak.[64] Titular prava može biti i otac deteta ako majka nije u mogućnosti da neposredno brine o detetu, a tu se podrazumevaju situacije da majka nije živa, da je na izdržavanju kazne zatvora ili da je lišena roditeljskog prava u korist oca.[65] Što se tiče uslova koji se tiče dužine prijavljenog prebivališta, čini se da je *ratio* očigledan i da je cilj da se izbegnu zloupotrebe koje se tiču promene mesta prebivališta samo radi ostvarivanja prava na novčanu naknadu.

Odlukom je predviđena i novčana naknada za porodicu u kojoj se rode blizanci, trojke ili četvorke. To se rešenje može pohvaliti, budući da je ranije bilo reči o tome da je Zakon o finansijskoj podršci to pitanje propustio da reguliše. Iznos naknade je 40.000 dinara i podrazumeva da se taj iznos dobija za svako dete. I ovde je titular prava

61 *Ibid.*

62 Grad Požarevac – Odluka o finansijskoj podršci porodici sa decom, *Službeni glasnik grada Požarevca* 4/2018, 9/2018 i 14/2018.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

majka, a otac ako je majka lišena mogućnosti da se neposredno stara o deci. Uslovi su identično postavljeni, te se pravo na tu naknadu ostvaruje ako majka ili otac imaju prebivalište na teritoriji grada Požarevca najmanje šest meseci pre rođenja dece.[66]

Može se kritikovati to što se ta odluka ne odnosi na drugo, treće ili četvrto dete osim kada je u pitanju isti porođaj. Ipak, treba imati na umu da jedinica lokalne samouprave takve odluke donosi u skladu sa svojim finansijskim mogućnostima.

Predviđena je poklon-čestitka u iznosu od 40.000 dinara za prva tri deteta rođena u Novoj godini u Opštoj bolnici „Voja Dulić" Požarevac, a predviđeno je i davanje poklon-paketa za svako rođeno dete čiji majka ili otac imaju prebivalište na teritoriji grada Požarevca.[67]

Regresiranje troškova boravka u predškolskoj ustanovi još jedan je vid finansijske podrške porodici koji je regulisan tim aktom. Tako, pravo na regresiranje troškova u iznosu od 50% od cene koštanja boravka blizanaca, trećeg i svakog narednog deteta u odlukom predviđenoj predškolskoj ustanovi ostvaruju roditelji sa prebivalištem na teritoriji grada Požarevca.[68] Pravo na regresiranje troškova u iznosu od 100% od cene koštanja postoji ako je reč o deci sa smetnjama u razvoju ili sa invaliditetom; ako su u pitanju deca korisnika novčane socijalne pomoći; ako su u pitanju deca iz materijalno ugroženih porodica; ako su to deca bez roditeljskog staranja. Ponavlja se postavljen uslov koji se odnosi na prebivalište roditelja.

Najzad, kao poslednje pravo, predviđena je novčana naknada deci nastradalog roditelja u vršenju službene dužnosti u iznosu od 250.000 dinara.[69]

3.4. Odluka grada Valjeva o većem obimu prava porodici sa decom i o finansijskoj podršci za podsticanje rađanja dece

Grad Valjevo je još jedna jedinica lokalne samouprave koja je, u skladu sa svojim ovlašćenjima, donela odluku koja se tiče finansijske podrške porodici sa decom.[70] Prava koja su propisana jesu pravo na novčanu pomoć nezaposlenim porodiljama, pravo na novčanu isplatu

66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 *Ibid.*
70 Grad Valjevo – Odluka o većem obimu prava porodici sa decom i o finansijskoj podršci za podsticanje rađanja dece, *Službeni glasnik grada Valjeva* 2/2020.

porodiljama koje su rodile dete 1. ili 14. januara i pravo na naknadu troškova boravka dece u predškolskoj ustanovi.[71]

Pravo na novčanu pomoć nezaposlenim porodiljama ostvaruju porodilje koje nisu u radnom odnosu a imaju prebivalište na teritoriji grada Valjeva, i to u iznosu od 10.000 dinara mesečno, od dana rođenja do navršene prve godine života deteta.[72] Pravo na novčanu isplatu porodiljama koje su rodile dete 1. ili 14. januara isplaćuje se jednokratno u iznosu od 50.000 dinara, a ostvaruje ga porodilja koja je rodila dete 1. ili 14. januara u Opštoj bolnici Valjevo, uz uslov da ima prebivalište na teritoriji grada Valjeva.[73] Da bi se ostvarilo pravo na naknadu troškova boravka dece u odlukom predviđenoj predškolskoj ustanovi, alternativno su postavljena dva uslova – ili da je reč o detetu bez roditeljskog staranja na smeštaju u hraniteljskoj porodici ili da ima prebivalište na teritoriji grada Valjeva i da je treće ili svako naredno dete posle trećeg u porodici.[74]

4. ZAKLJUČAK

Na kraju ovog rada možemo konstatovati da su u Srbiji uspostavljeni pravni okviri koji se tiču mera koje država preduzima u različitim finansijskim olakšicama, a radi društvene brige o porodici sa decom. Brojni su, međutim, izazovi u prevazilaženju aktuelnih problema koji se tiču te oblasti.

U Zakonu o finansijskoj podršci porodici treba reformisati ostatak spornih odredaba. Nesporno je da postoje izvesna pitanja koja on reguliše na dobar način – proširivanje kruga korisnika odgovarajućih naknada, povećanje iznosa roditeljskog dodatka, prebacivanje tereta naknade zarade na državu, a ne na poslodavca. Sve su to mere koje zaslužuju pohvalu. Međutim, propusti još uvek postoje. Primeri iz prakse su približili probleme sa kojima se jedna zaposlena žena suočava zbog novog načina obračuna zarade, što zaista u mnogo čemu smanjuje kvalitet života porodice koja ima novog člana. Mada se zakonodavac vodio idejom sprečavanja zloupotreba, ponovo se treba zapitati po koju cenu je to učinjeno ako pretpostavimo savesnost nekog lica. Ugledajući se

71 *Ibid.*
72 *Ibid.*
73 *Ibid.*
74 *Ibid.*

na druge evropske države i poštujući međunarodne radne standarde, zahtevani uslov za neophodan staž osiguranja treba uskladiti sa evropskom praksom. Očigledni su propusti u propisivanju zagarantovanog iznosa za odsustvo sa rada radi nege deteta ili posebne nege deteta i, kao takvi, oni prilično otežavaju već veliki izazov pomirenja poslovnih i porodičnih obaveza.

Valja razmotriti ideju uspostavljanja dečjeg dodatka kao univezalnog prava deteta, bez obzira na materijalni status porodice.

Problemi na koje se ukazivalo u ovom radu u mnogo čemu otežavaju položaj porodice u našem društvu. Zaključak ovog rada nas vraća na sam početak priče o značaju porodice kao nosećeg stuba društva, kao mesta gde započinju vitalni procesi socijalizacije deteta, kao neraskidive spone između pojedinca i društva. Iz tog razloga je neophodno neprestano raditi na poboljšavanju njenog položaja. Zato je važno imati odgovarajuću pravnu regulativu koja zaposlenim roditeljima omogućava da pomire i usklade svoje porodične i poslovne dužnosti, propise kojima se na adekvatan način reguliše pitanje najugroženijih porodica, propise koji nisu diskriminatorski.

Kako smo to ranije isticali, društvena briga o porodici je inspirisana društvenom brigom o deci jer, najzad, „čovečanstvo duguje detetu najbolje što mu može pružiti“ (Milosavljević 1988, 182).

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FINANCIAL SUPPORT TO FAMILIES WITH CHILDREN – KEY LABOR AND SOCIAL LAW INSTRUMENTS

Summary

There are numerous challenges faced by the modern family. Cultural, ideological, religious, financial. Families are constantly faced with the struggle for existence, which often makes it difficult for it to fulfill its primary function of caring for children. The main thing a family should represent is a refuge and a source of security for every individual, considering that healthy individuals in healthy families are the essence of a successful society. The author of this paper tries to point out the financial aspects of social care for families with children through the analysis of current legal regulations. The central part of the paper refers to the solutions of the Law on financial support for families with children and individual decisions of local self-government units regarding financial support for families with children. In order to fulfill its role of raising children, providing love, support, and security, it is necessary to have stable financial support. This support enables the family not to struggle for existence as its primary goal.

Key words: *family – financial support – existence – maternity leave – wage compensation.*

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Milica Nikolić*

PRIZNAVANJE I ZAŠTITA SINDIKALNIH SLOBODA U DOMAĆEM PRAVU U PERIODU OD PRVOG DO DRUGOG SVETSKOG RATA

Zbog izuzetne važnosti sindikalnih sloboda u 21. veku i trenutnog položaja sindikata, autorka ovim radom nastoji da, prevashodno primenom istorijskopravnog metoda, ukaže na put priznavanja i zaštite sindikalnih sloboda u domaćem pravu u periodu od Prvog do Drugog svetskog rata. U radu se prvenstveno polazi od određivanja pojma i sadržine sindikalnih sloboda, da bi se potom analizirale ekonomske, socijalne i političke prilike u Evropi i svetu koje su pokrenule borbu radničke klase za sindikalne slobode i prava.

Centralni deo rada bavi se analizom zakonskih pravnih propisa od kraja Velikog rata pa sve do početka Drugog svetskog rata, koje sadrže odredbe o sindikalnim slobodama. Takođe, analizirani su i društveno-političke i ekonomsko-socijalne prilike u Srbiji između dva rata, osnivanje prvih radničkih i sindikalnih organizacija i formiranje Glavnog radničkog saveza. Analizom dostupne literature i dostupne arhivske građe dolazi se do zaključka da je u međuratnom periodu radnička klasa uspela da se izbori za zakonsko priznanje sindikalnih sloboda, međutim, zakonske odredbe kojima se ono garantovalo u praksi skoro i nisu primenjivane.

Ključne reči: *sindikalne slobode – radnička klasa – međuratni period – pravo na sindikalno organizovanje – pravo na kolektivnu akciju.*

> *„Pobuna nije nikakav zahtev za svemoćnom slobodom. Naprotiv, ona vodi proces protiv svemoćne slobode. Pobunjenik hoće da se prizna činjenica kako sloboda ima granice gde se nalazi neko ljudsko biće, jer je granica upravo moć pobune tog bića"*
>
> (Alber Kami)

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1. UVODNA RAZMATRANJA

Srž svake borbe za ljudska prava i slobode, uključujući i sindikalne slobode o kojima će dalje biti reči, sadržana je upravo u navedenom citatu čuvenog francuskog pisca Albera Kamija. Kada se spomenu sindikalne slobode, najčešća asocijacija je radnička klasa i njena borba za sindikalna prava, iako u osnovi ta prava i slobode pripadaju i poslodavcima. Sindikalne slobode i prava predstavljaju kamen-temeljac socijalnog dijaloga, a putem njega i ostvarivanja socijalne pravde. Ustavnim i zakonskim garantovanjem sindikalnih sloboda i prava radnici su posredstvom svojih sindikata uspeli da mnogo uspešnije istaknu svoje zahteve. Stvaranjem sindikata, kao posledica pregovora između sindikata i poslodavaca, javljaju se i kolektivni ugovori (Jovanović 2018, 140–141). Sindikalna prava i slobode se razlikuju od „klasičnih" prava čoveka po obavezi države da aktivno učestvuje u njihovom garantovanju (Lubarda 2013, 816).

Kada govorimo o pomenutim slobodama i pravima, treba imati u vidu sledeće. Prvo, preduslov ostvarivanja prava na sindikalno udruživanje i organizovanje jeste da je u državi dozvoljeno pravo na mirno okupljanje i udruživanje uopšte. Bez toga se ne može govoriti o postojanju sindikalnih sloboda. Drugo, sindikalnim organizovanjem, to jest aktivnostima sindikata, odnosno udruženja poslodavaca, zaposleni, odnosno poslodavci, formiraju kolektivne interesne zahteve i na taj način se omogućava socijalni dijalog putem kolektivnog pregovaranja. Dakle, pravo na kolektivno pregovaranje javlja se kao logična posledica jer ukoliko u državi ne bi bilo priznato pravo na kolektivno pregovaranje, formiranje samih sindikata ne bi imalo smisla. I, treće, svoje aktivnosti sindikati mogu vršiti i putem pritiska, te se stoga pravo na kolektivnu akciju (najčešće pravo na štrajk) u modernoj teoriji posmatra kao pravo koje je tesno povezano sa pravom na sindikalno organizovanje. Pravo na štrajk se smatra nadogradnjaom prava na sindikalno organizovanje. Ovim napomenama se ističu međusobna povezanost i uslovljenost nekoliko prava koje simbolično možemo predstaviti na sledeći način.

Pravo na okupljanje/udruživanje uopšte ► pravo na sindikalno organizovanje ► pravo na kolektivno pregovaranje ► pravo na kolektivnu akciju (štrajk)

Pravo na sindikalno organizovanje je jedno od osnovnih socijalnih prava koje danas u svim demokratski uređenim državama spada

u rang ustavom zagarantovanog prava. Ono pripada i zaposlenima i samim sindikatima. Dakle, postoje individualna i kolektivna sloboda sindikalnog udruživanja, kao i pozitivan i negativan aspekt. Pozitivan vid se ogleda u pravu na osnivanje, organizovanje i pristupanje sindikatu, dok se negativan vid ogleda u tome da je zaposleni slobodan da ne bude član nijednog sindikata (Mijatović 2015, 15).

Pravo na kolektivno pregovaranje temelji se na filozofiji socijalnog dijaloga uopšte, na autonomiji socijalnih partnera u uređivanju svojih odnosa i uslova rada i na spremnosti strana za kompromis radi zaključenja kolektivnog ugovora o radu. To je osnovno kolektivno pravo sindikata, ali ne svih, već samo reprezentativnih. Međutim, prema Preporuci Međunarodne organizacije rada (MOR) broj 91, pravo na pregovaranje pripada i radnicima koji nisu članovi sindikata, ukoliko su izabrali svoje predstavnike za pregovore, uz ispunjenje uslova da sindikat nije osnovan ili da nije stekao reprezentativnost (Lubarda 2013, 878–883). Predmet kolektivnog pregovaranja mogu biti odnosi ugovornih strana (obligacioni deo), ali i uslovi rada (normativni deo) (Lubarda 2013, 891). Dakle, kolektivno pregovaranje je proces u kome reprezentativni sindikat i reprezentativno udruženje poslodavaca, zastupajući interese i zahteve svojih članova, pokušavaju da pronađu kompromis u vezi sa sadržajem i zaključe kolektivni ugovor (Jovanović 2009, 162).

Pravo na štrajk je danas ustavno i zakonski garantovano u svim demokratski uređenim državama (Jovanović 2009, 171). Štrajk kao izraz nezadovoljstva radnika pojavio se za vreme Industrijske revolucije, kao posledica industrijskog kapitalizma. Prema nekim teoretičarima, postoje tri osnovne koncepcije štrajka u kapitalizmu: građanska, korporativistička i marksistička (Ravnić 1971, 59). Savremena građanska koncepcija priznaje pretežno ekonomski karakter i cilj štrajka, za razliku od stare građanske koncepcije, prema kojoj je štrajk istovremeno i politička i ekonomska akcija, akcija koja ugrožava ekonomski i politički poredak države i, kao takav, štrajk je bio zabranjen (krivično delo) (Ravnić 1971, 60–64). Korporativistička koncepcija štrajka postojala je u totalitarnim režimima, poput fašističke Italije i nacističke Nemačke. Funkcija korporacije, koja je okupljala sindikate zaposlenih i sindikate poslodavaca, jeste postizanje ravnoteže interesa obeju strana. Navodno, štrajkom se vređalo načelo socijalne pravde i, kao takav, bio je zabranjen (Ravnić 1971, 64–65). Prema marksističkoj koncepciji, osnovni uzrok štrajka su klasno nepomirljive suprotnosti između rada

i kapitala. U osnovi svake klasne borbe ujedno je i politička borba, iz čega sledi da je konačni cilj štrajkačke borbe svrgnuće buržoaske vlasti (Ravnić 1971, 65–68).

Može se reći da je pravo na štrajk izvedeno iz prava na sindikalno organizovanje jer i pravo na štrajk podrazumeva udruživanje i zajedničku akciju zaposlenih sa ciljem zadovoljenja njihovih interesa. Štrajk podrazumeva kolektivni prekid rada radnika sa ciljem da se poslodavac prinudi da prihvati njihove zahteve (Jovanović 2009, 171–172). Zavisno od države i perioda, štrajk je imao različite oblike, pa se negde govorilo o slobodi štrajka (u smislu da obustava rada ne povlači krivične sankcije), dok se danas govori isključivo o pravu na štrajk. Pravo na štrajk garantovano je ustavima, zakonima, ali i nekim međunarodnim instrumentima: Međunarodnim paktom o ekonomskim, socijalnim i kulturnim pravima, potom velikim brojem konvencija MOR-a o slobodi udruživanja (br. 87, 98, 151, 154), velikim brojem preporuka i Evropskom socijalnom poveljom (Petrović 2009, 109–112).

2. DRUŠTVENO-POLITIČKE OKOLNOSTI OD ZNAČAJA ZA PRIZNAVANJE I RAZVOJ SINDIKALNIH SLOBODA U EVROPI I SVETU

Priznavanje sindikalnih sloboda povezuje se pre svega sa borbom radničke klase za poboljšanje uslova rada i priznavanje svojih prava. Najjače aktivnosti radničkog pokreta usledile su krajem XIX i početkom XX veka, usled određenih društvenih i političkih faktora.

U vreme liberalnog kapitalizma, zabrana rada sindikata opravdavana je osnovnim načelom – *laisser faire*, *laisser passer*. U državama u kojima je zastupljen liberalni kapitalizam, država ne interveniše u odnose na tržištu rada, a i kada to čini, to je u vidu krivičnog sankcionisanja sindikalnog udruživanja i aktivnosti (Lubarda 2013, 827–828). Uvidevši svoj težak ekonomski položaj u društvu, odnosno činjenicu da bivaju eksploatisani, radnici počinju da se udružuju u radničke pokrete sa ciljem da poboljšaju svoj položaj (Jovanović 2018, 36). Priznavanje sindikalnog udruživanja i radničkih sindikata usledilo je nakon što su njihove akcije, naročito štrajk, prestale da budu prekršajno i krivično kažnjive.[1] Udruženja zaposlenih, odnosno sindikati bili su

[1] To je bio slučaj sa velikim brojem država. Recimo u Italiji su sve do 1889. godine bili zabranjeni sindikalno organizovanje radnika i njihove akcije, odnosno štrajk

u nepovoljnijem položaju od udruženja poslodavaca jer se sindikati u svojoj borbi za poboljšanje uslova rada nisu borili samo protiv udruženja poslodavaca već i protiv javne vlasti, odnosno države (Ravnić 2004, 374–375). Bitan faktor za razvoj radnog prava uopšte bila je Oktobarska revolucija 1917. godine. Usled revolucionarnih promena koje je donela Oktobarska revolucija, radnici zapadnih zemalja su poveli borbu protiv buržoazije, ali u njoj ipak nisu uspeli. Kako je fašizam stupio na scenu, polako je potisnuo socijalizam i svi početni uspesi koje je postigla radnička klasa pali su u vodu (Brajić 2001, 29).

U Francuskoj je nakon 1848. bilo priznato pravo na sindikalno organizovanje, ali je ubrzo ukinuto. Tek 1884. godine je konačno zajemčena sindikalna sloboda, odnosno priznato pravo na sindikalno organizovanje (priznata samostalnost sindikata u odnosu na poslodavce i državu, pravo da se pristupi sindikatu i pravo da se ne pristupi nijednom sindikatu) (Despax, Rojot, Laborde 2011, 194–195). Tokom Prvog svetskog rata, država je bila više autoritarna i sve su češće propisivane zabrane udruživanja i štrajkova radnika u vojnim fabrikama. Kako su se u Francuskoj smenjivali autoritarni i liberalni režimi, tako se i razvijalo uređenje slobode udruživanja i prava na štrajk (Ravnić 2004, 375–376).

U Nemačkoj do slobode sindikalnog udruživanja dolazi tek 1871. godine, što je znatno kasnije nego u mnogim zemljama Zapada (Lubarda 2013, 829). U Grčkoj je, recimo, sloboda udruživanja priznata mnogo kasnije nego u velikom delu Evrope.[2] Pred početak Prvog svetskog rata, Nemačka je imala jak i dobro organizovan sindikalni pokret. Nakon rata, Vajmarskim ustavom su priznate sindikalne slobode garantovanjem osnovnih socijalnih prava. Međutim, pobedom nacionalsocijalista na izborima i njihovim dolaskom na vlast 1933. godine, sindikati gube autonomiju (Lubarda 2013, 829).

U Velikoj Britaniji su zakonom iz 1824. priznati sloboda sindikalnog udruživanja i pravo na štrajk, što je bilo mnogo ranije nego u Francuskoj i Nemačkoj, ali već 1825. godine ovta prava su bila znatno ograničena zbog nereda koji su često pratili štrajkove. Zakonom iz

je bio krivično kažnjiv. Nakon donošenja zakona iz 1889. štrajkovi i lokaut u privatnom sektoru bili su dozvoljeni ukoliko nisu bili praćeni velikim neredima i vandalizmom, dok u javnom sektoru nisu bili dozvoljeni uopšte. Međutim, prestanak krivične odgovornosti nije povlačio i prestanak građanskopravne odgovornosti. O tome više u Treu 2007, 133–134.

[2] Tek 1875. godine priznate su sindikalne slobode. Više u Douka, Koniaris 2018, 55.

1869. uvedena su poboljšanja u korist radnika, međutim, ipak nezadovoljni, radnici su ubrzo zahtevali njegovu promenu (Ravnić 2004, 376–377). Zakonom o sindikatima iz 1871. godine sindikati su konačno legalizovani (Lubarda 2013, 828).

U Sjedinjenim Američkim Državama, sve do donošenja Ruzveltovog *New Deal*-a, nije postojala zakonska regulativa (Lubarda 2013, 828). Okupljanje radnika vrlo dugo nije priznato. U XIX veku, i kada su sindikati zakonski priznati, sudovi su mnoge njihove akcije poput štrajka i bojkota proglašavali nezakonitim jer se smatralo da ograničavaju preduzetništvo. Tek nakon 1880. godine, sudovi su bili malo tolerantniji prema sindikatima. Krajem XIX i početkom XX veka poslodavci, smatrajući da nisu po zakonu obavezni da priznaju sindikate, počeli su da otpuštaju radnike članove sindikata ili da prilikom zapošljavanja zahtevaju od njih da potpišu tzv. žute ugovore, kojim su se radnici obavezivali da neće postati članovi sindikata. Sudovi su donosili sudske naloge kojima su se zabranjivali štrajkovi i druge akcije sindikata te su radnici oštru borbu vodili i protiv sudske vlasti (Ravnić 2004, 377–380). Pravo na sindikalno organizovanje u SAD je priznato tek nakon Velike ekonomske krize, donošenjem Vagnerovog zakona 1935. godine, nakon koga je donet i Taft–Hartlijev zakon 1947. godine (Lubarda 2013, 830).

3. DOPRINOS RADNIČKIH ORGANIZACIJA OSNIVANJU MEĐUNARODNE ORGANIZACIJE RADA

Međunarodno organizovanje radničke klase imalo je nekoliko korena. Usled industrijske revolucije dolazilo je do sve veće eksploatacije radnika, koji su, koncentrisani u velike fabrike, postajali sve solidarniji, što je rezultiralo stvaranjem radničkog i socijalističkog pokreta. Najjači pokretač organizovanja radničkog pokreta na međunarodnom nivou bio je Komunistički manifest i čuveni apel „Proleteri svih zemalja, ujedinite se!" (Pešić 1971, 64)

Prvo međunarodno udruženje radnika je *Prva internacionala*. To udruženje izvršilo je veliki uticaj na ostvarenja ideje međunarodnog radnog zakonodavstva. Na svim kongresima tog udruženja isticani su zahtevi za međunarodno uređenje zaštite radnika. U Parizu je, 1889. godine, održan kongres koji je okupio radničke predstavnike velikog broja država, na kome je osnovana nova međunarodna orga-

nizacija, *Druga internacionala*, koja se na svojim kongresima širom sveta, takođe, izjasnila za međunarodno radno zakonodavstvo. Nacionalni radnički sindikati su sve više uviđali potrebu da se stvori i jedan međunarodni centar, kako bi se zaštita radnika i poboljšanje uslova rada podigli na međunarodni nivo. Čak i tokom Prvog svetskog rata, aktivnosti radničkih organizacija su trajale, samo što se njihovo dejstvo, zbog ratnog stanja, nije toliko osećalo. Kao posledica snažnog uticaja Oktobarske revolucije na radnički pokret u svim zemljama, formirana je *Treća internacionala*. Nakon rata, kako se radilo na pripremi Mirovne konferencije, u svakoj državi osetio se pritisak i nacionalnih i međunarodnih radničkih organizacija da se na konferenciji, između ostalog, spomenu i pitanja međunarodnog radnog zakonodavstva (Pešić 1971, 64–79). Kao rezultat, Versajskim mirovnim ugovorom, tačnije njegovim delom XIII, osnovana je Međunarodna organizacija rada.

4. PRIZNAVANJE I ZAŠTITA SINDIKALNIH SLOBODA U DOMAĆEM PRAVU DO DONOŠENJA VIDOVDANSKOG USTAVA

4.1. Društveno-političke i ekonomsko-socijalne prilike u Srbiji do početka Prvog svetskog rata

Krajem XIX i početkom XX veka Srbija je bila izrazito seljačka zemlja. Prema nekim procenama, 1874. godine je skoro 90% stanovništva bilo seosko. Glavno zanimanje je bila zemljoradnja, dok se industrija razvijala polako (Savez samostalnih sindikata Srbije – SSSS 2020). U drugoj polovini XIX i prvoj polovini XX veka, Srbiju zahvataju krupne promene i relativno brz ekonomski napredak. Izgradnja železničke pruge Beograd–Niš 1884. godine doprinela je razvoju industrije kod nas. Duž pruge i na Savi i Dunavu počinju da se grade industrijska preduzeća, ali se razvoj podstiče i u ostatku države. Pred početak rata, Srbija je imala oko 500 industrijskih preduzeća u kojima je bilo oko 20.000 radnika. Organizacija radničkog pokreta menjala je svoje forme tokom vremena. Uz stvaranje Srpske socijaldemokratske partije (1903), javljaju se i prve sindikalne organizacije (kasnije Glavni radnički savez) (M. Milenković, T. Milenković 2002, 27–28). Pretpostavka sindikalnog organizovanja je garantovanje prava na udruživanje

uopšte, koje je u Srbiji prvi put priznato za vreme vladavine Milana Obrenovića, Zakonom o udruženjima i zborovima iz 1881.

Prema tom zakonu, građani su imali pravo slobodnog udruživanja i pravo održavanja zborova. Za razliku od nepolitičkih udruženja, osnivanje političkih je bilo podvrgnuto strožim pravilima. Osnivanje političkih udruženja moralo je da bude odobreno od nadležne policijske vlasti, a odobrenje je moglo biti uskraćeno samo ako osnivački akti udruženja nisu bili u skladu sa postojećim zakonom. Tri godine kasnije, 1884. godine, taj zakon je zamenjen novim, kojim je sužena prethodno data sloboda udruživanja (Stojanović 2018, 52–53). Ustavom iz 1888. godine, koji važi za najliberalniji ustav Srbije XIX veka, proklamovano je pravo na udruživanje, čime se prvi put u našoj istoriji pravo na udruživanje podiglo na rang ustavnog prava. Potom je zakonom iz 1900. godine u velikom delu ograničena sloboda udruživanja, da bi kasnije Ustavom iz 1903. godine reafirmisan liberalni koncept slobode udruživanja.

Od 1880. do 1911. godine državni dug Srbije je rastao pet puta brže od državnog budžeta. Kako bi se državni budžet povećao, povećan je porez, dakle sav dug se svalio na stanovništvo, odnosno na najsiromašnije. Životni standard je sve više padao. Seljaštvo je polako propadalo, sve veći broj ljudi sa sela je odlazio u gradove u potrazi za poslom u industriji, što je polako dovelo do pada cena nadnica radnika jer ih je bilo sve više. Kako se sve više povećava broj radnika u industriji, jača radnički pokret (Pantelić 2018, 9).

Sve veći priliv radnika u fabrike omogućio je čvršću povezanost i jačanje solidarnosti, čime je postavljen kamen-temeljac sindikalnom organizovanju radnika. Kako marksistički teoretičari tvrde, u osnovi sindikalnog organizovanja je klasna borba. Sindikalne organizacije su nastale kao posledica velikih klasnih razlika, pa je tako nesporan i njihov klasni karakter (Pavlović 1974, 39).

4.2. Prve radničke i sindikalne organizacije

Glavni cilj radničkog udruživanja bilo je moderno zakonsko regulisanje radnih odnosa. Iako je krajem XIX veka osnovan niz udruženja za pomoć članovima u slučaju bolesti, smrti, nezaposlenosti, karakter radnih odnosa uređenih Esnafskom uredbom, koja se tada primenjivala, nije se promenio (Pavlović 2008, 412–413). Uredbom o

esnafima nije regulisan položaj zaposlenih na zadovoljavajući način ni u vreme kad je doneta, a kamoli kasnije (M. Milenković, T. Milenković, 2002, 28). U zapadnim državama za poboljšanje položaja radnika, koji su bili u znatno boljem položaju nego radnici u Srbiji, činilo se mnogo više nego u Srbiji, što je isticano u razglasu Srpske radničke socijaldemokratske stranke „*Sem varvarske Turske, Srbija je jedina zemlja u Evropi gde nema zakona u korist radnika!*" Usled takvog stanja, radnici su se demonstracijama i štrajkovima izborili za jedno moderno radno zakonodavstvo (Pavlović 2008, 413).

Prve radničke organizacije su društva sitnih zanatlija čiji je cilj bio da pomažu članovima u slučaju bolesti, iznemoglosti i smrti. Potom su se pojavile nove organizacije – radnička udruženja za uzajamnu pomoć za slučaj bolesti i smrti. Prvo društvo tog tipa osnovano u Srbiji je *Družina tipografskih radnika*, osnovana 1874. godine. Tek 1901. godine, koja predstavlja prekretnicu, formira se prva radnička organizacija u Srbiji u XX veku – *Beogradsko radničko društvo* (Jelić 2016, 16–18). Odmah po osnivanju Beogradskog radničkog društva, počelo je da se radi na formiranju strukovnih sindikalnih organizacija. U periodu 1901–1903. godine osnovano je šest sindikalnih organizacija (saveza): građevinskih radnika, metalskih radnika, drvodeljača, šivačkih, trgovačkih pomoćnika i tipografskih radnika (SSSS 2020).

Posle državnog udara Aleksandra Obrenovića, 1903. godine, dolazi do oštre reakcije, čije posledice su naročito pogodile socijalistički radnički pokret. Formalno, rad sindikata i radničkih društava nije bio ograničen, ali je država težila da ih stavi pod svoju kontrolu, osnivajući takozvane „žute" sindikate koji su bili pod kontrolom vlasti. Kao reakcija na namere režima, radnici ubrzavaju aktivnosti na osnivanju jedne centralne organizacije (*Radnički savez*), koja bi okupila sve sindikalne i radničke organizacije u Srbiji (SSSS 2020).

Osnivanjem Radničkog saveza nakon Majskog prevrata, socijalistički radnički pokret naglo jača jer su beogradski socijalisti veliki deo zasluge pripisivali sebi. O povezanosti partije i sindikata govori i podatak da se u to vreme za sindikate i partiju govorilo da su dva tela sa jednim srcem. Dok je partija vodila političku borbu, sindikati su vodili ekonomsku (Vinaver 1964, 7). Dimitrije Tucović je u svojim govorima često isticao da su „*u borbi radničke klase nerazdvojno spojeni njen ekonomski pokret i politički rad*" (Tucović 1914, 29). Dakle, teško je napraviti razdelnu liniju između partije i sindikata, odnosno između

političkog i ekonomskog delovanja sindikata.[3] Istog datuma (20. jul 1903) održani su Prvi kongres Radničkog saveza i Osnivački kongres Srpske socijaldemokratske stranke. Taj datum predstavlja prelomni događaj u istoriji radničkog pokreta Srbije i njime se završava proces formiranja jedinstvenog radničkog pokreta (SSSS 2020). Sledeći korak je bilo usvajanje novih pravila strukovnih sindikalnih saveza (u daljem tekstu Pravila), koje je sastavio Odbor za izradu sindikalnih pravila pod rukovodstvom Dimitrija Tucovića. Iste godine, 1904, Pravila su podneta na potvrdu ministru narodne privrede, koji je, pod pritiskom sindikalnog rukovodstva, bio prinuđen da ih odobri. Dakle, iako pravo na sindikalno organizovanje nije bilo priznato tada, prvi put kod nas jedan nadležni organ je dozvolio formiranje sindikata (SSSS 2020). Od 1905. godine Radnički savez dobija novo ime – *Glavni radnički savez* i usvajaju se nova sindikalna pravila, kojima se ističe da se svi radnički sindikati Srbije objedinjuju u Glavni radnički savez (Jelić 2016, 23–24

S obzirom na to da je država bila potpuno neaktivna u finansijskom pomaganju nezaposlenih radnika, takvi radnici su ipak određen vid zaštite videli u svojim sindikatima. Dva su načina na koja su sindikati mogli da pomognu nezaposlenim članovima. Prvo, tako što su sindikati vršili ulogu berzi rada, odnosno tražili im posao, ili davanjem neposredne novčane pomoći. Najrasprostranjenije je bilo materijalno pomaganje nezaposlenih jer je prvi način, iako je bio jeftiniji, bio dosta komplikovaniji (M. Milenković, T. Milenković 2002, 31). Novčana pomoć se prikupljala iz sindikalnih članarina, samim tim, prvih godina i nije bila tako velika zbog malobrojnog članstva. Vremenom, kako je broj članova rastao, rasla je i novčana pomoć. Treba spomenuti još instituciju sindikalnih berzi rada koja je podrazumevala da, s jedne strane, sindikati preko biroa traže rad za svoje članove, dok, s druge strane, država i privatni poslodavci preko njega traže radnike za svoje poslove (M. Milenković, T. Milenković 2002, 28). Pomaganje nezaposlenih članova propisivano je kao jedan od ciljeva sindikalnih organizacija u svojim pravilima. Na primer, u članu 2 Pravila saveza građevinskih radnika iz 1904. godine navode se ciljevi saveza koji, između ostalog, obuhvataju i „materijalno pomaganje svojih članova, ukoliko to stanje kase dozvoljava“ (Hasanagić, Topalović 1964, 6–7).

[3] Istorija i kapitalističkih i socijalističkih zemalja pokazuje da su često sindikati samostalno ili zajedno sa nekim političkim organizacijama vršili i određene političke akcije. O uticaju političkih programa i organizacija na aktivnosti sindikata više u Tintić 1964, 35.

U vreme sve bržeg jačanja radničkog pokreta, nastala je parola koja simbolično pokazuje moć radništva i radničkih organizacija uprkos svim progonima kojima su radničke organizacije bile izložene: „*Kad htednu hrabre mišice tvoje, svi točkovi će da stoje*“ (Krekić 1926, 9). Pod velom te i mnogih drugih parola vođene su akcije sindikata u vidu štrajkova širom Srbije.

Savez rudarskih radnika je od 1907. godine održao niz štrajkova uglavnom zbog teških uslova rada. Prvo u Majdanpeku, a potom, dvadesetak dana kasnije, otpočeo je štrajk u Boru. Razlozi štrajkova su bili i omogućavanje uživanja sindikalnih sloboda, kao na primer, štrajkovi na Vrškoj Čuki i Aleksincu. Štrajk na Vrškoj Čuki je otpočeo u avgustu 1907. godine jer je uprava rudnika kažnjavala sindikalno organizovane rudare, bilo otpuštanjem, bilo smanjivanjem nadnica. Po završetku tog štrajka, otpočeo je novi, 4. januara 1908. godine. Glavni zahtevi oba štrajka bili su priznavanje prava na sindikalno organizovanje, odnosno omogućavanje i njegovog faktičkog uživanja. Isto tako, rudari u Aleksincu su štrajkovali u septembru 1907. godine. Taj štrajk, koji je trajao sedam dana, okončan je tako što je postignut sporazum sa Upravom rudnika, kojim je rudarima zagarantovano pravo organizovanja i pravo kolektivnog predstavljanja (Hasanagić, Topalović 1964, 440–444).

Period od 1909. godine bio je takođe obeležen nizom štrajkova širom Srbije i borbom radnika za uspostavljanje modernog radničkog zakonodavstva, donošenjem Zakona o radnjama.

Nakon neuspelog štrajka opančarskih radnika Užičkog kraja, u maju 1909. godine, u štrajk su stupili i krojački radnici zbog fizičkog zlostavljanja u fabrici. Nakon petnaest dana štrajka, poslodavci su prihvatili zahteve da na rad primaju samo radnike članove sindikata, potom je ukinut rad nedeljom i praznikom, a otkaz je bio moguć samo uz saglasnost i samog radnika. Ubrzo je došlo do novog štrajka koji je rezultirao pritiskom na poslodavce i njihovim priznavanjem krojačke sindikalne organizacije 1910. godine (Ignjić 1989, 656–658).

Pred donošenje Zakona o radnjama, zbog štrajkova širom zemlje, država je bila jedno veliko žarište. Zakonom o radnjama je smirena bura u kojoj se Srbija nalazila. Međutim, radništvo se nije zaustavilo samo na donošenju zakona već su dalju borbu usmerili ka efikasnoj primeni odredaba zakona u praksi.

4.3. Zakon o radnjama i sindikalne slobode

4.3.1. Garantije osnovnih kolektivnih prava

Nakon nekoliko neuspelih projekata, Zakon o radnjama (u daljem tekstu Zakon) usvojen je 11 (24). juna 1910. godine, a na snagu je stupio 1. jula 1911. godine. Zakonom je regulisana i radnopravna i materija kompanijskog prava, kao i određene kaznene odredbe. Zakonom su garantovana i individualna i kolektivna prava (Pantelić 2018, 13). Povodom regulisanja nekih pitanja nacrta zakona vođene su velike debate u skupštini. Ta pitanja su se ticala kolektivnih prava i sloboda, naročito prava na štrajk i prava na sindikalno organizovanje. Zakonom o radnjama u toj oblasti su uvedene drastične novine koje su velikim delom predstavljale ostvarenje programa Socijaldemokratske partije (Pavlović 2008, 418).

Pravo na sindikalno organizovanje do donošenja Zakona o radnjama nije bilo predviđeno kao poseban oblik udruživanja. Zakonom o radnjama je prvi put pravo na sindikalno organizovanje zakonski sankcionisano (Pantelić 2018, 15). Zakonom je bila predviđena mogućnost stvaranja sindikalnih organizacija (profesionalnih udruženja). Kao najviši predstavnici udruženja poslodavaca i radnika, obrazovane su komore, tako što bi svako od tih udruženja obrazovalo za sebe po jednu komoru, sa sedištem u Beogradu (Pavlović 2008, 422). Takođe, Zakonom je bilo predviđeno da poslodavačke i radničke organizacije mogu putem međusobnog sporazuma ustanovljavati berze rada (Pavlović 2008, 422).

Pravo na štrajk nije bilo eksplicitno priznato Zakonom, ali se može reći da ga je tolerisao (Pantelić 2018, 15). Zakonom je štrajk definisan kao slučaj kada više od jedne polovine radnika dotičnog preduzeća, ne računajući učenike, napusti posao i kao posledica toga dogodi se raskid ugovora o radu. U slučaju štrajka, zaposleni su imali rok od tri dana da se isele iz stanova poslodavaca. Stranim radnicima Zakonom je bilo zabranjeno i odlučivanje i učestvovanje u štrajku. Takođe, Zakonom je bilo predviđeno i isključenje sa rada (lokaut). Lokautom se smatralo ako više od polovine radnika bude kolektivno otpušteno na duže vreme (Pantelić 2018, 15). Odredba o štrajkačkoj straži je izbrisana, čime je nastala pravna praznina o tom pitanju, koja nije podrazumevala zabranu štrajkačke straže (Pavlović 2008, 418).

Kada je reč o *pravu na kolektivno pregovaranje*, odnosno materiji kolektivnih ugovora, Zakonom su bili priznati kolektivni ugovori. Međutim, u praksi su oni slabo zaključivani sve do Prvog svetskog rata (Pantelić 2018, 15).

4.3.2. Mehanizmi zaštite zakonom priznatih prava

Zakonom je predviđena i ustanova Inspekcije rada, međutim, faktički ona nije ni postojala, jer je bila vezana za izvršnu vlast. Zakonom o radnjama predviđalo se da se ustanove i *Sudovi dobrih ljudi*, te je sa tim ciljem 1912. godine doneta *Uredba o osnivanju sudova dobrih ljudi*. U Srbiji je tada prvi put uspostavljeno specijalizovano sudstvo (Pantelić 2018, 18). Sud dobrih ljudi sastojao se od tri člana, prvi je biran od poslodavaca, drugi od radnika, a trećeg biraju prva dvojica (Pavlović 2008, 422). Sudovi dobrih ljudi bili su nadležni i za rešavanje sporova povodom štrajka ili lokauta (Pantelić 2018, 15).

Na osnovu Uredbe o osnivanju sudova dobrih ljudi, bilo je neophodno da se u svakom okrugu uspostave ti sudovi, paralelno sa postojećim sudovima. Po pravilu, to je trebalo da se desi neposredno nakon stupanja Zakona na snagu, međutim u praksi je veliki deo odredaba Zakona često kršen, pa se i osnivanje tih sudova izbegavalo.[4]

4.4. Položaj sindikata od kraja Prvog svetskog rata do donošenja Vidovdanskog ustava (privremeno radničko zakonodavstvo)

Period 1912–1918. godine obeležili su česti prekidi rada sindikata širom zemlje, opadanje moći radničkog saveza i opšti ekonomski problemi u državi. Prvo su usledili Balkanski ratovi koji su potpuno prekinuli razvoj i delovanje sindikata širom zemlje. Po njihovom okončanju, počela je obnova sindikalnih organizacija i celokupnog radničkog pokreta. Kriva je išla uzvodno sve do 1914. godine i početka Prvog

[4] Tokom istraživanja u Međuopštinskom istorijskom arhivu Valjevo pronađen je jedan dopis iz novembra 1913. Godine, koji je Načelstvo okruga valjevskog uputilo Sudu opštine valjevske na osnovu naređenja Ministarstva narodne privrede. Naime, Ministarstvo narodne privrede je primilo žalbe iz Valjeva da tamo još uvek nije osnovan Sud dobrih ljudi. Smatrajući taj dokument izuzetno zanimljivim i značajnim pokazateljem kako odredbe Zakona o radnjama u praksi u velikoj većini slučajeva nisu zaživele, na kraju rada sledi prikaz dokumenta u celini (Međuopštinski istorijski arhiv Valjevo (MIAV), fond opština grada Valjeva, 1913, inv. jedinica 157).

svetskog rata. U prvoj ratnoj godini, sindikati faktički nisu funkcionisali jer je proglašena opšta mobilizacija srpske vojske i svi funkcioneri i rukovodioci sindikata su, zajedno sa ostalima, otišli u rat. U periodu 1915–1918, rad sindikalnih organizacija je bio zabranjen. Država je bila okupirana od Austrougarske i za vreme takvog stanja, sindikati su bili potpuno uništeni, razoreni, a radnici evakuisani širom sveta (SSSS 2020). Skoro celokupna beogradska industrija je stradala već u prvim godinama rata. Od momenta okupacije, Austrougarska je pomagala i podsticala proizvodnju samo u preduzećima koja su radila za nju (M. Milenković, T. Milenković 2002, 42). Tek posle okončanja Prvog svetskog rata, dolazi do obnove sindikalnih organizacija i radničkog pokreta (SSSS 2020).

Pod privremenim radničkim zakonodavstvom podrazumeva se zakonodavstvo koje je bilo u upotrebi u jugoslovenskim zemljama od završetka Prvog svetskog rata do usvajanja Vidovdanskog ustava 28. juna 1921. godine. Tada se radničko zakonodavstvo sastojalo od pravnih normi donetih pre i u toku rata, posleratnih zakonskih propisa pojedinih pokrajinskih vlada i, na kraju, zakonskih odredaba centralne vlade Kraljevine Srba, Hrvata i Slovenaca (u daljem tekstu Kraljevina SHS) (Pantelić 2018, 23).

Nova država, Kraljevina Srba, Hrvata i Slovenaca, nastala je 1. decembra 1918. godine i imala je pravni kontinuitet Kraljevine Srbije. Novonastala država se sastojala od šest administrativno-teritorijalnih i pravnih područja. U Kraljevini Srbiji se do formiranja Kraljevine SHS primenjivao Zakon o radnjama iz 1910. godine. Na teritoriji Crne Gore radni odnosi nisu bili regulisani jer je radno pravo bilo deo građanskog prava i primenjivao se Opšti imovinski zakonik. Slovenija i Dalmacija su pre rata bile u sastavu austrijskog dela dvojne monarhije, pa su u njima sve do donošenja Vidovdanskog ustava primenjivani austrijski zakoni (najznačajniji među njima Opšti obrtni red iz 1859. godine). Banat, Bačka, Baranja, Prekumurje i Međumurje pripadali su mađarskom delu monarhije, pa su se primenjivali mađarski predratni propisi koji su se odnosili na radnike. Srem, Hrvatska i Slavonija imali su autonomni položaj u okviru Mađarske. Bosna i Hercegovina je od 1908. godine bila pripojena Austrougarskoj (Pantelić 2018, 23–25).

Nakon formiranja Kraljevine SHS, centralna vlada radi na izradi propisa koji će važiti za celokupnu teritoriju Kraljevine SHS. Radnički pokret postaje sve masovniji i sve više pritiska vlast. Proleterijat zahteva da se donesu zakoni iz oblasti zaštite radnika i socijalnog osiguranja.

Kako se domaća elita plašila socijalnih potresa, pogotovo posle Oktobarske revolucije u Rusiji, težilo se popravljanju standarda života. Posle rata osnovano je i Ministarstvo socijalne politike (Pantelić 2018, 25).

Broj sindikalno organizovanih radnika bio je sve veći posle rata. Sindikati se postepeno obnavljaju i priliv članova je sve veći. Obnova sindikata nije bila brza i jednostavna. Sindikalni savezi u Beogradu preduzimali su inicijativu i davali uputstva za obnavljanje sindikata u unutrašnjosti Srbije. Važnu ulogu u obnavljanju sindikalnog pokreta imale su *Radničke novine* koje su među prvima u Beogradu počele da izlaze svakodnevno od 1918. godine (SSSS 2020). Sindikalne akcije, poput štrajka, postaju česte ponovo.

Jedan od masovnijih štrajkova iz tog perioda bio je štrajk železničara iz 1920. godine. U Kraljevini SHS je još od njenog stvaranja bilo pokušaja da se izjednači zakonodavstvo koje se odnosilo na železnicu i železničare. Naime, u izuzetno teškom položaju nalazili su se rudari i železničari. Radnička klasa je težila da se propisi primenjuju jedinstveno na sve radnike, uključujući i tu kategoriju radnika, međutim država je to odbijala, s jedne strane zbog specifičnosti profesije, a s druge strane zbog značaja železničkog saobraćaja i rudarstva za privredu zemlje. Položaj te grupe radnika bio je vrlo težak. Zbog toga su štrajkovi na železnici bili veoma česta pojava (Milenković 1981, 197). U Beogradu su 1919. godine vođeni pregovori između sindikalne organizacije revolucionarnog pokreta železničara i Ministarstva saobraćaja, a kao rezultat usvojen je Protokol sporazuma kojim su precizno regulisani svi uslovi rada i plaćanja železničkog osoblja na svim državnim železnicama u Kraljevini SHS. Odredbe Protokola su načelno bile odlične za železničare, ali on u praksi nije zaživeo jer su oblasne železničke direkcije negativno reagovale na njega. Ponovo su otpočeli štrajkovi širom železnica. U februaru 1920. godine došlo je do ponovnih pregovora, koji su završeni tako što je Ministarstvo saobraćaja osporavalo u celini Protokol sporazuma i na kraju ga ukinulo, nakon čega je izbio generalni štrajk železničara između 15. i 16. aprila 1920. godine, koji je okupio oko 60.000 železničara. Protiv štrajkača su upotrebljeni vojska i policija kako bi se štrajk potpuno ugušio (u Ljubljani je, recimo, pobuna krvavo ugušena) (Milenković 1981, 197–203). Na Zaloškoj cesti u Ljubljani, 24. aprila 1920. godine, vojska je na štrajkače reagovala brutalno, ubila je 15 radnika, a ranila 75 ljudi, među kojima je bila i četvorogodišnja devojčica (Portal Mašina 2019). Po okončanju štrajka, oko 2.400 radnika je otpušteno, pala su primanja, a uticaj koji

je sindikat železničara imao u revolucionarnim sindikatima je umanjen (Milenković 1981, 201).

Obračunavanje Vlade Kraljevine SHS sa železničarima je bilo obračunavanje sa radničkim revolucionarnim pokretom uopšte. Nakon tog štrajka, Vlada je na sve moguće načine pokušavala da ukine ili ograniči pravo na štrajk, usvajanjem zasebne *Uredbe o militarizaciji železnica i rudnika* (Milenković 1981, 201–203).

4.5. Uredba o postupanju u slučajevima nereda, štrajka i pobune na železnicama u Kraljevini (1920)

Vlada Kraljevine SHS donela je u oktobru 1920. godine Uredbu o postupanju u slučajevima nereda, štrajka i pobune na železnicama u Kraljevini SHS (u daljem tekstu Uredba). Njome je predviđena mogućnost da u slučaju izbijanja ili čak pripremanja štrajka železničara, vojni minister, na predlog ministra saobraćaja i ministra unutrašnjih poslova, ukazom pozove na vojnu vežbu neophodan broj železničkih službenika starosti od 18 do 50 godina. Mobilisani železnički službenici su potpadali pod nadležnost vojnih disciplinskih i vojnih sudskih organa. Neodazivanje mobilizaciji bilo je kažnjivo (Milenković 1981, 203).

Na osnovu člana 6 Uredbe, ministri vojske, saobraćaja i unutrašnjih poslova usvojili su 20. oktobra 1920. godine *Uputstvo za postupanje u slučaju nereda, štrajka i pobune na železnicama u Kraljevini SHS* (u daljem tekstu Uputstvo) (Milenković 1981, 203). U članu 1 Uputstva obavezuje se „muško osoblje sa železnice, bilo da je zaposleno ili nezaposleno na železnici da se upiše u spiskove, kao obveznici Vojno-železničke komande". U sledećem članu opisuje se način pozivanja obveznika u slučaju štrajka na železnici, a to se čini putem „objava istaknutih na svim javnim mestima i železničkim stanicama".[5]

Vlasti nisu imale priliku da u praksi upotrebe Uredbu o militarizaciji železničara do sredine 1921. godine jer u tom periodu nije bilo novih štrajkova železničkog osoblja. Uredba je bila protivzakonita jer je ograničavala pravo na štrajk koje je tada bilo ili zakonski priznato ili pak prećutno tolerisano (Zakon o radnjama). Donošenjem Uredbe o militarizaciji železničara, Vlada je železničarima na nezakonit način ograničila pravo na štrajk (Milenković 1981, 203).

[5] Uputstvo za postupanje u slučaju štrajka u Kraljevini Jugoslaviji, čl. 1 i 2.

4.6. Zaključna razmatranja

Dakle, period posle Prvog svetskog rata do donošenja Vidovdanskog ustava predstavljao je period u kome se razorena država oporavljala i sastavljala u jednu celinu. Sindikalne organizacije, usled jačanja radničkog pokreta, počinju da se obnavljaju, jačaju i opet vode akcije (štrajkove) radi poboljšanja svog položaja. Vetar u leđa radničkoj akciji dala je Oktobarska revolucija 1917. godine u Rusiji.

U drugoj polovini 1920. godine u Banatu i Bačkoj je bilo oko 24.000 sindikalnih članova, uglavnom poljoprivrednika, dok je Srbija, kao privredno slabije razvijena od Vojvodine, imala oko 23.000 sindikalnih članova. U državi je ukupno oko 55.000 radnika bilo obuhvaćeno sindikatima, kao moćnim faktorom u odnosima rada i kapitala. Period jačanja sindikalnih organizacija prekida se donošenjem Obznane 1920. godine i zabranom rada Komunističke partije Jugoslavije (KPJ) i svih komunističkih organizacija. U Obznani sindikati nisu bili spomenuti, ali su faktički osetili iste progone kao KPJ (M. Milenković, T. Milenković 2002, 70–71). Međutim, u maju 1921. godine Ministarski savet dozvoljava rad sindikalnim organizacijama koje se bave isključivo ekonomskim pitanjima radništva, dakle isključivo nepartijskim.[6] Drugog avgusta 1921. godine donet je *Zakon o zaštiti javne bezbednosti i poretka u državi*, kojim je definitivno zabranjen rad KPJ i kojim su bile previđene kazne za bilo kakav vid komunističke aktivnosti. U progonu komunista stradali su i sindikati i njihove organizacije. Ovim zakonom pravo na sindikalno organizovanje je itekako suženo (M. Milenković, T. Milenković 2002, 71).

5. SINDIKALNE SLOBODE OD DONOŠENJA VIDOVDANSKOG USTAVA DO POČETKA DRUGOG SVETSKOG RATA

Od Vidovdanskog ustava do uvođenja diktature razvoj i priznavanje sindikalnih sloboda imali su pozitivan pravac. Nakon uvođenja Šestojanuarske diktature, ta kriva je postala negativna. Formalno, Septembarskim ustavom kralj Aleksandar I Karađorđević proklamovao je slobodu udruživanja, ali u granicama zakona, zakona koji je tu slobodu

[6] Odluka br. 1104/1921, 27. maj 1921. godine, Ministarskog saveta o dozvoli rada sindikalnim organizacijama koje se bave ekonomskim pitanjima radništva.

zabranio. Pozitivan put i jačanje sindikalnih pokreta u Srbiji, nažalost, ponovo su prekinuti Drugim svetskim ratom i sve za šta se radnička klasa izborila do tada palo je u vodu.

5.1. Društveno-političke i ekonomsko-socijalne prilike u Kraljevini SHS do početka Drugog svetskog rata

Prema popisu stanovništva iz 1921. godine, Kraljevina je imala 12 miliona stanovnika, od čega je malo više od dva miliona živelo u gradskim naseljima. Beograd i severozapad zemlje bili su jedini veći industrijski centri, sa glavnim granama u prehrambenoj, odnosno drvnoj industriji i proizvodnji električne energije. Bila je ukupno 1.831 fabrika, od čega su samo 462 proizvodile sredstva za proizvodnju. Od 1921. do 1931. broj radnika u zanatima i industriji povećao se sa 8% na 10,73% (Petrović 2011, 122).

Klasni sukobi su se videli u brojnim štrajkovima i radničkim akcijama. U periodu 1921–1926, nezavisni sindikati su zabeležili da je u 3.239 jugoslovenskih preduzeća štrajkovalo ukupno oko 177.000 radnika (Petrović 2011, 123). Nezavisni sindikati su do 1929. godine četiri puta zabranjivani i uslovno otvarani. Za vreme Obznane, centrumaši osnivaju socijalističke sindikate pod ranijim nazivom Glavni radnički savez, a vlast im predaje imovinu prethodno oduzetu komunističkim organizacijama. Taj savez dalje jača tako što se 1922. godine ujedinjuje sa socijaldemokratskim sindikatima i stvara *Glavni radnički savez Jugoslavije (GRSJ)*. Potom im se priključuju neki članovi iz Nezavisnih sindikata i tako dolazi do formiranja *Ujedinjenog radničkog sindikalnog saveza Jugoslavije (URSSJ)* (M. Milenković, T. Milenković 2002, 71–72). Jedini koji su uspeli da očuvaju svoju jedinstvenu sindikalnu organizaciju i nakon donošenja Obznane bili su grafički radnici. Uprkos privrednim oscilacijama u Kraljevini, broj grafičkih preduzeća neprekidno je rastao i do 1930. se udvostručio (na primer, 1921. ih je bilo 108, a 1930. godine 213). Međutim, broj zaposlenih u tim preduzećima je uglavnom opadao jer je u štamparije uvođena nova tehnologija. Bolje mašine su sve više potiskivale ljudski rad (M. Milenković, T. Milenković 2002, 139).

Tokom 1921. godine usvojen je Zakon o zaštiti javne bezbednosti i poretka u državi, kojim su predviđene krivične sankcije za učešće državnih službenika i činovnika u štrajku. Takođe, Zakonom o železnici propisane su kazne za učešće u štrajku (Pantelić 2018, 36).

Problemi u Kraljevini kojih je bilo na svim poljima doživljavaju svoju kulminaciju 1928. godine. Država se našla na ivici raspada i kralj Aleksandar je, misleći da spasava državu, 6. januara 1929. godine, ukinuo ustav, raspustio Narodnu skupštinu i uveo ličnu diktaturu. Zabranjen je rad svih političkih stranaka koje su imale ikakvu versku ili nacionalnu osnovu (M. Milenković, T. Milenković 2002, 198). Početkom oktobra 1929. godine objavljen je Zakon o nazivu i podeli Kraljevine na upravna područja. Promenjeno je dotadašnje ime države u Kraljevina Jugoslavija i izvršena podela države na devet upravnih područja – banovina. Trećeg decembra 1931. godine kralj Aleksandar je doneo Ustav Kraljevine Jugoslavije, poznatiji kao „Oktroisani ustav" (M. Milenković, T. Milenković 2002, 198–199).

Tokom 1930. godine, Jugoslaviju je zahvatila svetska privredna kriza. Na udaru je prva bila drvna industrija, koja je uglavnom radila za izvoz. Potom su i druge industrije i njihova preduzeća sve više odlazili pod stečaj. Izvoz poljoprivrednih proizvoda je smanjen, a kako je to bila glavna stavka u jugoslovenskoj izvoznoj trgovini, opale su cene tih proizvoda na domaćoj pijaci. Selo je potpuno uništeno, a mase seljaka su pohrlile u gradove u potrazi za bilo kakvim poslom, ne bi li preživeli. U periodu 1932–1933, privredna kriza je bila na vrhuncu i tada su skoro prestale da važe zaštitne odredbe radničkog zakonodavstva jer je broj onih koji traže zaposlenje bio ogroman. Poslodavci su bili svemoćni, a radnici praktično bez ikakve zaštite (M. Milenković, T. Milenković 2002, 200).

Rad Nezavisnih sindikata zabranjen je 1929. godine, od kada su komunisti počeli masovno da ulaze u URSS-ove sindikate. Tokom 1938. godine članstvo je poraslo na oko 100.000. Kako su tokom privredne krize zakonski propisi o zaštiti radnika prestali da se primenjuju, a uslovi rada su se znatno pogoršali, sve više raste broj radničkih štrajkova i učesnika u njima. Po ulasku u socijalističke sindikate, komunisti osvajaju rukovodeće pozicije i, preuzimajući vođstvo u većini sindikalnih pododbora, postaju glavni organizatori štrajkova. Kako bi se izbegli štrajkovi, 1937. godine Vlada donosi *Uredbu o minimalnim nadnicama, kolektivnim ugovorima i arbitraži*. Krajem 1940. godine Vlada je zabranila URSSJ (M. Milenković, T. Milenković 2002, 202–204).

U Kraljevini Jugoslaviji je 1938. godine organizovano oko 189 štrajkova, dok je samo oko 146 uspelo, a na nivou države je u štrajku bilo ukupno 2.118 preduzeća. Jedan od masovnijih štrajkova iz tog perioda bio je i štrajk radnika jedne valjevske fabrike „Vistad" 1940. godine

(Maksimović 2017, 145). U toku te godine, fabrika je tri puta bila zahvaćena štrajkovima, posle nekog vremena, radnici su se solidarisali sa štrajkom pružnih građevinskih radnika, što je dovelo do generalnog štrajka radničke klase Valjeva. Zahtevi radnika vojne fabrike sastojali su se u tome da se preko izabranih predstavnika zaključi kolektivni ugovor, da se poveća iznos nadnica i da se uvedu zaštitne mere za radnike na rizičnim pozicijama (Vujić *et al*. 1967, 271–273).

U oktobru 1934. na kralja Aleksandra izvršen je atentat u Marselju. Kako je prestolonaslednik Petar II bio maloletan, namesničku vlast su činila trojica namesnika, od kojih je knez Pavle bio dominantna ličnost. Kako zbog pripajanja Austrije Nemačkoj i činjenice da se sve više fizički približavala Jugoslaviji, tako i zbog pritiska koji je trpeo, knez Pavle se sve više priklanjao Nemačkoj. Već 1937–1938. bilo je jasno da je rat sa Nemačkom neizbežan, što se ubrzo i dogodilo (M. Milenković, T. Milenković 2002, 202–204).

Nakon tzv. aprilskog rata, Jugoslavija je okupirana i razbijena na nekoliko delova. U tom periodu ne možemo govoriti o bilo kakvom radničkom zakonodavstvu niti sindikalnim slobodama. Zabranjen je rad svih političkih partija i sindikalnih organizacija.

5.2. Vidovdanski ustav

Prvom ustavu nove države prethodilo je nekoliko nacrta, međutim samo je vladin nacrt, iza kog su bili radikali, demokrate i kralj, imao uspeha (Perović 2015, 8). Ustav Kraljevine Srba, Hrvata i Slovenaca je donet 28. juna 1921. godine na praznik Vidovdan, pa je u istoriji nacionalne ustavnosti poznat i kao „Vidovdanski". Od ukupno 419 poslanika Ustavotvorne skupštine, za predlog ustava glasalo je 223, protiv je glasalo 35, dok je 161 bio uzdržan (Marković 2015, 114). Za usvajanje ustava bila je potrebna prosta umesto kvalifikovane većine, čime se težilo izbegavanju bilo kakvog rizika prilikom usvajanja ustava (Perović 2015, 8). Vidovdanski ustav je bio temelj daljeg regulisanja radničkog zakonodavstva i donet je pod uticajem nemačkog Vajmarskog ustava, koji je prvi u Evropi sadržao osnovne ekonomsko-socijalne odredbe (Pantelić 2018, 30).

Članom 14 Vidovdanskog ustava građanima se jemči pravo udruživanja, zbora i dogovora, koje će bliže biti uređeno donošenjem posebnog zakona. Na zborove nije moguće dolaziti naoružan i okupljanja na javnom mestu moraju prethodno biti prijavljena nadležnoj

vlasti. Ciljevi udruživanja moraju biti dozvoljeni, odnosno ne smeju da budu kažnjivi zakonom.[7] Članom 33 garantuje se pravo radnika na sindikalno organizovanje iz kojeg ne proizlazi pravo na štrajk, ukoliko je on protivpravan po građanskim ili krivičnim propisima (Pantelić 2018, 30).

Vidovdanski ustav je ključna prekretnica u priznavanju sindikalnih sloboda i oblasti zaštite prava radnika uopšte. Na osnovu njega kasnije je donet niz zakona koji su važili za prilično progresivne zakone toga vremena, od koji će neki od njih koji su relevantni za ovu temu biti obrađeni u ostatku poglavlja. Celokupna borba radničkog pokreta nakon donošenja tih zakona bila je usmerena na sprovođenje zakonskih odredaba u praksi (Jovanović 2018, 42).

5.3. Ustavne i zakonske garantije sindikalnih sloboda

Nakon donošenja Vidovdanskog ustava usvojen je niz zakona. Za te zakone je karakteristično da ne odražavaju neku novu i autentičnu ideju već su bili rađeni po ugledu na zakone drugih zemalja, naročito Austrije, i po ugledu na konvencije i preporuke MOR-a (Kovačević 2015, 39). Što se tiče prava na udruživanje uopšte, nakon donošenja Vidovdanskog ustava, primenjivan je dopunjen Zakon o javnim zborovima i udruženjima od 31. marta 1891. koji je jemčio pravo udruživanja u ciljevima koji nisu protivni zakonu.

5.3.1. Zakon o zaštiti radnika (1922)

Prvi u nizu zakona donetih nakon Vidovdanskog ustava je Zakon o zaštiti radnika (u daljem tekstu Zakon), usvojen 28. februara 1922. godine.

Zakonom se proklamuje pravo na udruživanje radnika u specijalna udruženja radi zaštite ekonomskih, kulturnih i moralnih interesa. Članovi tih udruženja (misli se na sindikate) mogu biti samo zaposleni u preduzećima, bez obzira na starost i pol.[8] Udruživanje je bilo moguće i na profesionalnoj i na teritorijalnoj osnovi.[9] Osim toga, Zakonom je to pravo priznato i osoblju zaposlenom u socijalnoj zdravstvenoj službi, članom 14 Pravilnika o radu tog osoblja, a isto je važilo

[7] Ustav Kraljevine Srba, Hrvata i Slovenaca, *Službene novine KSHS* 142/1921, čl. 14.

[8] Zakon o zaštiti radnika, *Slubene novine KSHS* 128/1922, čl. 35.

[9] Vidi više u: Jovanović 2019, 209.

i za viničare (radnike u vinogradima) (Bajič 1937, 93). Budući da je udruživanje radnika njihovo pravo, ne može im se vršenje tog prava zabraniti. Svaka odredba ugovora koja bi išla za ukidanjem ili ograničavanjem tog prava bila bi ništava (Politeo 1934, 201). Tim članom se, dakle, delimično uređuje položaj sindikata jer član sindikata može biti samo pomoćno osoblje. Sindikati su dužni da svojim članovima izdaju legitimacije, a evidenciju o sindikatima vode radničke komore (Pantelić 2018, 33).

Zakonom o zaštiti radnika, takođe, predviđene su i Radničke komore kao klasna predstavništva radnika i nameštenika. One su samostalna pravna lica koja stoje pod isključivim nadzorom Ministarstva socijalne politike (Politeo 1934, 193). Zadatak radničkih komora je da zaštite ekonomske, socijalne i kulturne interese svih radnika i nameštenika na svom području.[10]

Kada je reč o pravu na štrajk, ako on u konkretnom slučaju nije zabranjen, onda predstavlja samo civilnopravnu povredu ugovora o službi. Država presuđuje spor samo na osnovu zahteva zainteresovane strane, ukoliko stranka svoj zahtev ostvaruje na osnovu tužbe. U načelu, država se drži po strani i jedino u slučaju štrajka ili isključenja sa rada pokušava da dođe do sporazuma posredovanjem (Pantelić 2018, 33).

Detaljno je regulisan i položaj radničkih poverenika u zakonu. Radnički poverenici štite privredne, socijalne i kulturne interese radnika, zaposlenih u preduzećima, utiču na održavanje dobrih odnosa između radnika i poslodavaca i sarađuju na pripremanju i izradi kolektivnih ugovora. Broj radničkih poverenika zavisi od broja radnika u preduzeću, a izbor se vrši neposrednim i tajnim glasanjem na godinu dana (Politeo 1934, 195–197). Poslodavci ne smeju otpustiti ni diskriminisati radničke poverenike zbog pravilnog vršenja njihove dužnosti prema odredbama Zakona o zaštiti radnika.[11] Dakle, radnički poverenici uživaju posebnu zaštitu.

Propisi o radničkim poverenicima tog zakona odnose se i na radnike zaposlene u rudarskim preduzećima, međutim, u rudarskim preduzećima se ipak nisu birali radnički predstavnici nego su postojale tzv. rudarske zadruga, kao zajedničke organizacije (predstavništva) službodavaca i rudara. Zakon o osnivanju zadruga u rudarstvu predstavljao je *lex specialis* u odnosu na Zakon o zaštiti radnika koji ga nije stavio van snage. Rudarske zadruge su zajedničke organizacije vlasnika

[10] Zakon o zaštiti radnika, *Službene novine KSHS* 128/1922, čl. 37.

[11] *Ibid*., čl. 119.

rudnika i rudara, i to prinudnog karaktera, jer se članstvo u njima dobija *ipso iure*. One su primer mešovite sindikalne organizacije (Bajič 1937, 100–101).

Što se tiče materije kolektivnog pregovaranja, odnosno kolektivnih ugovora o radu, zakon ih spominje ali ih ne definiše (Pantelić 2018, 32). Kolektivni ugovori o radu dobijaju značaj u periodu između dva svetska rata, naročito u industrijski razvijenijim delovima Kraljevine SHS, odnosno Jugoslavije (Lubarda 2013, 889).

5.3.2. Septembarski (Oktroisani) ustav

Suspendovanjem Vidovdanskog ustava državnim udarom zemlja je ušla u vanustavno stanje. Pod pritiskom unutrašnjih i međunarodnih okolnosti kralj Aleksandar I Karađorđević je doneo, odnosno podario narodu Ustav 3. septembra 1931. godine. U literaturi se taj ustav naziva još i Septembarski ili Oktroisani ustav. Njegovim donošenjem okončan je interegnum ustava, „međuustavni" period u istoriji ustavnosti prve jugoslovenske države (Marković 2015, 120).

U odnosu na Vidovdanski ustav, Oktroisani je redukovao veliku većinu ekonomskih i socijalnih prava (Pantelić 2018, 39). Septembarski ustav je proklamovao slobodu udruživanja, zbora i dogovora, ali samo „u granicama zakona". Recimo, sloboda udruživanja je formalno bila garantovana, ali u praksi često zabranjivana i ograničavana. Dok se za Vidovdanski ustav može reći da je korak napred, Septembarski je korak nazad u pogledu socijalnih i ekonomskih odredaba.

5.3.3. Zakon o radnjama (1931)

Dok je na snazi bio Septembarski ustav, usvojen je Zakon o radnjama 5. novembra 1931. godine, koji je primenjivan sve do okupacije Kraljevine Jugoslavije. Zakonom o radnjama (u daljem tekstu Zakon) detaljno se uređuju radni odnosi. Kako se njegov prvi deo odnosi na radnje i imaoce, a drugi na pomoćno osoblje, taj zakon spada u tip mešovitih zakona (Pantelić 2018, 40).

Pravo na kolektivno pregovaranje, odnosno *materija kolektivnih ugovora* detaljno je regulisana Zakonom o radnjama, za razliku od Zakona o zaštiti radnika, u kojem se samo spominje kolektivni ugovor, ali se ne definiše. U Zakonu se definiše kolektivni ugovor kao „pismena pogodba koju zaključi službodavac ili službodavačka organizacija jedne ili više srodnih struka kao predstavnik službodavaca,

sa jedne strane i stručna služboprimačka organizacija kao predstavnik služboprimaca, sa druge strane, a kojom se pogodbom uređuju međusobni službeni odnosi, prava i dužnosti" (Politeo 1934, 18). Za razliku od individualnih, u kolektivnim ugovorima o radu na strani zaposlenih ugovornik je stručna služboprimačka organizacija (sindikat). Takođe, kolektivni ugovor veže sve zaposlene koji pripadaju dotičnom sindikatu koji je sklopio kolektivni ugovor, iako ima zaposlenih koji nisu članovi dotične sindikalne organizacije. Kolektivni ugovor važi i za one zaposlene koji su se u času sklapanja ugovora nalazili u službi i za one koji su nakon tog momenta stupili u službu (Politeo 1934, 18–19). Da bi kolektivni ugovor bio valjan, treba da bude sastavljen u pismenoj formi. Otkazni rok kod kolektivnog ugovora traje onoliko koliko je predviđeno kolektivnim ugovorom, a ako nije predviđeno, onda se primenjuju norme o otkaznom roku individualnog ugovora. Za odnos individualnog i kolektivnog ugovora važi načelo „*in favorem laboratoris*" – odnosno načelo povoljnosti za zaposlene (Pantelić 2018, 42).

Kada je reč o *pravu na sindikalno udruživanje*, u Zakonu o radnjama ne spominju se slobode osnivanja stručnih organizacija služboprimaca već je to učinjeno u Zakonu o zaštiti radnika. Kada je reč o udruženju službodavaca, u članu 359 Zakona govori se o obaveznim (prinudnim) udruženjima.[12] Postoje prinudna udruženja trgovaca i zanatlija kao i industrijalaca i cilj njihovog osnivanja je „razvijanje duha zajednice i uzajamnog pomaganja, kao i staranje o dobrim odnosima između službodavaca i njihovog pomoćnog osoblja kao i dobrih odnosa prema ostalim privrednim i kulturnim udruženjima" (Politeo 1934, 199–200). Za prinudna udruženja industrijalaca važi da je njihovo područje uže od područja trgovačkih i zanatskih udruženja. Neku vrstu sindikata zaposlenih u trgovačkim i zanatskim radnjama koji su članovi prinudnih udruženja čine pomoćnički odbori. Gde nema njih, interese pomoćnika zastupa radnička komora (Bajič 1937, 100).

Iz prava na udruživanje ne proizilazi pravo na sindikalna borbena sredstva, odnosno štrajk, ukoliko je po građanskom ili krivičnom zakonu protivpravan. Pitanje protivpravnosti se prosuđuje u svakom pojedinačnom slučaju (Bajič 1937, 94). Prema slovu zakona, ukoliko svi članovi obrtne posade imaju razlog za istupanje iz službe i to učine, oni samo izvršavaju svoje zakonom priznato pravo (Pantelić 2018, 46). Dakle, pravo na štrajk je bilo dozvoljeno članovima obrtne posade ako

[12] Zakon o radnjama, *Službene novine Kraljevine Jugoslavije* 262/193, čl. 359.

postoji opravdan razlog za to. Primer opravdanog razloga je situacija u kojoj je službodavac povredio norme kolektivnog ugovora prema svim članovima obrtne posade. Nije opravdan razlog ukoliko je povreda normi kolektivnog ugovora učinjena prema samo jednom delu obrtne posade ili pak pojedincima (Bajič 1937, 94).

Kako je 30. decembra 1921. godine donet *Zakon o inspekciji rada* kojim je osnovana Inspekcija rada pod okriljem Ministarstva socijalne politike, nadzor nad primenom Zakona o radnjama imala je upravo ta institucija. Njen glavni zadatak se sastojao u neposrednom nadzoru nad izvršenjem zakona, uredbi i pravilnika koji se odnose na socijalnu zaštitu radnika u zanatskim, trgovačkim i industrijskim preduzećima (Politeo 1934, 198). Međutim, ta institucija nije uspevala da uspešno obavlja svoj posao jer nije bila efikasna u kontroli preduzeća (Pantelić 2018, 46). Zakon kao zakon je bio dobar, ali je njegova primena u praksi bila otežana.

5.3.4. Zakon o udruženjima, zborovima i dogovorima (1931)

Zakon o udruženjima, zborovima i dogovorima usvojen je 18. septembra 1931. godine i njime su uređeni pravni položaj društava, osnivanje i odnos države prema njima (Bajič 1937, 96).

Unutrašnje uređenje sindikata određuje se prema opštim propisima koja važe za društva. Prema tome, sindikati su društva (Bajič 1937, 96), a u članovima 4–6 Zakona govori se o osnivanju, pravilima i pravima države prema njima.[13]

Sindikati su pravna lica i samim tim ne mogu zaključivati pravne poslove u ime svojih članova jer nisu njihovi zastupnici. Dakle, prava i obaveze iz pravnih poslova mogu nastupiti samo za sindikat, ali ne i za njegove članove. Jedini izuzetak od tog pravila jeste zaključenje kolektivnog ugovora i njegovo dejstvo za zaposlene (Bajič 1937, 96).

Prema tome da li su udruženi samo službodavci ili samo služboprimci ili službodavci i služboprimci, postoje dve vrste sindikata: čisti i mešoviti. Sposobnost zaključivanja kolektivnih ugovora o radu imaju samo čiste sindikalne organizacije, čija je svrha da štite profesionalne i privredne interese svojih članova. Isto tako, nužni uslovi su da sindikalne organizacije moraju biti slobodne i da moraju biti predstavnici određene grupe, ali zaista, a ne fiktivno (Bajič 1937, 96–97).

[13] Zakon o udruženjima, zborovima i dogovorima, *Službene novine Kraljevine Jugoslavije* 225/1931, čl. 4–6.

Pravni položaj sindikata se razlikuje zavisno od toga da li je reč o sindikatima službоprimaca (zaposlenih) ili sindikatima službodavaca (poslodavaca). Sindikalne organizacije zaposlenih su ranije nastale nego sindikalne organizacije poslodavaca i samim tim su sebi pribavile veliki uticaj. Zajednička svojstva tih sindikata su: zaključenje kolektivnih ugovora (doduše, izuzetno, prema članu 9 Uredbe o utvrđivanju minimalnih nadnica, zaključivanju kolektivnih ugovora, pomirenju i arbitraži i prinudne organizacije mogu zaključiti kolektivne ugovore), nastupanje kao stranke u postupku pomirenja i arbitraže u pogledu onih kolektivnih ugovora koje su zaključili, osnivanje berzi rada, pravo da budu saslušani od upravnika Beograda u postupku o utvrđivanju minimalnih nadnica (Bajič 1937, 97–98). Za razliku od nabrojanih svojstava, koja pripadaju i jednim i drugim sindikatima, samo sindikalne organizacije službоprimaca (zaposlenih) izdaju svojim članovima legitimacije, zastupaju svoje članove u individualnim pravnim sporovima pred izabranim odborima i učestvuju u izboru poverenika jer mogu da podnesu kandidatsku listu (Bajič 1937, 98).

5.4. Garantije u ostalim pravnim propisima

O donošenja Vidovdanskog ustava pa sve do potpisivanja akta o kapitulaciji Kraljevine Jugoslavije, osim niza zakona koji su u ovom radu već analizirani, usvajan je i ogroman broj pravnih propisa, uredbi, pravilnika i naredbi koji je sadržao barem po neku odredbu koja se ticala sindikalnih sloboda.

Recimo *Uredba o sniženju režijskih troškova novčanih zavoda pod zaštitom* (sadrži odredbu o ovlašćenju sindikata za potpisivanje kolektivnih ugovora), *Naredba o zbrinjavanju nezaposlenih radnika i nameštenika od (1935)* (sadrži odredbu o pravu sindikata službоprimaca i sindikata službodavaca da osnivaju berze rada), veliki broj propisa o železnici (Bajič 1937, 98). Jedan vrlo bitan pravni propis iz tog perioda, koji se tiče sindikalnih sloboda, jeste *Uredba o utvrđivanju minimalnih nadnica, zaključivanju kolektivnih ugovora, pomirenju i arbitraži*.

Prvi zakon kojim je uređen položaj činovnika bio je Zakon o činovnicima građanskog reda iz 1861. godine. Tim zakonom je u velikoj meri omalovažen položaj činovnika i oduzeta su im mnoga prava. Važio je sve do donošenja novog Zakona o činovnicima i ostalim državnim službenicima građanskog reda iz 1923. godine. Njime je, prvi

put, usledilo ozbiljno uređivanje položaja javnih službenika. Potom je 1931. godine usvojen novi zakon, Zakon o činovnicima. U oblasti službeničkog prava, taj zakon je važio kao opšti, dok su za pojedine struke državne službe postojali i posebni zakoni (na primer, Zakon o sudijama) (Ilić Petković 2014, 67–68).

Pravo na sindikalno organizovanje pripadalo je i sudijama. Mogli su da osnivaju svoja udruženja (Udruženje sudija Kraljevine Jugoslavije koje je bilo organizovano na načelu sekcija i pododbora). Kroz udruženja, sudije su nastojale da poprave svoj staleški položaj i zaštite svoje interese.[14]

5.4.1. Uredba o utvrđivanju minimalnih nadnica, zaključivanju kolektivnih ugovora, pomirenju i arbitraži (1937)

Uredba o utvrđivanju minimalnih nadnica, zaključivanju kolektivnih ugovora, pomirenju i arbitraži (u daljem tekstu Uredba) doneta je 12. februara 1937. godine.[15] Uredba sadrži odredbe o zaključivanju kolektivnih ugovora o radu i o pravu na štrajk. Donošenje te uredbe su uslovili veliki broj štrajkačkih akcija, sa ciljem poboljšanja svog položaja, stalno održavanje zborova sindikata i pisanje legalne i ilegalne štampe o niskim nadnicama radnika (Hađirović 1965, 103).

Uredba sadrži odredbu kojom se zabranjuju štrajk i isključenje sa rada dok traje postupak pomirenja, a u slučajevima kada je propisano obavezno mirenje, kolektivna obustava rada je zabranjena i samim tim se protivpravnost tog akta ne bi ocenjivala prema individualnom civilnopravnom položaju poslodavaca odnosno zaposlenih. Kršenje te zabrane je kažnjivo (Bajič 1937, 94). Za razliku od mirenja, dok traje postupak arbitraže, štrajk i isključenje sa rada nisu zabranjeni na tako uopšten način, nego samo za ona preduzeća za koja je arbitraža obavezna (dakle, državna, banovinska i opštinska preduzeća). U tim preduzećima je svaka kolektivna obustava rada uopšteno zabranjena i kažnjiva (Bajič 1937, 95).

[14] U praksi se zaista radilo na stvaranju uslova za ostvarenje tog prava sudija na sindikalno organizovanje. U međuopštinskom istorijskom arhivu Valjeva pronađen je dopis uprave Udruženja sudija Kraljevine Jugoslavije Okružnom sudu u Valjevu kojim se od suda traži da osnuje pododbor na području Valjevskog suda, kako bi se svim sudijama i sudijskim pomoćnicima na toj teritoriji omogućilo da postanu članovi Udruženja i aktivno učestvuju u popravljanju svog položaja i zaštiti svojih interesa.

[15] Uredba o utvrđivanju minimalnih nadnica, zaključivanju kolektivnih ugovora, pomirenju i arbitraži, *Službene novine Kraljevine Jugoslavije* 33/1937.

6. ZAKLJUČNA RAZMATRANJA

Sindikalne slobode i prava je iznedrila radnička klasa, odnosno proleterijat. Ukoliko je uporedimo sa velikim industrijskim silama, Srbija spada u države koje su relativno kasno donele prvi zakon o radu (zakon o radnjama). On je za naše standarde bio itekako modernih shvatanja, pa je uglavnom ostao samo slovo na papiru. Najveća kočnica sindikatima, sve jačem organizovanju i sve masovnijem radničkom pokretu bili su česti ratovi i njihove posledice koje su se duboko osećale. U rasponu od nekih 40 godina Srbija je četiri puta ratovala. Stanovništo je bilo desetkovano, a zemlja opustošena. Iako je iz svakog rata izašla na pobedničkoj strani, svaki ju je koštao daleko više.

Glavna karakteristika prvih sindikalnih organizacija su izostanak sindikalnog jedinstva, neorganizovanost i sprovođenje akcijea *ad hoc*, bez jakog vođstva. Takođe, treba napomenuti da je uz sindikalne organizacije bitan fakor bila Socijaldemokratska stranka, pa je samim tim teško odvojiti političku borbu od one čisto ekonomske. Nakon Šestojanuarske diktature i zabrane rada KPJ, komunisti sve više ulaze u redove socijalističkih sindikata i preuzimaju rukovodeće pozicije. Štrajkovi i neredi postaju izuzetno česti, s jedne strane zbog nepoštovanja odredaba radničkog zakonodavstva, a s druge strane zbog sve većeg komunističkog, revolucionarnog članstva.

Sindikalne slobode su postojale i mnogo pre prvog zakonskog regulisanja i postale su toliko jaka prirodna činjenica da je bilo samo pitanje trenutka kada će biti zakonski garantovane. Bez jake i istrajne radničke klase, sindikalne slobode i prava ne bi nikada ni bile zakonski uređene. Ukoliko imamo u vidu trenutni položaj radnika, ugroženost njihovih osnovnih prava, uključujući i sindikalna, čini se da danas radnička klasa nema taj duh i borbenost koje je imala nekad davno da se izbori za svoj položaj. Javlja se i sasvim opravdan strah od toga šta nosi budućnost za radničku klasu.

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RECOGNITION AND PROTECTION OF TRADE UNION FREEDOMS IN DOMESTIC LAW IN THE PERIOD FROM THE FIRST TO THE SECOND WORLD WAR

Summary

Due to the extreme importance of trade union freedoms in the 21st century, as well as the current position of trade unions, the author tries to point out the path of recognition and protection of trade union freedoms in domestic law in the period from the First World War to the Second World War, primarily using the historical-legal method. The paper primarily starts from determining the concept and content of trade union freedoms, in order to then analyze the

economic, social and political conditions in Europe and the world that triggered the struggle of the working class for trade union freedoms and rights.

The central part of the paper deals with the analysis of legal regulations from the end of the Great War until the beginning of the Second World War, which contain provisions on trade union freedoms. Also, socio-political, as well as economic-social conditions in Serbia between the two wars, the establishment of the first labor and trade union organizations, as well as the formation of the Main Workers' Union, were analyzed. The analysis of both the available literature and the available archival material leads to the conclusion that during the interwar period the working class managed to fight for the legal recognition of trade union freedoms, however, in practice, the legal provisions guaranteeing the same were almost never applied.

Key words: *trade union freedoms – working class – interwar period – trade union rights – right to collective action.*

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Víctor García Yzaguirre*

ANTECEDENT OF NORMS AND IMPLICIT EXCEPTIONS AN ANALYSIS PROPOSAL**

In this article I analyze the concept of implicit exception and clarify if it allows us to present a structural component of the antecedent or not. For this, I carry out: i) an analysis of the notion of antecedent and its components; and ii) an analysis of the different ways of understanding the implicit exceptions in legal theory. I conclude that with the notion of implicit exception we are presenting types of operations and its results and not a structural component of the antecedent. Firstly, it may be used to present the process and result of better understanding the content of the antecedent of a norm. Secondly, it may be used to present the process and result of creation of the law by judges.

Keywords: *Implicit exceptions, antecedents, rules, judicial creation of law, normative conflict.*

1. INTRODUCTION

Jurists often point out that law enforcers, in order to avoid solving a normative problem incorrectly or unfairly, create implicit exceptions. This as a way of presenting that they have introduced a distinction in the antecedent of the norm in order to reduce its scope, and thereby generate that a subset of recipients of a regulation cease to be regulated. Along with this, implicit exceptions are usually considered by jurists to be a component of the antecedent, in the sense that we

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can differentiate, within the antecedent, which properties operate as implicit exceptions and which do not.

This brief presentation of a common idea among legal scholars has given rise to an extensive literature among legal theorists as to what they are trying to say[1]. In this regard, the purpose of this article is to resolve the following two questions: first, what are jurists saying when they use the expression "implicit exceptions"? And, second, does qualifying a given property as an "implicit exception" mean attributing some characteristic to it that is different from the rest of the properties of the antecedent?

To answer these questions, I will proceed in three steps. In the first place, I am going to present, from the studies on the structure of norms, what the antecedent of the norms is and how it is composed. Specifically, I am going to concentrate on analyzing how we can decompose its elements in order to verify, later, if any of these allow us or not to account the "implicit exceptions". Second, I will discuss the different ways in which legal theorists use the term "implicit exception". Within this section I am going to argue that "implicit exceptions" can be understood in two ways: i) as an explanation of an implicit presupposition on which the norm was formulated; or ii) as the substitution of a norm for another that contains, in comparison with the previous one, a new relevant property in the antecedent. Finally, in the third place, I am going to conclude that the notion of implicit exceptions, properly understood, does not account for a structural element of the antecedent, but rather is a way of presenting an operation and its result of identifying a norm.

2. THE ANTECEDENT OF THE RULES

In order to determine whether or not an implicit exception accounts for a type of fragment of the antecedent of a rule, it is necessary to start by making some conceptual clarifications about what the antecedent is and how we can decompose it. In order to fulfill the purposes of this article and not to extend it too much, I am going to focus on prescriptive norms.

[1] Many of them carried out within the set of discussions on the notion of defeasibility in law. In this regard, see: Ferrer, Ratti 2012; Bayón, Rodríguez 2003.

By prescriptive norms I mean norms that guides the conduct of its subjects (Alchourrón, Bulygin 2012, 173). That is, it is a norm that regulates whether a certain action (or set of actions) is mandatory, prohibited, permitted or empowered for a type of recipient. Following Riccardo Guastini (2018a, 49) on this point, prescriptive norms can be of two types, express or implicit, depending on the way in which they were identified[2].

By "explicit norm" I understand all those meanings that can be attributed to normative texts. In this sense, it accounts for the possible meanings that we can identify from a text using the available interpretation techniques (Chiassoni 2011, 311; 2019a, 22, 105). This notion includes all those interpretive results that have been formulated having applied, at least, some of the generally shared syntactic, semantic and pragmatic linguistic rules, the different interpretive techniques in use and/or the dogmatic theses spread in doctrine. In short, it refers to the possible meanings (in a certain space-time and in a legal community) of some normative texts[3].

By "implicit rule" I understand all those rules that have been created by a competent authority in the place of application of the law. In other words, these types of norms are the result of having used a legal construction technique (Guastini 2018a, 166)[4]. The latter means (in extreme synthesis) that they are norms that cannot be attributed as a possible meaning of a normative text, nor do they constitute logical implications of a norm.

As we can see, the difference between an explicit norm and an implicit norm is based on whether the norm is the product of an act of interpretation or legal construction (Guastini 2012a, 34; 2012b,

[2] In the article I will express myself in terms of norms and rules interchangeably to refer to this notion. To achieve the purposes of this article, it will not be necessary to delve into the discussions that differentiate rules from principles.

[3] The explicit norms, in this sense, would be all those norms that are part of the framework of possible meanings (those meanings identified through a cognitive interpretation). Having clarified the meaning of an express norm, this allows us to introduce some clarifications regarding what exactly legislators produce. Following Pierluigi Chiassoni (2019b, 111), legislators are creators of provisions, that is, of linguistic statements that are the object of interpretation. Which standards this provision expresses depends on the interpretive techniques available to interpreters in a given legal community. If this is so, then, the legislators do not create norms, but texts to which we can attribute a set of express norms.

[4] Following Chiassoni (2019b, 106), these are acts of elaboration of new norms by the interpreter (it is a case of a norm without normative formulation).

215–16; 2018a, 49; 2019a, 17). However, both types of norms share the same structure: they are composed of an antecedent, a connective and a consequent. From these three components, I will specify how to understand the antecedent[5].

The antecedent of the norms is composed of a generic case, that is, by a set of properties that, if they are verified in an individual case, then the prescription contained in the consequent follows[6]. By "generic case" is meant a class or set of classes of properties, that is, types of situations in which actions or events can occur (they establish the where, when, why, how, under what means, to whom, by whom). A generic case includes a normatively relevant property or a combination of normatively relevant properties. A property is expressed by a predicate applied to a subject, action, or state of affairs. The complementary case of a property expresses the negation of that property. By normatively relevant, following Carlos Alchourrón and Eugenio Bulygin (2012, 150–51), I mean that its presence or absence is correlated to different normative consequences[7].

[5] For precision purposes, it should be noted that the connective accounts for the implication relationship, that is, the type of connection that is intended to be expressed between the antecedent and the consequent. The consequent accounts for a deontically modalized action or activity that must be executed after verifying (in an individual case) the properties contained in the antecedent. Along with this, it is relevant to point out that the order of these elements is decisive with respect to the type of conditional norm that is intended to be accounted for. Briefly, the debate on representing the structure of legal conditional norms has been characterized by two competing positions: the bridge conception and the insular conception of norms (Rodríguez 2005). In this article I will assume the bridging conception of norms. According to this, the conditional norms are represented in the following way: (p->Oq). As we can see, the deontic operator only affects the consequent, which means that the deontic commitment assumed under this proposal is that the conditional norms are a bridge that links what is (or could be) a case with what it should be.

[6] Following George Von Wright (1970, 5–9), the antecedents are composed of application conditions. For a different terminology on this point see: Ross 1971, 107ff. In the main text, to analyze the content of the antecedent, I will follow the terminology used in: Alchourrón, Bulygin, 2012. For precision purposes, it should be noted that, depending on the authors, the terminology and theoretical language used to realize that idea. For other expressions see: Schauer 2004, 82; MacCormick 1978, 43; Shlag 1985, 38; Gottlieb 1968, 48; or Twining, Miers 2010, 90.

[7] Generic cases, by expressing classes, endow norms with a general character. For precision purposes, following Riccardo Guastini (2016, 53–54), when speaking of the generality of the antecedents, it is necessary to differentiate between the general and abstract character of the antecedents. The antecedents of the norms are general in the sense that they are not addressed to a single individual, but to a class of individuals. The antecedents of the norms are abstract in the sense that they do not apply to a

By "individual case", on the other hand, is meant a specific situation that is identifiable as having one or all of the properties provided for in the generic case, i.e. it is an instantiation or exemplification of the generic case (Alchourrón, Bulygin 2012, 43–44)[8]. A norm regulates an individual case as long as this is an instantiation or exemplification of the generic case contained in the antecedent of the norm (case that is subsumable in the scope of application of the general norm) (Von Wright 1970, 90; Mendonca 1997, 61).

The previous remark already allows us to identify a way of understanding the notion of an antecedent: it is a concept that accounts for the set of cases the norm has solved deductively (Navarro 2005, 118)[9]. Now, it is necessary to observe that the content of the antecedent of a norm is dependent on the type of components with which the generic case has been formed. I am going to further this point.

2.1. Components of the antecedent

I am going to start by specifying how to identify the content of the antecedent and, after that, it's different components[10]. The content of the antecedent can be identified expressly or by implication.

single fact, but to a class of facts. In a similar sense, see Francisco Laporta (2007, 89). On this point, Alchourrón identified three possible meanings of «generality of norms»: i) general in relation to regulated subjects, that is, to all members of a class of people (for example, all law students at the University of Lima, all women, all Peruvians, etc.); ii) general in relation to time, that is, to all the temporal instants that occur within a period of time (for example, every day within a certain period); and iii) general in relation to the circumstances, that is, to all events that belong to a class of events (for example, all events that are understood as the murder of someone or entering into a contract) (Alchourrón 2010 [1993], 83). In this regard, for the purposes of this article I will only take into account sense i) and iii), using the labels proposed by Guastini to identify them.

[8] On the distinction between generic case and individual case, also see: Von Wright 1970, 42–44.

[9] It should be noted that the antecedent of a norm is determined by the way in which the norm has been identified. In this sense, the scope of the norms is a descriptive notion of the way in which the interpreter has decided to attribute a certain meaning to a provision or to have formulated an implicit norm. On this precision see (Rodríguez, Vicente 2009, 191; Ferrer, Rodríguez 2011, 62).

[10] On this point I must make two clarifications. In the first place, I do not intend to make an exhaustive reconstruction of the discussions on how conditional norms have been understood in the specialized literature, I only intend to clarify some conceptual tools that will allow me to clarify the relationship between implicit exception and scope. For a brief presentation of how conditional structures are used

An antecedent is expressly identified when a normative authority has explicitly indicated what circumstances must be verified in order for the consequent of the norm to follow. Norms with this type of structure are called hypothetical norms. For example: "if a person is of legal age and national elections are held, then it is mandatory for them to vote". As we can see, the consequent of the norm ("it is mandatory to vote"), is followed every time it is verified that we are dealing with a person of legal age and in a context of national elections.

Instead, an antecedent is identified by implication when no express condition has been stated by a normative authority, but we can infer what it is from the consequent of the norm. Rules with this type of structure are called categorical rules. For example: "compulsory to pay taxes". The antecedent of this rule can be identified from the prescribed action: every time a person has the opportunity to pay their taxes, they must pay them. If you do not have the opportunity to pay them (for example, you have an exemption), then this rule does not apply. It should be noted that the presentation of a categorical norm can be translated into hypothetical or conditional. This will mean presenting a tautology in the antecedent with the action (or actions) foreseen in the consequent.

Now, how is an antecedent composed? The properties of a generic case do not necessarily operate in the same way. Within a generic case we can subdivide its properties into various types of conditions, i.e. structural units within the antecedent whose verification affects in a certain way the inference of the consequent. Each type of condition reflects a different way of understanding the antecedent of a norm.

For purposes of clarity, it is convenient to dwell briefly on some of the main ways of classifying and analyzing the conditions contained in the antecedent: i) basic and subordinate conditions; ii) positive conditions and negative conditions; and iii) main, alternative, conjunctive condition; and conditions for exceptive qualification[11]. Each of these

to express different types of connections (or connectives) and dependencies between elements (conceptual, causal and epistemic relationships between two objects) see: Cantwall 2018. Secondly, it should be noted that the discussions on the structure of norms are related to how to interpret legal material (linguistic statements), but they have their own problems. This type of discussion is about what are the minimum elements that a norm has and what properties each of these has. In this regard see: Raz 1986, 97–99; Hart 1982, 107.

[11] This list is not and is not intended to be exhaustive of all the possible ways to analyze the structure of the antecedents. I have only listed these to be useful for the purposes of this article.

distinctions, as we shall see, highlights different aspects of the elements contained in the antecedent (thus, they answer different theoretical questions). Let's see each one of them:

2.1.1. Basic and subordinate conditions

To realize an adequate analysis of the conditional norms, Von Wright proposed a distinction of types of conditions based on whether or not their presence guarantees the consequent. Under this proposal, in an "if A, then B" norm, the antecedent A can be understood as follows:

1. That property A is a sufficient condition for property B means that when A is present then B will also be present.
2. That property A is a necessary condition of property B means that whenever B is present then A will also be present, but not (necessarily) the other way around.
3. That property A is a necessary and sufficient condition of property B means that whenever and only when A is present then B is also present.
4. That property A is a contributing condition of property B means that A is a necessary condition of at least one sufficient condition of B.
5. That property A is a substitute condition for property B means that A is a sufficient condition for at least one necessary condition for B (Von Wright 1951, 66–74).

We can group these conditions into two types of conditions: basic, i.e. those that do not depend on other conditions; and subordinate, i.e. those that depend on other conditions (Alchourrón 2010 [1996a], 129; Moreso, Rodríguez 2010, 18). In this sense, basic conditions are sufficient conditions, as well as necessary and sufficient. Instead, substitute and contributing conditions are subordinate.

The identification of a condition as basic or subordinate will depend on the type of connection and dependency that wants to be represented between the consequent and the antecedent. From an antecedent composed only of subordinate conditions the consequent cannot be inferred[12]. On the other hand, different types of inferences can be formulated from an antecedent composed of basic conditions, depending on the type of condition used: i) if necessary and suffi-

[12] For an elaboration of this point see: García Yzaguirre 2020b.

cient conditions are used, the antecedent can be inferred from the consequent; and ii) of necessary conditions, the consequent can be inferred both by said conditions and by other conditions not indicated (because they are implicitly foreseen or because they are contained in other norms)[13].

The distinction between basic and subordinate conditions also allows us to present a difference between two types of norm presentations: i) norms with a weakened or *open antecedent*; and ii) norms with a strong or *closed antecedent*. Norms with a weakened antecedent are those composed of an antecedent from which the consequent is not inferred. For example, it accounts for norms with an antecedent composed of contributing conditions. On the other hand, norms with a strong antecedent are those composed of an antecedent from which the consequent is inferred. For example, it accounts for norms with an antecedent composed with at least one sufficient condition for the consequent[14].

2.1.2. Positive conditions and negative conditions

The properties and the complementary properties contained in the antecedent of a norm can be further differentiated between positive and negative conditions. This can be understood in two ways.

[13] For the purposes of clarity and precision, it is necessary to highlight the difference between identifying an antecedent composed of a sufficient or necessary and sufficient condition for the consequent from identifying a "complete" norm. The first supposes having identified a norm that can be applied as a normative premise in subsumptive judgments (it is subject to the *modus ponens* and the reinforcement of the antecedent). The second, on the other hand, is an ambiguous expression used to refer, at least, to: i) the specification in the antecedent of all the properties and complementary properties that determine its scope of application; or ii) an antecedent that includes a normative qualification of all the properties that characterize a certain individual case subject to evaluation. As we can see, the first gives an account of what information is necessary to determine the applicability of the consequent and the second gives an account of the exhaustiveness of the information that a normative system offers regarding the applicability of a consequent.

[14] In this regard, it should be noted, solely for purposes of clarity, that it is not correct to confuse a hypothetical or conditional norm composed of an *open antecedent*, with a categorical norm. As a norm with open antecedent is characterized a norm whose antecedent is composed of properties that are not sufficient for the consequent. This assumes that the interpreter considers that the set of application conditions has not been fully determined. On the other hand, a categorical norm has an antecedent that is tautological with the content of the norm (with the deontically modalized action), which is to say that the norm is applicable every time there is an opportunity to carry out the action contained in the normative consequent (which supposes having identified at least one sufficient condition for the consequent).

Firstly, the positive-negative distinction can be seen as a way of pointing out the same thing as the distinction between case and complementary case, respectively. In this way we have, on the one hand, a positive condition understood as a way of indicating a property, that is, the description of a type of action or state of affairs. On the other hand, a negative condition is a way of indicating a complementary property, that is, the description of an omission or non-existence of a state of affairs. As we can see, this possibility of understanding the distinction makes it redundant with others for which we already have technical terms. In light of this remark, I discard this way of using the distinction.

Secondly, the positive-negative distinction can be understood as a way of differentiating the effects of its verification in an individual case. In this way, positive conditions refer to all those properties that, if verified, allow a certain action or state of affairs to be classified under a conceptual category and that a specific legal consequence is applicable to it. By negative conditions, on the other hand, we refer to all those properties that, if verified, do not allow the action or state of affairs to be classified under a certain conceptual category[15].

This distinction was initially proposed by Wesley Newcomb Hohfeld (1991, 43) who, to exemplify his point, suggests to think about the properties that must be verified in order to indicate that we are facing a contract between A and B. The positive conditions could be, for example, that each party is human, at least a certain age, that one party has made an offer, the other party has accepted the offer, etc. The negative conditions could be the properties that describe A has maliciously misled B or A has coerced B into accepting his offer. As we can see, a positive or negative condition can be composed of properties and/or complementary properties[16].

This distinction, however, has two major problems. On the one hand, we lack criteria for distinguishing between positive and negative

[15] In this sense, the effect of verifying a negative condition in a case entail qualifying the individual case within a generic case that is either not correlated with a normative consequence (normative gap), or is correlated with a normative consequence that inverts the character of the consequent. By inverting the character of the consequent, I am referring to one of the following possible variations of the normative qualification of the action: i) the content (action deontically qualified) goes from being obligated to being prohibited or permitted to do or not to do; ii) the content goes from being prohibited to being obligated or permitted; or iii) the content goes from being permitted to being obligated or prohibited.

[16] For a similar distinction, but focused on the argumentation structure, see: Toulmin 2003, 136–38; Hart 1948–49.

conditions[17]. Indeed, any property, depending on how it is presented, can be understood as positive or negative. In that sense, this would be a useful distinction as long as the theoretical language can formulate a criterion that allows sustaining an exhaustive and exclusive difference between both types of conditions. Richard Susskind tried to solve this problem by introducing further clarifications, which I will give an account of in the next section. On the other hand, it is a distinction that does not allow much clarification. Assuming that we can differentiate between positive and negative conditions, we can always present the negation of a negative condition as a form of a positive condition. Following Hohfeld's example, if we understand "mislead" as a negative condition, then we can identify the positive condition as "has not been misled". Without prejudice to these theoretical problems (which I will not delve into), jurists often use this distinction to present the content of the antecedents.

2.1.3. Main, alternative, conjunctive and conditions for exceptive qualification

Susskind (1987, 133) has proposed assessing the antecedent of the norms differentiating four types of conditions: i) main conditions, ii) alternative conditions, iii) conjunctive conditions; and iv) conditions for exceptive qualification. Each of these conditions can refer to acts, actions, events or situations. This reference can be to a property, a complementary property, or a combination of both.

The notions of main, alternative and conjunctive conditions account for all the facts or actions that, if verified in an individual case, make a legal norm applicable. In this sense, these three types of conditions are different ways of presenting positive conditions. In greater detail, an antecedent composed of a main condition of application refers that the consequent is applied after verifying a fact or action (p); an alternative application condition refers that the consequent is applied after verifying multiple facts or actions, whether they occur together or at least one of these (pvq); and a conjunctive condition of application states that the consequent is applied after verifying multiple facts or actions as they occur together (p.q).

On the other hand, an application of an conditions for exceptive qualification refers to all the facts or actions that, if verified in an in-

[17] On this problem in the Hartian version of the distinction, see: Garcia Yzaguirre 2020c.

dividual case, make the rule inapplicable, since they would be outside its scope (p.¬q). As we can see, this presentation by Susskind tries to make Hohfeld 's distinction between positive and negative conditions more precise, being more precise with the type of positive conditions and varying from label to negative conditions by exception condition. I will come back later to the question how to understand what an exception is.

Now, having completed this reconstruction of the different ways of understanding an antecedent, what does it mean that we are facing an implicit exception? What does it tell us about the antecedent of a norm to point out that a certain property operates as an implicit exception?[18]

3. IMPLICIT EXCEPTIONS

I start with an example to clarify the kind of problem we face when talking about implicit exceptions. During the Covid-19 pandemic, a large number of countries have implemented a series of measures restricting freedom of movement in order to reduce the rate of infection. In this context, let us imagine a country that implements a mandatory quarantine regime that prohibits people from leaving their habitual residence, except for those accredited by the State to carry out work considered essential. Those who break the quarantine are sanctioned with an onerous fine. Naturally, confinement produces effects of various kinds (loss of work, loss of contact between family members, among many others), including subjecting those who suffer it to an intense and constant level of stress. This affectation is particularly severe for a certain group within the set of people who live with Autism Spectrum Disorder (ASD). For them, it supposes a disturbance of their daily routine that produced a noticeable increase in severe anxiety crises. Let us imagine, in this context, that the father of a minor with ASD decides to take his son out of the house and take a short walk down the street so that he feels better and does not have a new anxiety attack. Once in the park, a policeman stops them and imposes a fine (in addition to ordering and coercing them to return home). The fine is appealed and the competent judge considers that, despite having veri-

[18] On the different ways of understanding the notion of exception in legal theory, see: Garcia Yzaguirre 2020a.

fied the antecedent in the individual case, said normative consequence should not be imposed, since the departure from home was due to health needs which operate as implicit exceptions[19].

What does it mean in this case that "health need" operates as an implicit exception? In the following lines I am going to analyze two of the main ways of understanding "implicit exceptions" formulated in legal theory in order to clarify this point: as an explanation of a presupposition or as the substitution of a norm for another that contains, in comparison with the former, a new relevant property in the antecedent[20].

3.1. Implicit exceptions as implicit presuppositions contained in the antecedent

For a group of legal theorists, when jurists speak of "implicit exceptions" they refer to how norms should be identified. The main thesis is that, when identifying a norm, we tend to make incomplete presentations of the antecedent, since we assume certain properties that we leave unexpressed. When these presupposed properties are made explicit by the judges, they operate as limits to the scope of application, that is, as implicit exceptions. This means that the relevant point when asking about implicit exceptions is how we identify the implicit presuppositions and what it means to make them explicit [21].

I start by clarifying three possible (and very widespread) ways of understanding implicit presuppositions and their explanations.

[19] I express myself in terms of a hypothetical case, but I base myself on the events that occurred in Peru and Spain. It should be noted that these countries adopted, shortly after implementing mandatory quarantine measures and after verifying the type of situations described in the main text, a regimen of therapeutic outings for all those people who required, for medical reasons, to briefly leave their homes as useful measure to reduce stress levels.

[20] It should be stressed that the analysis of the notion of implicit exception depends both on the theoretical model adopted and on the object of study. In this sense, for example, if we analyze the notion of norm as a reason for action, then the list of possibilities on how to understand an exception would be focused on types of moral reasons that allow the variability of the importance of each norm. For a study of this type focused on (types of) moral principles (from a particularist approach) see (Strahovnil 2012). For a study of reasons and exceptions (or *defeaters*), see: Sinnot-Armstrong 2006, 68–69, 215; 1999, 5–6.

[21] I must specify that, to fulfill the purposes of this article, it is not necessary nor will I delve into how to understand the notion of implicit meaning of texts. For an analysis of this point see Sbisá 2017.

3.1.1. Review of relationships between norms

A first way of understanding the explanation of implicit presuppositions is as a result of a revision of our preferences about the relations between norms of a normative system. This means that, initially, our interpretation of the content of the antecedent of a norm qualified an action in a certain way. However, after taking into account the rest of the norms that are part of the normative system to which said norm belongs, we realize that this, properly understood, qualified said action in another way.

Said revision can be produced if we consider that an adequate interpretation of the norms implies assuming a relationship of preference between them[22]. The classic example to present the first assumption was formulated by Alchourrón (1991, 267), which I shall return to using current normative provisions. Consider the provisions of articles 106 and 20.2 of the Peruvian Penal Code[23]. From the first article, it is possible to interpret a norm that prescribes the obligation to punish those who commit homicide, while from the second, it is possible to interpret a prescriptive norm that prohibits punishing minors. We can present each of these rules as follows:

N1: mandatory to punish those who commit homicide

N2: minors should not be sanctioned.

Let us suppose a case in which John, a minor of 16 years, has killed Patrick. According to N1, a derived norm is inferred by which John should be punished (for having committed homicide). On the other hand, N2 infers a derived norm by which John should not be sanctioned (because he is a minor). This leads us to a case of normative conflict, since the judge with respect to John must, at the same time, sanction him (according to N1) and not sanction him (according to N2).

Now, if the judge considers that, properly understood N1 and N2, it is the case that "being a minor" operates as a limitation to the

[22] In this sense, for example, see Rodríguez 2003a, 98. In a similar sense (explanation of implicit exceptions based on legal principles), see Alonso 2010, 292.

[23] Article 106 states "Whoever kills another will be punished with imprisonment for not less than six nor more than twenty years". For its part, article 20.2 establishes "The following are exempt from criminal liability: 2. Anyone under 18 years of age". In my formal reconstruction, I have ignored, solely for reasons of clarity with the point to be exemplified, the specifications of the applicable sanctions, accounting only for the obligation and the prohibition that can be interpreted from each of these provisions.

cases of sanctioning homicides, then he must reformulate how he has identified the norms. In this sense, it will proceed to discard N1 and identify N1' which contains the following prescription: "if a person commits homicide and is not a minor, then it is obligatory to punish him". As we can see, in this way you have identified and made explicit an implicit exception.

3.1.2. Incorporation of new property

A second way of understanding the explicitation of implicit presuppositions is through the incorporation of a new property in the antecedent of the norm as a result of a "better" specification of the justification of the norm. For some jurists, standards are means to achieve purposes, so the interpretive work must be aimed at correctly identifying the prescriptions (according to the purpose) in each application. In view of this, they assume that the antecedent of the norms can (and should) be varied in order to reduce it if, in this way, we achieve a better specification of the object or purpose of the norm. In this sense, the purposes are the source of implicit exceptions to the prescriptions.

An example of how to understand implicit assumptions and the identification of implicit exceptions has been given by Eugenio Bulygin (2005b, 75). This author has proposed to differentiate between adequate and inadequate identifications of norms. The criterion to differentiate one from the other is whether or not the identified standard accounts for the purpose of the standard. In this sense, an adequate identification of the norm would be equivalent to interpreting a provision in such a way that the norm concretizes the justification of the norm. On the other hand, an inadequate identification of the norm refers to a deficient interpretation of a provision, i.e. the interpretative result attributed by a person who "did not understand the meaning of the expression" was legislatively adopted.

In order to clarify his point, the author uses as an example the famous case of the barber of Bologna proposed by Samuel Pufendorf. During the Middle Ages, the following provision was in force in the city of Bologna: "whoever sheds blood in the streets should be punished with the greatest severity". Under a literal interpretation, the most severe punishment prescription would be imposed on any person who spills blood in the streets, such as, for example, a barber who accidentally cuts his client and thereby spills his blood in the street,

the doctor who performs an emergency intervention in a street that involves the patient bleeding, or the case of a child who, playing with another, breaks his nose and makes his blood splash on the pavement. For Bulygin, this provision must be understood according to its purpose, that is, to discourage fights, duels or other violent acts on public roads. In this way, the above cases would be outside the scope of the standard (or, in more precise terms, we should interpret the provision in such a way that said cases are outside the scope of the standard) (Bulygin 2005b, 75; 2014, 78–79)[24]. To do this, it will be necessary to incorporate as many new properties as are necessary in the antecedent in order to exclude them, properties that are called implicit exceptions.

3.1.3. Intent of the legislator

A third way of understanding the explanation of implicit presuppositions is by replicating the previous exercise, but substituting the idea of "purpose of the norm" for "intention of the legislator of the norm". Briefly stated, an implicit exception is understood to be the distinction the legislator would have made if he had the opportunity to do so. In this sense, reference is made to the fact that if we make a counterfactual judgment of the will of the legislator, we can identify which normatively irrelevant property should be considered relevant in order to exclude a certain type of generic case from the scope of application of the norm.

An example of how to understand implicit presuppositions and the identification of implicit exceptions has been offered by Alchourrón in *On Law and Logic*. Very briefly, according to this author, we determine what are the implicit exceptions to a norm based on counterfactual judgments about what the disposition (evaluative attitude) of the legislator would be with respect to a certain circumstance (Rodriguez 2002, 376). In this sense, if in one case we have the norm "If A, then OB", circumstance C can be in one of the following assumptions (Alchourrón 2010 [1996b], 168)[25]: i) it is an implicit exception provided that the normative authority, at the moment of issuing the norm, she would have been willing to accept "If A.~C, then OB" and reject "If A.C, then OB"; ii) it is not an implicit exception as long as the regulatory authority, at the time of issuing the rule, would have been willing

[24] A similar strategy to this has been used by Hernández Marín (2012).

[25] I closely follow the description contained in (Ratti 2013a, 225).

to accept both "If A, then OB" and "If AC, then OB"; or iii) it does not constitute an implicit exception nor an implicit non-exception (it is indeterminate), provided that the regulatory authority, at the time of issuing the rule, had not had any of the provisions indicated in the previous points.

Implicit exceptions, in this sense, are a set of presupposed properties that must be made explicit for an adequate identification of the rule. Under Alchourrón's theorization, for its explanation it is necessary to ask what the legislator would have decided if he had taken into account a certain property that he did not value. Returning to the example of the Bologna law, one would have to ask how the legislator would have normatively qualified the case of a barber or a doctor who, in the exercise of his profession, sheds the blood of a person in the street? If we consider it justified that, had these assumptions been considered, it would have excluded these types of actions from the scope, then we are faced with an implicit exception.

3.1.4. Type of norm or structural component?

As we have been able to see, the three previous theoretical proposals understand (assuming different theoretical presuppositions) that an implicit exception is a property that is incorporated after the process of making one (or some) implicit presuppositions explicit. What does this notion of antecedents tell us?

I start by indicating that all these theories are assuming a way of understanding that the antecedent of the norms is not completely explicit. This in the sense that the interpreter must carry out subsequent interpretive acts to satisfactorily identify which is the norm that is part of the normative system. This implies that interpreters, by identifying implicit exceptions, are not changing the rule, but rather identifying it "correctly".

A norm with an incomplete antecedent (meaning it does not present all the presuppositions on which it has been formulated) expresses a norm with an antecedent that contains only subordinate conditions (more precisely, contributing conditions). In contrast, a norm with the full antecedent expresses a norm with an antecedent containing basic conditions. The implicit exceptions, comprehended this way, account for the properties that are incorporated (using express rules, purposes of the rules or the intention of the legislator) to be able to

consider that we have stopped having subordinate conditions to have basic conditions.

This point is theoretically important, since it allows us to affirm that due to "implicit exceptions" a structural component of the antecedent is not accounted for. In other words, it would not be differentiating between types of conditions, but rather it would be realizing the operations necessary to interpret a certain normative text "correctly".

The foregoing assumes that the notion of negative condition or exception, if used to account for implicit exceptions, does not allow a logical feature to be differentiated from a fragment of the antecedent. What does allow to distinguish, from the rest of the components of the antecedent, is why it was incorporated: to reduce the scope of the norm as a result of having made explicit an implicit presupposition.

3.2. Implicit exception as a result of substituting one rule for another

For another group of legal theorists, when jurists speak of "implicit exceptions", what they are doing is giving an account of the attribution of relevance to a property that, until then, was irrelevant. According to these positions, the judges replace norms so that the regulation of an action or state of affairs is in accordance with their evaluative preferences.

This means that the relevant point to analyze when describing implicit exceptions is what types of operations are performed when normative relevance is attributed to an irrelevant property in order to replace one rule with another. To clarify this statement, I am going to underline two ways of understanding this operation: i) creation of implicit exceptions as a result of resolving an axiological gap; and ii) creation of implicit exceptions as a result of resolving a conflict between an express rule and an implicit rule.

3.2.1. Implicit exceptions and axiological gaps

In certain cases, jurists consider that the antecedents are correlated with wrong solutions. Following Alchourrón and Bulygin, these are cases of axiological gaps, that is, cases in which the normative system offers, in the opinion of the interpreter, an axiologically unacceptable normative solution.

More precisely, these authors differentiate between relevance thesis and relevance hypothesis. Relevance thesis refers to the proposition with which we identify all the relevant properties in the normative system. In other words, it expresses a descriptive discourse of what properties are considered relevant by law. On the other hand, by hypothesis of relevance, the proposition with which we identify the properties that should be foreseen (or not foreseen) in the normative system so that it is axiologically adequate is named[26]. If the relevance thesis and the relevance hypothesis are coextensive (i.e. they coincide in identifying the same set of properties), then we will have an axiologically satisfactory normative system. If not, then we will have an axiologically unsatisfactory normative system (Alchourrón, Bulygin 2012, 154)[27].

If it is the case that the relevance hypothesis is more extensive (contains more properties) than the relevance thesis, then we will have created an axiological gap. That is, an axiologically inadequate case because the generic case of the norm does not contain a property that should have been introduced (according to the evaluative system of the interpreter). In simpler terms: the antecedent does not contain a distinction that it should contain.

The axiological gaps are resolved through a restrictive reinterpretation operation by the judge. To clarify this point, let's look at the following example: a person has a religious belief that prescribes not working on Saturdays (for example, a believer in the Adventist Christian creed). Your work activities as a dependent are governed, let us suppose, by the following rule "if a dependent worker, then it is compulsory to work from Monday to Saturday". As can be seen, this legal obligation supposes the impossibility of materializing their religious duty of not carrying out work on Saturdays[28].

[26] The hypothesis of relevance, thus understood, supposes the identification and use of an evaluative criterion (Alchourrón, Bulygin 2012, 154).

[27] It is worth highlighting the precision of these authors that the axiological adequacy of a normative system is a broader notion than that indicated in the main text. A normative system can be axiologically inadequate due to: unsatisfactory provisions for generic cases, that is, for having a relevance thesis that does not coincide with our relevance hypothesis; or for having adequately identified the generic cases, but correlated them with inappropriate normative consequences (for example, correlated them with an obligation when it should have been a prohibition) (Alchourrón, Bulygin, 2012, 154–55; Alonso, 2010, 139). In simpler terms, a system is unfair because it has chosen the cases poorly or because it has chosen them well, but has solved them poorly.

[28] As an example of this discussion, see the decision of the Supreme Court of the United States Sherbert vs. Vernes, the decision of the Constitutional Court of Peru No. 0895–2001-AA/TC or the decision of the Constitutional Court of Colombia T-839/09 for decisions in favor of including an exception to the duty of workers to

Let us now assume that the judge considers that the generic case contained in the antecedent, that is, "dependent worker", does not contain distinctions that it should have contained. According to the categories analyzed, "dependent worker" configures a relevance thesis (generic case composed of property p). Faced with this, the judge formulates a hypothesis of relevance under which a new property must be introduced. In this sense, it proposes that the labor normative formulation is better interpreted in the following way: "if a dependent worker and not an Adventist" (that is, as a generic case composed of the properties (p.¬r)). In this way, to properly identify the norm (stop being "unfair" and become "fair"), it should be "if a dependent worker and not an Adventist, then it is obligatory to work from Monday to Saturday".

The way to resolve the discrepancy between a relevance thesis and a relevance hypothesis is by substituting the chosen norm, that is, setting aside the relevance thesis and adopting the interpretation of the provision contained in the relevance hypothesis. In other words, to resolve an axiological gap we must treat the relevance hypothesis as the new relevance thesis. Understood in this way, the solution of the axiological gaps, as we can see, is realizing a process and result of identifying norms. In more precise terms, by substituting a relevance thesis for a relevance hypothesis, what we are realizing is a restrictive reinterpretation process whereby we discard one interpretation for another with a more restricted scope because it is more specific (in other terms, we substitute a generic case for another generic case that is finer, that is, one that contains one or more additional properties). In this sense, resolving a case of an axiological gap is to account for a case of reinterpretation or substitution of one norm for another.

A clear way of presenting the operation of creating and resolving an axiological gap is, as Guastini has rightly pointed out, through the dissociation argument (Guastini 2008). In short: i) we make a *prima facie* interpretation of a provision, according to the example, "if a dependent worker, then it is compulsory to work from Monday to Saturday"; ii) the identified generic case is subdivided into two types, following the indicated example, we subdivide the generic case "dependent workers" (p) into "dependent workers who are not Adventists" (p1) and "dependent workers who are Adventists" (p2); iii) the subclass

work on Saturdays for religious reasons. For a decision against creating such an exception see the ruling of the Spanish Constitutional Court No. 19/1985.

"dependent workers who are Adventists" (p2) together with the exclusion of the subclass "dependent workers who are not Adventists" (p1) is correlated with the normative consequence, that is, "if a dependent worker and not Adventist, then obligatory to work from Monday to Saturday"; iv) with the subclass "dependent workers who are Adventists" (p2) the interpreter has attributed normative relevance to a property that was irrelevant and, in this way, has created a normative gap (it is a relevant generic case that is not correlated to a normative solution); and v) in relation to the normative gap, the interpreter can resolve it through an extensive interpretation of another provision or by another implicit rule or leave the case indeterminate[29].

Now, from this proposal, what does an implicit exception mean? According to the above, we can differentiate between two norms: N1, that is, the norm that generated the axiological gap; and N2, that is, the norm that resulted from having resolved the axiological gap. The difference between N1 and N2 is that the latter contains more properties in the antecedent. Jurist calls these new properties implicit exceptions.

From this approach, these implicit exceptions show that they have attributed normative relevance to a normatively irrelevant property. This means that the judge has set aside an express norm (which did not contain said property) to use an implicit norm (which he himself has created and which does contain said property) to avoid generating an unfair result.

Following Guastini, with this theorization, an operation of creation of the law by the judges is being realized. The different structural distinctions are not relevant to account for this notion, which will only be relevant to specify how this new property is related to previously identified properties.

3.2.2. Implicit exceptions as a result of a conflict between an explicit rule and an implicit rule

By implicit exception one can refer, as Andrea Dolcetti and Giovanni Battista Ratti have presented (Dolcetti, Ratti 2017; 2020; Ratti 2020, 144–49), the result of resolving a conflict between an implicit norm and an explicit norm that entails preferring the applicability of the implicit norm. Let's look at the point in more detail.

The scenario that we are interested in evaluating is that of a norm derived from an explicit norm that is in normative conflict with

[29] See also (Chiassoni 2019b, 196).

a norm derived from an implicit norm. In this regard, as the authors point out, we have two possible solutions: i) the norm derived from an express norm prevails; or ii) the rule derived from the implicit rule prevails. If the judge resolves the normative conflict in favor of the norm derived from an express norm, we will be facing a case of what they call "direct reasoned application" (Dolcetti, Ratti 2016, 42). In these cases, the judge takes into consideration reasons against the application of a norm derived from an express norm offered by a norm derived from an implicit norm and considers that they are not sufficient to vary the normative qualification of an individual case. As we can see, they are accounting for the scenarios in which the judge has considered that there are better reasons to use the express standard.

If the judge resolves the normative conflict in favor of the norm derived from an implicit norm, we will be facing a case of creating an implicit exception (Dolcetti, Ratti 2016, 39)[30]. In these cases, the judges create a preference in favor of the norm derived from an implicit norm over the norm derived from an explicit norm. This supposes substituting an explicit norm for another that includes the normative evaluations of the judge that justify the creation of the implicit norm.

Let's see an example[31]. Let us consider a normative system in which members of the police are governed by the norm N1 «if police officer, then it is obligatory to rotate from police station every two years of service». This police station rotation duty implies the geographical relocation of the work center of police officers, that is, changing the city or town where the police service is lived and provided. Imagine the case in which a police officer is two weeks away from serving two years in a city and, moreover, is seven months pregnant. Suppose that the city where she has been performing her duties is where her partner and relatives live, so that the effects of the rule that prescribes rotation will imply that she stops living in the same place where they live during the last part of the pregnancy and for much of the first two years of the child's life.

The police officer judicially questioned that he be subjected to the rotation obligation, since she considered that such effects were unbearable. Under this assumption, let us assume, the judge carried out an act of legal construction in order to create the norm N2 "if pregnant police officer, then it is forbidden to relocate their work center outside the city

[30] In a similar sense (Luzzati 2018, 336–37).

[31] The example case is inspired by the facts resolved in the judgement No. 0167/2019-S2 of the Constitutional Court of Bolivia.

where they live", based on the idea of that a gestation is better carried out accompanied by its support networks (be they family, friends or the type of social network that has been built). This created a conflict between a norm derived from an explicit norm (N1) and a norm derived from an implicit norm (N2) (it is impossible for the police officer to comply with the order to rotate and the order not to rotate together).

Let us assume that the judge decides to prefer N2 over N1, in this way he has decided to create an implicit exception to the explicit rule. The norm that regulates the individual case would be "if police officer and not pregnant, then it is obligatory to rotate from station every two years of service". As we can see, with the "not pregnant" property, the scope of application of the express rule has been reduced. This is, as we see, the implicit exception[32].

This theorization proposes that jurists, when speaking of implicit exceptions, account for acts of creation of the law at the site of application. According to this, the judge creates an implicit norm (which contains the attribution of relevance to a property that, for the law, is normatively irrelevant) and makes it prevail over the explicit norm. This means that the express norm will be set aside and the implicit norm will be used to resolve the individual case.

As we can see, from this way of looking at implicit exceptions we are not accounting for a structural element of the antecedents either. What you are realizing is an operation with rules and its result.

4. IMPLICIT EXCEPTIONS: OPERATIONS WITH RULES AND NOT RULE FRAGMENTS

After having assessed these two ways of understanding implicit exceptions, it is now possible to make some statements about what this notion of the antecedent tells us. I proceed to differentiate what the

[32] This point allows us to highlight the difference between exempting and violating a rule. We are facing a violation of a norm in the case in which an agent who is in a subsumable circumstance in the generic case of a norm performs an action or generates a state of affairs that is normatively incompatible with the consequent of said norm (in other words, if the norm prescribed Phq, it will be a violation if the addressee performs q). Instead, we will be faced with an exception if the agent's action is normatively justified. As Bernard Gert (2005, 221–22) points out, justifying an exception to a duty is a way of presenting the justification of a duty itself. In a similar sense (Vavrynem 2009, 96; Holton 2010, 374ff).

theories tell us about implicit exceptions as identification of the antecedent and components of the antecedent (according to what was seen in section 2.1.).

On the one hand, theorizing about implicit exceptions clarifies relevant conceptual points as to how we identify the antecedent. Both ways of understanding implicit exceptions suppose the modification of the generic case contained in the antecedent of a norm in order to incorporate a new property in a conjunctive relationship with the previously identified properties. In formal terms, introducing an implicit exception (from both theories) means going from (p->Oq) to (p.r –>O¬q)[33].

If the above is correct, then this affects the identification of the antecedent in two ways: i) in the case of hypothetical norms, it involves incorporating an additional explicit property to the set of explicit properties already identified; and ii) in the case of categorical norms, it necessarily entails that it be presented as a hypothetical norm and that the antecedent ceases to be tautological with the consequent, since it will have explicit properties (the implicit exception).

On the other hand, in relation to the composition of the antecedent, it is worth making some clarifications and distinctions. In the first place, the different theoretical approaches about implicit exceptions do not try (and fail) to clarify a structural component of the antecedent. What they try to do (and achieve) is to clarify a set of operations and their results with rules. Let's look at each component distinction to prove this claim.

The distinction between basic and subordinate conditions is useful in presenting ways in which interpreters consider that the consequent is or is not guaranteed by the antecedent (and what kind of guarantee they have). The different theories about implicit exceptions, as we have seen, do not account for a new type of basic or subordinate condition. Instead, these only account for the incorporation of a new property that either allows passing from a subordinate condition to a basic one, or else allows changing the type of basic condition (from having necessary conditions to having a set of necessary conditions

[33] It should be noted that it is not normatively relevant if the new property is formalized as (r) or as its complement (¬). The positive or negative presentation is dependent on how we describe an action or state of affairs and we can always use one or the other to present the same fact. On this point (Williams 1988; García Yzaguirre 2020a).

that, together with the new property, operate together as a sufficient condition for the consequent).

Taking this distinction into account, the first set of views on implicit exceptions understand the explicitation of exceptions (or implicit presuppositions) as the necessary act to convert a norm with a weak antecedent into one with a strong antecedent. Likewise, it proposes that this act is understood as a better understanding of the norm in relation to the rest of the norms in the system that it is a part of – its purposes, or the intention of the legislator. In contrast, the second set of theorizing about implicit exceptions does not require or employ an understanding of norms with a weakened antecedent. Otherwise, it assumes and uses norms understood with a strong antecedent: what they propose is to replace a strong antecedent with another (only finer or with more distinctions).

The distinction between positive and negative conditions, as we have seen, suffers from the problem of not offering a criterion for differentiating one from the other. At this point, it is worth noting the different theories about the implicit exceptions that could be used as a criterion to identify negative conditions: they are all those that the judges identify, either by explicitation of an implicit presupposition, or by act of judicial creation of the law. Although it could be the case that this point allows us to formulate a new clarification: the distinction between positive and negative conditions, evaluated in such a way, would not differentiate between components of norms, but would be at the level of normative propositions. These notions do not account for elements of the rules, but rather allow us to describe, with some rhetorical-argumentative purpose, different ways of approaching certain fragments of the rules.

As for the distinction between the main, alternative, conjunctive and exceptions (proposed by Susskind), if we take into account these theories about implicit exceptions, a false distinction is highlighted: exception conditions and conjunctive conditions operate in the same way. This is done in two ways: i) two conjunctive properties have the effect of specifying the generic case, which is the same effect produced by the exception conditions; and ii) when including a new property (an implicit exception), it operates using a conjunction with the rest of the previously identified properties. This assumes that they are both labels that differentiate between non-differentiable objects[34].

[34] On this point see: Garcia Yzaguirre 2020c.

Secondly, it should be noted that each way of understanding implicit exceptions is a way of presenting and analyzing different discourses made by jurists. The first group of thoughts (implicit exception as an implicit presupposition contained in the antecedent) is trying to clarify what the jurists are saying when they point out that the identification of a new property does not imply a change in the norm but a better identification. her. On the other hand, the second group of thoughts (implicit exception as substitution of one norm for another), is trying to clarify discourses of jurists who consider that any modification of the antecedent implies identifying a new norm.

In addition to the different discourses of the jurists, each of these assumes a different way of understanding the background. The first assumes that the norms must be identified, at first, by using subordinate conditions. The second, on the other hand, assumes that norms must be identified by using basic conditions. In this sense, it is not that one set of theorizations is better than the other, each of these highlights different information and allows us to better present different discourses of jurists.

5. CONCLUSION

Legal theorists, by clarifying the notion of implicit exception, are not trying to clarify a new type of antecedent's component. They are clarifying processes and their results that interpreters carry out at the moment of identifying a norm, in a satisfactory way (according to their correctness criteria).

These processes can be of two types. Firstly, it may be about processes of better understanding the content of a norm. An implicit exception, within this type of theory, is understood as a property incorporated in the antecedent of a norm as a result of the explicitation of an implicit presupposition. These explanations can be made using, for example, the relations of the norm with other norms of the same reference normative system, the purpose of the prescription or the intention of the legislator.

On the other hand, it can be about processes of creation of the law by the judges. An implicit exception, within this type of theorizing, is understood as a property incorporated in the antecedent of a norm as a result of attributing normative relevance to an irrelevant property.

These acts of normative creation can be carried out, for example, by creating and resolving either an axiological gap, or a conflict between an express norm and an implicit norm.

The result of both ways of understanding the incorporation of a new property in the antecedent of a norm does not account for a new type of structural component of the antecedents. What has been created is a property that operates in conjunctive relation to the previously identified properties and that can have the effect of converting an antecedent, either composed of subordinate conditions to one with basic conditions, or else composed of a type of basic condition. to another type of basic condition.

The evaluations of the implicit exceptions, from the structure of the norms, shows us the same information as other notions that we already use to account for the antecedents. What this notion does allow us to clarify, with clarity and precision, is a set of operations and results that the judges carry out with the norms during an interpretive process.

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